

Nos. 17-1097, 17-1103

**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**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

KIRA DELLINGER VOL
Supervisory Attorney

MISCHA K. BAUERMEISTER
Attorney

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-0656
(202) 273-1776

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

XPO LOGISTICS FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1097, 17-1103
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	13-CA-189647
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

XPO Logistics Freight, Inc. was the Respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board. Local Lodge 701, International Association of Machinists & Aerospace Workers AFL-CIO was the charging party before the Board.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on March 10, 2017, and reported at 365 NLRB No. 42. The Decision and Order relies on findings made by the Board and Board officials in an earlier representation proceeding (Board Case No. 13-RC-177753). The Board’s findings in the

representation proceeding are contained in an unpublished Regional Director's Decision and Certification of Representative issued on July 20, 2016, and an unpublished Board order issued on November 9, 2016, denying review of the Regional Director's Decision and Certification of Representative.

C. Related Cases

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, S.E.

Washington, D.C. 20570

(202) 273-2960

Dated at Washington, D.C.
this 28th day of September 2017

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Relevant statutory and regulatory provisions	3
Statement of the issue presented	3
Statement of the case.....	3
I. The representation proceeding.....	4
II. The unfair-labor-practice proceeding	6
Summary of argument.....	7
Argument.....	8
Substantial evidence supports the Board’s finding that XPO violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union	8
A. Objections based on alleged third-party misconduct warrant a rerun election only if the misconduct created a general atmosphere of fear and reprisal; no evidentiary hearing is required absent an offer of proof that, if credited, would satisfy that standard.....	9
B. The Board did not abuse its discretion in overruling XPO’s objections without an evidentiary hearing	12
1. XPO’s offer of proof does not establish an objectionable threat...13	
2. XPO’s conclusory allegation of retaliatory sabotage is insufficient to establish objectionable conduct	18
Conclusion	23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>800 River Rd. Operating Co. v. NLRB</i> , 846 F.3d 378 (D.C. Cir. 2017).....	12
* <i>Amalgamated Clothing & Textile Workers Union v. NLRB</i> , 736 F.2d 1559 (D.C. Cir. 1984).....	11, 12, 16, 20, 22
* <i>Amalgamated Clothing Workers of Am. v. NLRB</i> , 424 F.2d 818 (D.C. Cir. 1970).....	9, 10, 19, 22
<i>AOTOP, LLC v. NLRB</i> , 331 F.3d 100 (D.C. Cir. 2003).....	10, 11, 13
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>C.J. Krehbiel Co. v. NLRB</i> , 844 F.2d 880 (D.C. Cir. 1988).....	12
<i>Culinary Workers Local 226 (Casino Royale, Inc.)</i> , 323 NLRB 148 (1997).....	16
<i>Durham Sch. Servs., LP v. NLRB</i> , 821 F.3d 52 (D.C. Cir. 2016).....	9
<i>Exxon Chem. Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004).....	8
<i>Family Serv. Agency v. NLRB</i> , 163 F.3d 1369 (D.C. Cir. 1999).....	11
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999).....	3

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Heck's Inc.</i> , 172 NLRB 2231 (1968).....	16
* <i>Majestic Star Casino, LLC v. NLRB</i> , 373 F.3d 1345 (D.C. Cir. 2004).....	12, 16
<i>ManorCare of Kingston, PA, LLC v. NLRB</i> , 823 F.3d 81 (D.C. Cir. 2016).....	17
<i>Matlock Truck Body & Trailer Corp. v. NLRB</i> , 495 F.2d 671 (6th Cir. 1974)	19
<i>Matson Terminals, Inc.</i> , 361 NLRB No. 50, 2014 WL 4809833 (Sept. 26, 2014), <i>enforced</i> , 637 F. App'x 609 (D.C. Cir. 2016)	17
<i>Mike Yurosek & Son, Inc.</i> , 292 NLRB 1074 (1989).....	16
<i>Natter Mfg. Corp. v. NLRB</i> , 580 F.2d 948 (9th Cir. 1978)	9, 22
<i>NLRB v. Air Control Prods.</i> , 335 F.2d 245 (5th Cir. 1964)	10
* <i>NLRB v. Bostik Division, USM Corp.</i> , 517 F.2d 971 (6th Cir. 1975)	18, 19, 20
* <i>NLRB v. Downtown Bid Servs. Corp.</i> , 682 F.3d 109 (D.C. Cir. 2012).....	9, 14, 15
<i>NLRB v. Earle Indus., Inc.</i> , 999 F.2d 1268 (8th Cir. 1993)	11

