

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 21, 2020

Nos. 19-1097, 19-1125

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

**XPO LOGISTICS FREIGHT, INC.
PETITIONER/CROSS-RESPONDENT**

v.

**NATIONAL LABOR RELATIONS BOARD
RESPONDENT/CROSS-PETITIONER**

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

**FINAL PRINCIPAL BRIEF OF PETITIONER/CROSS RESPONDENT
XPO LOGISTICS FREIGHT, INC.**

**JOSHUA L. DITELBERG
SEYFARTH SHAW LLP**
*233 South Wacker Drive
Suite 8000
Chicago, IL 60606-6448
(312) 460-5000*

**MARSHALL BABSON
SEYFARTH SHAW LLP**
*620 Eighth Avenue
New York City, NY 10018-1405
(212) 218-5500*

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Petitioner/Cross-Respondent XPO Logistics Freight, Inc. -- formerly Con-Way Freight, Inc. -- certifies the following pursuant to Circuit Rules 26.1 and 28.1.

(A) PARTIES AND AMICI

The parties are Petitioner/Cross-Respondent XPO Logistics Freight, Inc. and Respondent/Cross-Petitioner National Labor Relations Board. International Brotherhood of Teamsters, Local 63 also was a party in the matter before the National Labor Relations Board.

(B) RULINGS UNDER REVIEW

The ruling under review is the Decision and Order issued by the National Labor Relations Board on April 23, 2019 in Case No. 21-CA-227312, and which is reported at *XPO Logistics Freight, Inc.*, 367 NLRB No. 120. In Case No. 21-CA-227312, XPO Logistics Freight, Inc. is contesting International Brotherhood of Teamsters, Local 63's certification as bargaining representative in Case No. 21-RC-136546, reported at 366 NLRB No. 183 (2018).

(C) RELATED CASES

The ruling under review has not previously been before this Court or any other court. The National Labor Relations Board's Cross-Application for Enforcement, Case No. 19-1125, has been consolidated with XPO Logistics Freight, Inc.'s Petition for Review, Case No. 19-1097. XPO Logistics Freight, Inc. is unaware of any other

related case involving substantially the same parties and the same or similar issues. D.C. Circuit Case Nos. 18-1247 and 18-1267 (*Con-Way Freight Inc. v. NLRB*) involve a petition for review and cross-application for enforcement of different issues in different cases consolidated in the same National Labor Relations Board proceeding with the instant case, and also reported at 366 NLRB No. 183 (2018).

s/Joshua L. Ditelberg

Joshua L. Ditelberg

CORPORATE DISCLOSURE STATEMENT

XPO Logistics Freight, Inc. -- formerly known as Con-way Freight Inc. -- is a freight transportation and logistics company. It is a Delaware corporation that is 100% owned by XPO CBW, Inc. f/k/a Con-way, Inc., also a Delaware corporation. XPO CNW, Inc. is 100% owned by XPO Logistics, Inc., a publicly-traded Delaware corporation.

STATEMENT REGARDING JOINT APPENDIX

Pursuant to Federal Rule of Appellate Procedure 30(c) and Circuit Rule 30(c), counsel for the parties have consulted and agreed to use a deferred joint appendix.

TABLE OF CONTENTS

JURISDICTION.....	1
ISSUES PRESENTED.....	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	2
I. PROCEDURAL HISTORY	2
II. FACTS	5
A. The Knife Incident Between Placencia And Camarena.....	5
1. It Is Undisputed A Knife Incident Occurred.....	5
2. The Board’s Findings Regarding The Knife Incident Are Unsupported By Substantial Evidence	15
3. The Board Found That Reports Of The Knife Incident Were Widely Disseminated Among Voters In The Union Election	21
4. Placencia Is A Teamsters Agent	22
B. Intimidating Statements Were Posted On The “Change Conway To Win” Blog	23
C. Robles Received Harassing Calls After Being Named In The “Change Conway To Win” Blog.....	26
SUMMARY OF ARGUMENT	27
STANDING	30
STANDARD OF REVIEW	30
ARGUMENT	31
I. THE ELECTION SHOULD BE SET ASIDE BECAUSE IT WAS HELD IN AN ATMOSPHERE PREVENTING EMPLOYEE FREE CHOICE.....	31