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Golden Age Beverage Co.</i> , 415 F.2d 26 (5th Cir. 1969)	9, 22
<i>NLRB v. United Mine Workers</i> , 429 F.2d 141 (3d Cir. 1970)	16
<i>NLRB v. Wis-Pak Foods, Inc.</i> , 125 F.3d 518 (7th Cir. 1997)	20
* <i>Overnite Transp. Co. v. NLRB</i> , 105 F.3d 1241 (8th Cir. 1997)	20
<i>Picoma Indus.</i> , 296 NLRB 498 (1989)	18
<i>Q. B. Rebuilders, Inc.</i> , 312 NLRB 1141 (1993)	21
<i>Robert Orr-Sysco Food Servs.</i> , 338 NLRB 614 (2002)	18
<i>Smithers Tire & Auto. Testing of Texas, Inc.</i> , 308 NLRB 72 (1992)	21
<i>Spectrum Health-Kent Cmty. Campus v. NLRB</i> , 647 F.3d 341 (D.C. Cir. 2011)	17
<i>Stannah Stairlifts, Inc.</i> , 325 NLRB 572 (1998)	21
<i>Tampa Crown Distributors, Inc.</i> , 118 NLRB 1420 (1957)	11

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

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Terrace Gardens Plaza, Inc. v. NLRB</i> , 91 F.3d 222 (D.C. Cir. 1996).....	2
<i>U.S. Rubber Co. v. NLRB</i> , 373 F.2d 602 (5th Cir. 1967)	10
<i>Wayneview Care Ctr. v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011).....	17
<i>Westwood Horizons Hotel</i> , 270 NLRB 802 (1984)	11, 13, 14, 18
 Statutes:	
Section 7 (29 U.S.C. § 157)	7
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 6, 7, 8
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 6, 7, 8
Section 9(c) (29 U.S.C. § 159(c))	3
Section 9(d) (29 U.S.C. § 159(d)).....	2, 3
Section 10(a) (29 U.S.C. § 160(a))	1
Section 10(e) (29 U.S.C. § 160(e))	2, 17
Section 10(f) (29 U.S.C. § 160(f))	2
 Regulations:	
29 C.F.R. § 102.67(g)	17
29 C.F.R. § 102.69(c)(1)(i)	10

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

GLOSSARY

Act	National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
Board	National Labor Relations Board
Br.	Opening proof brief of Petitioner/Cross-Respondent XPO Logistics Freight, Inc.
NLRB	National Labor Relations Board
Union	Local Lodge 701, International Association of Machinists & Aerospace Workers AFL-CIO
XPO	XPO Logistics Freight, Inc.

STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board submits that this case involves the straightforward application of well-established legal principles and that the case may accordingly be decided without oral argument. However, if the Court believes that oral argument would be of assistance or if it grants the request of XPO Logistics Freight, Inc. for oral argument, the Board respectfully requests the opportunity to participate.

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

Nos. 17-1097, 17-1103

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**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of XPO Logistics Freight, Inc. (“XPO”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of an Order issued by the Board on March 10, 2017, and reported at 365 NLRB No. 42. The Board had jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act (“the

Act”), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices. The Board’s Order is final, this Court has jurisdiction over the petition and cross-application, and venue is proper pursuant to Section 10(e) and (f) of the Act. *Id.* § 160(e), (f). XPO’s petition for review and the Board’s cross-application for enforcement were timely, as the Act places no time limit on those filings.

The Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding, *XPO Logistics Freight, Inc.*, Board Case No. 13-RC-177753. The petitioner before the Board in that proceeding was Local Lodge 701, International Association of Machinists & Aerospace Workers AFL-CIO (“the Union”), which sought to become the bargaining representative of a unit of XPO employees. After the Board held an election, in which the Union prevailed, XPO filed objections, seeking to have the results set aside. The Board overruled these objections and certified the Union as the unit’s bargaining representative.

Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court includes the record in the representation proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). The Court may review the Board’s actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board’s Order in whole or part. 29

U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act and the Board's Rules and Regulations are reproduced in an addendum to this brief.

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue is whether substantial evidence supports the Board's finding that XPO violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by refusing to recognize and bargain with the Union. The dispositive underlying issue is whether the Board acted within its wide discretion in overruling XPO's election objections and certifying the Union, and doing so without an evidentiary hearing.

STATEMENT OF THE CASE

After the Union prevailed by a vote of 8 to 3 in a Board-conducted representation election, the Board certified it to represent a unit of XPO's mechanics and custodians. XPO refused to bargain with the Union, and the Board found that its refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1). XPO does not dispute that it is refusing to bargain with the Union, but claims the Union was not properly certified as the employees' bargaining representative because the Board erred in overruling XPO's election

objections without conducting an evidentiary hearing. The evidence and procedural history relevant to these objections is set forth below.

I. THE REPRESENTATION PROCEEDING

XPO operates a truck storage facility in Gary, Indiana (“the Facility”). (JA 16; JA 36.)¹ On June 7, 2016, the Union filed a petition with the Board, seeking to represent a bargaining unit of mechanics and custodians employed at the Facility. (JA 18; JA 36.) The Board’s regional office conducted an election on June 29, 2016, in which 8 out of 11 valid ballots were cast in favor of representation by the Union. (JA 16; JA 37.)

Afterwards, XPO filed objections alleging that the election was unfair because of a pre-election threat to one employee and sabotage of another employee’s work equipment. (JA 16-17; JA 1-3.) In support, XPO submitted declarations by the two allegedly affected employees (JA 9-15) and an offer of proof that alleged the following facts (JA 16).

Before the election, pro-union employee Shamari Henderson asked anti-union employee Don-Traiel Carr if, as rumored, their co-worker Joe Last would be

¹ Record references in this final brief are to the Joint Appendix (“JA”) filed by XPO on September 22, 2017. Br. refers to XPO’s opening proof brief. References preceding a semicolon are to the Board’s findings; those following are to supporting evidence.

leaving the Facility. (JA 17; JA 5.) Carr answered that he did not know. (JA 5.) Henderson then said that if Last left, Carr would be “alone doing most of the work” because Carr did not support the Union and Last was his only ally. (JA 17; JA 5.) Carr shared Henderson’s comments with Last, who interpreted them as a threat meant to induce Carr to vote for the Union. (JA 5.)

On the day of the election, before he voted, Last found two bolts to the grille of his forklift missing, and the remaining bolts loosened. (JA 6.) The bolts had been securely fastened when Last checked them the prior evening. (JA 6.) Last believed a pro-union employee intentionally removed and loosened the bolts to get Last disciplined in retaliation for not supporting the Union. (JA 17; JA 6.)

On July 20, 2016, the Regional Director issued a Decision and Certification of Representative finding XPO’s offer of proof insufficient to sustain its objections, or even warrant a hearing, and certifying the Union as the representative of the petitioned-for bargaining unit of XPO mechanics and custodians. (JA 18.) On August 3, 2016, XPO filed a request for review with the Board (JA 20-27) and, on November 9, 2016, a three-member panel of the Board (Chairman Pearce; Members Miscimarra and McFerran)² denied XPO’s request,

² Phillip A. Miscimarra was named Acting Chairman in January 2017 and Chairman in April 2017.

finding it raised no substantial issues warranting review (JA 28).

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

After its certification as bargaining representative, the Union requested that XPO recognize and bargain with it. (JA 29.) XPO refused to do so. (JA 29-30.) The Board's General Counsel issued a complaint against XPO, alleging that its refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 8(a)(5), (1), and moved for summary judgment before the Board. (JA 29.)

On March 10, 2017, a three-member panel of the Board (Acting Chairman Miscimarra; Members Pearce and McFerran) granted summary judgment, finding that XPO violated the Act as alleged. (JA 29.) The Board concluded that all representation issues raised by XPO in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that XPO neither offered to adduce at a hearing any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its decision in the representation proceeding. (JA 29.)