A.	Under The Board’s Alternative Legal Standards, Employee Free Choice Was Prevented	31
1.	The Board’s Party Interference Test	32
2.	The Board’s Third Party Interference Test	33
3.	The Impact Of Interference In A Close Election	34
4.	Placencia and Diaz Were Teamsters Agents	35
(i)	Placencia	35
(ii)	Diaz	38
5.	The Election Should Be Set Aside Under Either Board Test Of Interference	39
(i)	The Board’s determination that Placencia did not threaten Camarena is unsupported by substantial evidence	39
(ii)	Even if the Court accepts the Board’s conclusion that Placencia did not threaten Camarena, the knife incident was understood by ULX employees as a threat	40
(iii)	As Placencia was a Teamsters agent, the party election interference test should apply	42
(iv)	Even under the third-party election interference test, employee understanding of the knife incident as a threat warrants setting aside the election.....	43
(v)	The Board erroneously failed to find that intimidating statements on the “Change Conway To Win” blog and harassing calls to Robles contributed to an atmosphere preventing employee free choice.....	44
	CONCLUSION	46

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>*Al Long, Inc.,</i> 173 NLRB 447 (1969)	29, 33
<i>Allentown Mack Sales and Service, Inc. v. NLRB,</i> 522 U.S. 359 (1998)	31
<i>Avecor, Inc. v. NLRB,</i> 931 F.2d 924 (D.C. Cir. 1991)	30
<i>Bristol Textile Co.,</i> 277 NLRB 1637 (1986)	34, 37
<i>Browning-Ferris Industries of California, Inc. v. NLRB,</i> 911 F.3d 1195 (D.C. Cir. 2018)	31
<i>Buedel Food Products Co.,</i> 300 NLRB 638 (1990)	34
<i>C.J. Krehbiel Co. v. NLRB,</i> 844 F.2d 880 (D.C. Cir. 1988)	35
<i>*Cooper Hand Tools,</i> 328 NLRB 145 (1999)	37
<i>Corner Furniture Discount Center, Inc.,</i> 339 NLRB 1122 (2003)	36
<i>Delta Brands, Inc.,</i> 344 NLRB 252 (2005)	32, 43
<i>Electra Food Machinery, Inc.,</i> 279 NLRB 279 (1986)	43
<i>Great American Products,</i> 312 NLRB 962 (1993)	37
<i>IBEW, Local 557, AFL-CIO (Newton Heat Trace, Inc.),</i> 343 NLRB 1486 (2004)	36

<i>*Local 1814, International Longshoremen’s Assoc. v. NLRB,</i> 735 F.2d 1384 (D.C. Cir. 1984).....	35, 37
<i>*ManorCare of Kingston PA, LLC v. NLRB,</i> 823 F.3d 81 (D.C. Cir. 2015).....	27, 31, 34, 41, 42
<i>NLRB v. Downtown BID Services Corp.,</i> 682 F.3d 109 (D.C. Cir. 2012).....	29, 30, 33
<i>*NLRB v. Georgetown Dress Corp.,</i> 537 F.2d 1239 (4th Cir. 1976)	37
<i>NLRB v. Katz,</i> 701 F.2d 703 (7th Cir. 1983)	36
<i>*NLRB v. L & J Equip. Co.,</i> 745 F.2d 224 (3d Cir. 1984)	32
<i>NLRB v. Schwartz Bros., Inc.,</i> 475 F.2d 926 (D.C. Cir. 1973).....	32
<i>North of Mkt. Senior Servs. v. NLRB,</i> 204 F.3d 1163 (D.C. Cir. 2000).....	35
<i>*One Stop Kosher Supermarket, Inc.,</i> 355 NLRB 1237 (2010).....	35
<i>Overnite Transp. Co. v. NLRB,</i> 140 F.3d 259 (D.C. Cir. 1998).....	36
<i>*Ozark Automotive Distributors, Inc. v. NLRB,</i> 779 F.3d 576 (D.C. Cir. 2015).....	34, 37
<i>*PPG Industries, Inc. v. NLRB,</i> 671 F.2d 817 (4th Cir. 1982)	37
<i>*Pacific Coast M.S. Industries Co., Ltd.,</i> 355 NLRB 1422 (2010)	32
<i>Pacific Micronesia Corp. v. NLRB,</i> 219 F.3d 661 (D.C. Cir. 2000).....	30