To remedy the unfair labor practice, the Board's Order requires XPO to cease and desist from failing and refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing

employees in the exercise of their rights guaranteed them by Section 7 of the Act. Affirmatively, the Board ordered XPO to (1) bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement; and (2) post a remedial notice. (JA 30-31.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that XPO violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. XPO admits this conduct, but contends that it did not thereby violate the Act because the Board abused its discretion in overruling its election objections without an evidentiary hearing. But the Board acted well within its discretion.

An employer that, like XPO, objects to the results of a representation election because of alleged misconduct by third parties must prove the occurrence of misconduct that was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. Furthermore, the objecting employer is only entitled to an evidentiary hearing to prove the alleged misconduct if it provides the Board with an offer of proof that, if credited, would require the election results to be set aside.

Here, the Board reasonably found that the facts stated in XPO's offer of proof did not warrant an evidentiary hearing, much less a rerun election. XPO alleged, first, that a pro-union employee objectionably "threatened" an anti-union

employee by stating that the latter would “be alone doing most of the work” after another anti-union employee left. Second, XPO alleged that missing and loose bolts on the grille of a forklift used by an anti-union employee constituted objectionable sabotage. Under well-settled precedent, it is clear that the Board did not abuse its discretion in finding that, even crediting XPO’s allegations, those two incidents could not establish a general atmosphere of fear and reprisal as required to overturn the results of the representation election. Thus, in light of XPO’s admitted refusal to recognize and bargain with the Union, substantial evidence supports the Board’s finding that XPO violated Section 8(a)(5) and (1) of the Act.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT XPO VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees[.]” 29 U.S.C. § 158(a)(5).³ Here, XPO has admittedly refused to bargain with the Union. (JA 29.) Thus, as long as the Board properly certified the Union as the employees’ collective-bargaining representative, the Board is entitled to enforcement of its Order finding XPO violated Section 8(a)(5) and (1) of the Act.

³ An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

See, e.g., NLRB v. Downtown Bid Servs. Corp., 682 F.3d 109, 112 (D.C. Cir.

2012). XPO contends that the Board abused its discretion in certifying the Union as the bargaining representative of XPO employees over XPO's election objections without holding an evidentiary hearing. But the Board acted well within its discretion.

A. Objections Based on Alleged Third-Party Misconduct Warrant a Rerun Election Only If the Misconduct Created a General Atmosphere of Fear and Reprisal; No Evidentiary Hearing Is Required Absent an Offer of Proof That, If Credited, Would Satisfy That Standard

A party objecting to a Board-conducted representation election bears a “heavy burden” to prove prejudice to the fairness of the election. *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970). The objecting party is not, moreover, entitled by right to an evidentiary hearing on its objections. *Id.* at 828; *accord Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). The Board's practice “is designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections.” *Amalgamated Clothing Workers*, 424 F.2d at 828 (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)). The objector may not use an evidentiary hearing as a “fishing expedition.” *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978) (rejecting employer's

argument that, “without a hearing and the concomitant opportunity to subpoena and examine witnesses, it has no effective method of acquiring the evidence the Board demands”).

To obtain a hearing, the objector must provide the Board with an offer of proof describing evidence that, if credited, would warrant a new election. *See Amalgamated Clothing Workers*, 424 F.2d at 828 (“[T]he objector must supply the Board with specific evidence which prima facie would warrant setting aside the election[.]”) (quoting *U.S. Rubber Co. v. NLRB*, 373 F.2d 602, 606 (5th Cir. 1967)); 29 C.F.R. § 102.69(c)(1)(i) (“[If] the regional director determines that the evidence described in the [objector’s] offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, . . . the regional director shall issue a decision disposing of the objections”). Whether evidence described in the objector’s offer of proof is sufficient to trigger a hearing depends upon the Board’s substantive criteria for the relevant claim of election misconduct. *AOTOP, LLC v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003). When the party’s offer of proof, if credited, would not justify setting aside the election under those criteria as a matter of law, there is simply “nothing to hear.” *Amalgamated Clothing Workers*, 424 F.2d at 829 (quoting *NLRB v. Air Control Prods.*, 335 F.2d 245, 249 (5th Cir. 1964)).

The standard for evaluating pre-election misconduct differs based on who is responsible for the purported misconduct. When a party to the election—employer or union—is responsible, the election will be set aside if the misconduct “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.” *Family Serv. Agency v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999) (alteration in original) (quoting *NLRB v. Earle Indus., Inc.*, 999 F.2d 1268, 1272 (8th Cir. 1993)). When—as here—third parties, such as employees supporting the union, are responsible, the election will be set aside only where “the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Tampa Crown Distributors, Inc.*, 118 NLRB 1420, 1421 (1957); accord *Family Serv. Agency*, 163 F.3d at 1377. In either situation, the effect of the alleged misconduct is evaluated objectively from the perspective of a reasonable employee. See *AOTOP*, 331 F.3d at 104.

In determining whether an election was tainted by a general atmosphere of fear and reprisal, this Court gives less weight to misconduct attributed to anonymous actors than misconduct by known third parties, even when the misconduct is unambiguously related to the election. *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984). The Court

gives even less weight to anonymous conduct that may not be related to the union, the workplace, or the election. *Id.*

Appellate review of Board decisions certifying bargaining representatives is “extremely limited.” *Id.* at 1564. “[T]he Board is entrusted with a wide degree of discretion in conducting representation elections.” *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988). Accordingly, the Court will enforce a Board order overruling an employer’s election objections unless the Board abused its discretion and the abuse of discretion was prejudicial. *See 800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017). The same standard applies to review of the Board’s denial of an evidentiary hearing. *See Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1350 (D.C. Cir. 2004).

B. The Board Did Not Abuse Its Discretion in Overruling XPO’s Objections Without an Evidentiary Hearing

Under settled precedent, XPO’s offer of proof is insufficient to warrant an evidentiary hearing, much less a rerun election. XPO’s objections concern two alleged incidents: (1) an alleged threat to anti-union employee Carr by pro-union employee Henderson; and (2) alleged tampering with anti-union employee Last’s forklift-grille bolts. Because XPO offered no evidence that the alleged threat or tampering were carried out by agents of the Union, both must be evaluated under the third-party standard. (JA 17.) Thus, a hearing would have been warranted

only if the evidence described in XPO's offer of proof, if credited, would establish misconduct that "was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB at 803. Here, the Board reasonably held that the conduct alleged by XPO, considered separately or *in toto*, could not have created such an atmosphere. (JA 17-18.)

1. XPO's offer of proof does not establish an objectionable threat

As the Board found (JA 17-18), Henderson's comment hardly qualifies as a threat at all, and certainly not one that could have created a general atmosphere of fear and reprisal. As mentioned above, the effect of alleged misconduct is evaluated objectively. *See AOTOP*, 331 F.3d at 104. According to XPO's offer of proof, Henderson made a vague statement to Carr that if Last left, Carr would "be alone doing most of the work." (JA 17; JA 5.) XPO offered no evidence to show that a reasonable employee in Carr's position would have interpreted Henderson's alleged statement as signifying an intent to retaliate for failure to support the Union. Indeed, XPO did not aver that Carr understood the statement, which was addressed to him, as threatening.

Even assuming *arguendo* that Henderson's alleged statement could reasonably be construed as threatening Carr with extra work if he continued in his anti-union stance, the Board reasonably held that the statement was not so

aggravated as to render free choice in the election impossible. (JA 17-18.) To assess whether a threat created a general atmosphere of fear and reprisal, the Board considers five factors: (1) the nature of the threat; (2) whether the threat was directed at the entire bargaining unit; (3) the extent of dissemination of the threat among unit employees; (4) whether the person making the threat was capable of carrying it out and whether employees likely acted on fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *See Downtown Bid Servs.*, 682 F.3d at 116 (citing *Westwood Horizons Hotel*, 270 NLRB at 803). Henderson's alleged statement is clearly not objectionable under this standard.

First, XPO has failed to show that "the person making the threat was capable of carrying it out" or that employees likely acted in fear thereof. *Downtown Bid Servs.*, 682 F.3d at 116. XPO's suggestion (Br. 14) that Henderson or other pro-union employees could assume managerial prerogatives and increase other employees' workload is implausible, and XPO has offered no evidence to support it. Also unsupported by the offer of proof is XPO's suggestion (Br. 14) that pro-union employees could harm pro-company employees by blaming them "in the event work is not complete." Although XPO characterizes Henderson's statement as "akin to a threat of job loss" (Br. 14-15), this Court has recognized that such

threats carry little weight when made by third parties. *See Downtown Bid Servs.*, 682 F.3d at 116.