<i>Pastoor Bros. Co.,</i> 223 NLRB 451 (1976)	37, 39
<i>*Picoma Industries,</i> 296 NLRB 498 (1989)	45
<i>Q.B. Rebuilders, Inc.,</i> 312 NLRB 1141 (1993)	41
<i>RJR Archer, Inc.,</i> 274 NLRB 335 (1985)	34, 43
<i>*Robert-Orr Sysco Food Services,</i> 338 NLRB 614 (2002)	34, 43
<i>SEIU District 1199 (Staten Island University Hospital),</i> 339 NLRB 1059 (2003)	44
<i>Service Employees Local 87 (West Bay Maintenance),</i> 291 NLRB 82 (1988)	35, 36, 39
<i>*Sewell Manufacturing Company,</i> 138 NLRB 66 (1962), <i>supp. by</i> 140 NLRB 220 (1962)	32
<i>Smithers Tire,</i> 308 NLRB 72 (1992)	34, 41, 43
<i>Sonoco of Puerto Rico,</i> 210 NLRB 493 (1974)	34
<i>Stannah Stairlifts, Inc.,</i> 325 NLRB 572 (1998)	43
<i>Steak House Meat Co.,</i> 206 NLRB 28 (1973)	34, 43, 45
<i>Sutter E. Bay Hospitals v. NLRB,</i> 687 F.3d 424 (D.C. Cir. 2012)	30
<i>*Taylor Wharton Division,</i> 336 NLRB 157 (2001)	33

<i>Titanium Metals Corp. v. NLRB</i> , 392 F.3d 439 (D.C. Cir. 2004).....	30
<i>Toering Electric Co.</i> , 351 NLRB 225 (2007)	35
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	30
<i>Wal-Mart Stores</i> , 350 NLRB 879 (2007)	35
* <i>Westwood Horizons Hotel</i> , 270 NLRB 802 (1984)	33, 34, 43

Statutes

29 U.S.C. § 152(13)	36
29 U.S.C. § 158(a)(1).....	1
29 U.S.C. § 158(a)(5).....	1
29 U.S.C. § 159(d)	1
29 U.S.C. § 160(a)	1
29 U.S.C. § 160(e)	1
29 U.S.C. § 160(f).....	1, 30

Other Authorities

NLRB Casehandling Manual, Part 2 (Representation Proceedings), Section 11340.4.....	34
Restatement (Second) of Agency § 27	36
T.S. Eliot, “The Hollow Men”	29

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

Cabrera	John Cabrera (Con-way ULX employee driver)
Camarena	Luis Camarena (Cruz & Associates labor consultant)
Con-way	Con-way Freight Inc. n/k/a XPO Logistics Freight Inc.
Cruz & Associates	Third party labor consulting firm
Diaz	Louie Diaz (Teamsters staff organizer)
Fuentes	Clemente Fuentes (Con-way ULX employee driver)
GC	General Counsel of the National Labor Relations Board
JA-__	Joint Appendix page ____
NLRA/Act	National Labor Relations Act
NLRB/Board	National Labor Relations Board
Placencia	Juan Placencia (Con-way ULX employee driver)
Robles	Ramsey Robles (Con-way ULX employee driver trainer)
Roman	Steve Roman (ULX freight operations supervisor)
ULX	XPO service center located at 1955 E. Washington Boulevard, Los Angeles, California.
Union/Local 63/ Teamsters/CP	International Brotherhood of Teamsters, Local 63
XPO/R	XPO Logistics Freight, Inc. f/k/a Con-way Freight Inc.