Second, there was insufficient dissemination of the alleged threat to create a general atmosphere of fear and reprisal. (JA 18.) XPO's offer of proof does not allege that Carr reported Henderson's statement to any employee other than Last. (JA 5.) Hence, no more than two employees could have been affected by Henderson's statement. That number is non-determinative in light of the Union's 8-3 victory. XPO does not contend that Last and Carr's votes were dispositive as a pair, but instead adds Henderson to the mix for a total of three voters who were "aware of the threat." (Br. 16.) The illogical implication is that pro-union employee Henderson could have scared himself into supporting the Union through his own statement to a co-worker.

Taking the foregoing together, Henderson's alleged statement was not likely to make any employees vote for the Union out of fear and, in any event, certainly not a number of employees that could have been dispositive in the election. Under these circumstances, the Board did not abuse its discretion in finding Henderson's alleged statement unobjectionable. In fact, this Court has approved Board decisions overruling objections in situations with more explicit, serious, or widely disseminated threats, even when accompanied by other misconduct. *See, e.g., Downtown Bid Servs.*, 682 F.3d at 111-12, 116-17 (new election not warranted

where pro-union employees made “serious” threats to co-workers of job loss if they did not support the union and harassed them with profanity and racial epithets, and employee locker-room poster was anonymously defaced with profane and racist language); *Majestic Star Casino*, 373 F.3d at 1350 (evidentiary hearing on objections not warranted where employer alleged that employee, in presence of other employees, said “it’s time to light them up fellas[,]” referring to anti-union employees); *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1561, 1565-68 (new election not warranted where pro-union employee talked about “cars being torn up by the union people against the people that were anti-union” and stated that “people could be hurt”; another pro-union employee told co-worker in jest that if co-worker did not vote for the union, the employee would kill him; anonymous phone call threatening employee with property damage was followed by anonymous vandalism; and there was hearsay evidence of employee receiving calls threatening bodily harm if he did not sign union card).

XPO’s cases (Br. 14-16), in contrast, are inapposite. Four of them are irrelevant because they involve misconduct by agents of a party (union or employer). *See NLRB v. United Mine Workers*, 429 F.2d 141, 145-47 (3d Cir. 1970); *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 148 (1997); *Mike Yurosek & Son, Inc.*, 292 NLRB 1074, 1074 (1989); *Heck’s Inc.*, 172 NLRB 2231, 2231 (1968). As stated above, a different standard applies to

misconduct committed by parties or their agents as opposed to third parties. *See supra* at 11. XPO does not contend that the Board erred in applying the third-party standard. Thus, it has waived any such contention and implicitly conceded that its party-conduct cases are irrelevant. *See Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 353 (D.C. Cir. 2011) (petitioner waived argument by failing to raise it in opening brief).⁴

XPO's third-party cases, meanwhile, involve multiple threats of harm to persons or property, which were plainly within the capacity of the speaker to implement. *See ManorCare of Kingston, PA, LLC v. NLRB*, 823 F.3d 81, 86-87 (D.C. Cir. 2016) (court found numerous threats of physical harm and property damage made to non-supporters of unionization by two pro-union employees objectionable when "disseminated widely within the unit," and given that one of the pro-union employees was known to have been in fights before and bore a hand

⁴ Even if XPO had argued that the party-conduct standard applied, this Court would not have jurisdiction to consider that argument because XPO did not present it to the Board in its request for review. *See* 29 U.S.C. § 160(e); *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349-50 (D.C. Cir. 2011) (the Court lacks jurisdiction to consider objections not raised to the Board "in the time and manner that the Board's regulations require"); 29 C.F.R. § 102.67(g) ("Failure to request [Board] review shall preclude . . . parties from relitigating, in any related subsequent unfair-labor-practice proceeding, any issue which was, or could have been, raised in the representation proceeding."); *see also, e.g., Matson Terminals, Inc.*, 361 NLRB No. 50, slip op. at 1 n.1, 2014 WL 4809833, at *1 n.1 (Sept. 26, 2014) (same), *enforced*, 637 F. App'x 609 (D.C. Cir. 2016) (per curiam). Rather, XPO conceded that the third-party standard applies. (JA 21-22.)

injury from a knife fight); *Robert Orr-Sysco Food Servs.*, 338 NLRB 614, 614-15 (2002) (threats of physical violence, property damage, and deportation); *Picoma Indus.*, 296 NLRB 498, 498-99 (1989) (assorted threats by six employees to persons and property disseminated to approximately 25 of 140 unit employees); *Westwood Horizons Hotel*, 270 NLRB 802, 802-03 (1984) (multiple threats by pro-union employees, made in the presence of other employees, to “beat up” specific co-workers; additional threats and physical force by pro-union employees to compel others to vote). XPO’s cases merely emphasize the weakness of its threat allegation.

In sum, XPO was not entitled to a hearing to prove the alleged threat, much less a rerun election.

2. XPO’s conclusory allegation of retaliatory sabotage is insufficient to establish objectionable conduct

The Board acted well within its discretion in holding that the alleged, anonymous tampering with the bolts on Last’s forklift’s grille could not have rendered the election unfair, even considered in conjunction with the alleged threat to Carr. (JA 18.) Neither XPO nor Last implicated any specific individual in the incident. (JA 18; JA 6, JA 11.) Moreover, although XPO asserts in its brief that the state of Last’s forklift grille was “dangerous” (Br. 19), it offered no evidence to support that assertion, and it does not claim that anyone was injured. *See NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 974-75 (6th Cir. 1975) (noting absence

of injuries in rejecting objections premised, *inter alia*, on cut forklift wires and towels on forklift manifold that might have caused fire if undetected). Based on the evidence offered, the Board reasonably found that “a few loose screws on a grille are insufficient to render free choice impossible.” (JA 18.) *See id.* at 974 (“It is well settled that ‘[p]roperty destruction of a somewhat minor nature’ . . . is not a sufficient basis to set aside the findings of the Board if there is no evidence that ‘any of these incidents prevented any of the employees from voting their free choice.’”) (quoting *Matlock Truck Body & Trailer Corp. v. NLRB*, 495 F.2d 671, 673-74 (6th Cir. 1974) (per curiam)).

In an effort to bolster its sabotage allegation, XPO argues that the Board ignored other evidence of retaliation in the form of tampering with Last’s toolbox. (Br. 19.) Absent an offer of “specific evidence” of misconduct, XPO’s conclusory assertions of retaliation do not warrant consideration. *Amalgamated Clothing Workers*, 424 F.2d at 828. Yet Last’s declaration again failed to identify a suspect or otherwise provide a basis for his belief that someone tampered with his toolbox or that, if they did so, they acted with a retaliatory purpose. (JA 11.) Just as importantly, XPO offered no evidence that any incidents concerning Last’s toolbox occurred between the time the election petition was filed and the election. Except in rare circumstances, the Board and this Court consider only alleged misconduct occurring between the time an election petition is filed and the election,

Amalgamated Clothing and Textile Workers, 736 F.2d at 1567, which is commonly referred to as the “critical period,” *NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 521 (7th Cir. 1997). For that reason as well, XPO’s conclusory assertions of other retaliation against Last would have minimal value in establishing a general atmosphere of fear and retaliation, even if supported.

Moreover, even assuming that someone intentionally tampered with Last’s forklift grille bolts, XPO offered no evidence to raise the incident above the class of minor property damage, not unambiguously related to the election, to which the Board and this Court affords minimal weight. *See Amalgamated Clothing and Textile Workers*, 736 F.2d at 1568. The Board has repeatedly found, with court approval, that anonymous tampering with, or vandalism to, the property of anti-union employees or the employer does not warrant a rerun election, even in conjunction with evidence of election-related threats by pro-union employees. *See id.* at 1567-69 (minor acts of vandalism, including scratches and cuts to anti-union employees’ cars, alongside multiple threats); *Overnite Transp. Co. v. NLRB*, 105 F.3d 1241, 1245, 1247 (8th Cir. 1997) (damage to cars of three employees and threats of bodily harm); *Bostik Div.*, 517 F.2d at 972-975 (damage to cars, threats, and alleged tampering with company equipment).