JURISDICTION

The NLRB had jurisdiction under 29 U.S.C. § 160(a) to issue its April 23, 2019 Decision and Order finding that XPO unlawfully refused to bargain with the Teamsters under 29 U.S.C. §§ 158(a)(1) and (5).

XPO filed a timely Petition for Review of the Decision and Order on April 30, 2019. The NLRB filed its Cross-Application For Enforcement on June 10, 2019. This Court has jurisdiction in this matter pursuant to 29 U.S.C. §§ 160(e)-(f).

This Court is authorized to review the Decision and Order, as well as the underlying certification decision and administrative record, pursuant to 29 U.S.C. § 159(d), which provides that the entire record of the proceedings underlying a certification decision shall be before the Court upon a petition for review or enforcement of a Board order that is based in whole or in part upon such decision.

ISSUES PRESENTED

1. Whether the NLRB's decision that the October 23, 2014 election result was the product of employee free choice is supported by substantial evidence.
2. Whether the NLRB should have set aside the results of the October 23, 2014 election and declined to certify the Teamsters as bargaining representative for the reasons described in XPO's Objections in Case No. 21-RC-136546.
3. Whether the NLRB erred in failing to hold that the "laboratory conditions" required for a fair union representation election under the NLRA did not

exist in Case No. 21-RC-136546, such that the results should have been set aside and the Teamsters not certified as bargaining representative.

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the Statutory Addendum.

STATEMENT OF THE CASE

I. Procedural History

Pursuant to a Stipulated Election Agreement in Case No. 21-RC-136546, the NLRB conducted an election on October 23, 2014 to determine whether the Teamsters would be the bargaining representative of a unit of full-time and regular part-time driver sales representatives and driver sales representative students employed by XPO at its ULX service center located at 1955 E. Washington Boulevard, Los Angeles, California. The revised tally of ballots issued on July 20, 2015 was 22 votes in favor of the Teamsters, and 20 votes cast against the Teamsters.

XPO timely filed Objections to the election and offers of proof on October 30, 2014. After an initial investigation, the NLRB Regional Director ordered that a hearing be held on the following Objections:

Objection No. 1

During the critical period, the Union and its representatives, agents and supporters engaged in threatening, intimidating, coercive and abusive conduct directed at the Employer's employees, supervisors, managers, consultants, and others, which threatened, intimidated, and coerced employees, placed them in reasonable fear for their safety, and placed them in reasonable fear of retaliation, retribution, and other reprisals if they did not support or vote for the Union in this election.

Objection No. 2

On the day of the election, the Union and its representatives, agents, and supporters threatened, intimidated, and coerced employees while they were on their way into the Employer's facility to vote in this election.¹

Objection No. 3

Even if the conduct set forth in Objections 1 and 2, above, cannot be attributed to the Union or its agents, this conduct constituted improper third party conduct that, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election and interfered with the election result inasmuch as it constituted improper pressuring, threatening, coercion, and intimidation of eligible voters.

Objection No. 4

A general atmosphere of fear, coercion, and confusion was created during the critical period by the Union and its representatives, agents, or supporters, or by third parties, that interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the conduct of the election and the election result.

Objection No. 5

The conduct set forth in Objections 1, 2, 3, and 4, above, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election, interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the conduct of the election and the election result.

Objection No. 6

During the critical period, the Union and its representatives, agents and supporters engaged in additional improper or objectionable conduct that interfered with this election or rendered a free and fair election impossible.

¹ This Objection was withdrawn at the hearing. JA-420.

The balance of this brief has been omitted for this sample.
For a complete version of this brief, please contact our office.

Thank you.