Finally, even assuming that the alleged sabotage could have affected employees’ free choice, there was insufficient dissemination to create a general

atmosphere of fear and reprisal. (JA 18.) XPO offered no evidence that Last told any other unit employees about either the loose bolts or the alleged toolbox incident. (JA 6.) Under this Court's precedent, therefore, the Board acted well within its discretion in finding that XPO's weak allegations of a threat and sabotage, affecting at most a non-determinative number of voting employees, did not warrant a hearing, much less a new election, whether considered alone or in conjunction with the third-party "threat" to Carr. *See supra* at 13-16.

None of XPO's cases (Br. 17-18) stand for a contrary conclusion. They involved concrete threats by known persons able to implement them. In one case, moreover, the threat appeared to have been carried out. *See Q. B. Rebuilders, Inc.*, 312 NLRB 1141, 1141 (1993) (Immigration and Naturalization Service ("INS") detained employee in presence of 20 others following widely disseminated threats to call INS to report employees, most of whom were not U.S. citizens, if they failed to vote for the union); *see also Stannah Stairlifts, Inc.*, 325 NLRB 572, 572 (1998) (pro-union employee threatened, in front of entire four-person bargaining unit, to "kick the shit out of and kill" employee known to oppose unionization); *Smithers Tire & Auto. Testing of Texas, Inc.*, 308 NLRB 72, 72-73 (1992) (in-plant spokesman for union told employee with black eye that "this is what happens when you cross us"; two employees told another employee that others would know how she voted and threatened to flatten her car tires, which was of "particular

significance” because “the [e]mployer’s workplace [was] isolated and the employees need[ed] their cars to go to work”).

XPO invokes the tautology that a hearing might uncover evidence of misconduct that XPO has not included in its offer of proof. (Br. 22-23.) But XPO is not entitled to a fishing expedition, *Natter Mfg. Corp.*, 580 F.2d at 952 n.4, and for good reason. As noted above, the Board’s practice “is designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections.” *Amalgamated Clothing Workers*, 424 F.2d at 828 (quoting *Golden Age Beverage Co.*, 415 F.2d at 32). “[D]elay itself almost inevitably works to the benefit of the employer and may frustrate the majority’s right to choose to be represented by a union[.]” *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1563. Because XPO failed to offer “specific evidence which prima facie would warrant setting aside the election,” *Amalgamated Clothing Workers*, 424 F.2d at 828, the Board acted well within its discretion by refusing to hold a hearing.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying XPO's petition for review and enforcing the Board's Order in full.

/s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

/s/ Mischa K. Bauermeister
MISCHA K. BAUERMEISTER
Attorney

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-0656
(202) 273-1776

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

September 2017

**STATUTORY AND REGULATORY ADDENDUM
TABLE OF CONTENTS**

National Labor Relations Act (“the Act”), 29 U.S.C. § 151, et seq.

Section 7 (29 U.S.C. § 157) ii
Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... ii
Section 8(a)(5) (29 U.S.C. § 158(a)(5))..... ii
Section 9(c) (29 U.S.C. § 159(c)) ii
Section 9(d) (29 U.S.C. § 159(d))..... iii
Section 10(a) (29 U.S.C. § 160(a)) iv
Section 10(e) (29 U.S.C. § 160(e)) iv
Section 10(f) (29 U.S.C. § 160(f)).....v

The Board’s Rules and Regulations

29 C.F.R. § 102.67(g)v
29 C.F.R. § 102.69(c)..... vi

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) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section];

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in

whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(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.

THE BOARD'S RULES AND REGULATIONS

Sec. 102.67 *Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.*

* * *

(g) Finality; waiver; denial of request. The regional director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

Sec. 102.69 *Election procedure; tally of ballots; objections; certification by the regional director; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; regional director decisions on objections and challenges.*

* * *

(c)(1)(i) Decisions resolving objections and challenges without a hearing. If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

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

XPO LOGISTICS FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1097, 17-1103
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	13-CA-189647
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 5,163 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, DC
this 28th day of September, 2017

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

XPO LOGISTICS FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1097, 17-1103
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	13-CA-189647
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2017, 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:

Jonathan E. Kaplan, Attorney
Littler Mendelson PC
3725 Champion Hills Drive, Suite 3000
Memphis, TN 38125

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, DC
this 28th day of September, 2017