

ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 17-1097

**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 FROM AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER/CROSS-RESPONDENT

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**CORPORATE DISCLOSURE STATEMENT PURSUANT
TO CIRCUIT RULE 26.1**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for Petitioner states that Petitioner XPO Logistics Freight, Inc. is a wholly-owned subsidiary of XPO CNW, Inc. The sole shareholder of XPO CNW, Inc. is the publicly-traded corporation XPO Logistics, Inc. No publicly-held company owns 10% or more of the stock of XPO Logistics, Inc.

Respectfully submitted,

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

I. PARTIES AND AMICI

1. XPO Logistics Freight Inc. (“XPO”) is the Petitioner/Cross-Respondent.

2. The National Labor Relations Board (“Board” or “NLRB”) is the Respondent/Cross-Petitioner.

3. District 9, International Association of Machinists & Aerospace Workers AFL-CIO (“Union” or “IAM”) was the charging party in the underlying proceedings before Region 13 of the NLRB.

4. There were no amici in the proceedings before the Board.

II. RULING UNDER REVIEW

XPO seeks review of the NLRB’s Decision and Order in Case No. 13-CA-189647, issued on March 10, 2017 and reported at 365 NLRB No. 42. XPO also seeks review of the NLRB’s Decision and Order in Case No. 13-RC-177753, issued on November 9, 2016, in which XPO’s Request for Review of the Regional Director’s Decision and Certification of Representative was denied.

III. RELATED CASES

This case has not previously been before this Court, or any other United States court of appeals, or any other court in the District of Columbia.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner/Cross-Respondent XPO Logistics Freight, Inc. believes this Court would be aided by oral argument in this case. Accordingly, XPO respectfully requests that oral argument be scheduled and heard in this case.

TABLE OF CONTENTS

	PAGE
CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1	i
CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES.....	ii
I. PARTIES AND AMICI.....	ii
II. RULING UNDER REVIEW.....	ii
III. RELATED CASES.....	ii
STATEMENT REGARDING ORAL ARGUMENT	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES	vii
GLOSSARY OF ABBREVIATIONS	xi
I. JURISDICTIONAL STATEMENT	1
II. STATEMENT OF ISSUES.....	2
III. STATUTES AND REGULATIONS	3
IV. STATEMENT OF THE CASE	5
A. Procedural History.....	5
B. Background Facts.....	7
V. SUMMARY OF THE ARGUMENT	9
VI. STANDING.....	10
VII. ARGUMENT.....	11
A. Standard of Review	11

TABLE OF CONTENTS
(CONTINUED)

	PAGE
B. The Board And Regional Director’s Decision That Objectionable Threats Were Not Made During The Critical Period Is Not Supported By Substantial Evidence.....	12
C. The Board And Regional Director’s Decision That The Equipment Sabotage Was Not Objectionable Is Not Supported By Substantial Evidence	17
D. The Board And Regional Director Erred by Failing To Set Aside The Election As A Result Of The Cumulative Effect Of The Conduct Of The Union’s Supporters	19
E. The Regional Director And National Labor Relations Board Prejudicially Denied XPO The Chance To Submit Relevant Evidence At A Hearing	21
VIII. CONCLUSION.....	23
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)	24
CERTIFICATE OF SERVICE	25
ECF CERTIFICATION	25

TABLE OF AUTHORITIES
(CONTINUED)

	PAGE(S)
CASES¹	
<i>Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB</i> , 253 F.3d 19 (D.C. Cir. 2001).....	11
<i>Baja's Place, Inc.</i> , 268 NLRB 868 (1984).....	13
<i>Culinary Workers Local 226 (Casino Royale, Inc.)</i> , 323 NLRB 148 (1997).....	15
<i>Duralam, Inc.</i> , 284 NLRB 1419 (1987).....	20
<i>E.I. du Pont de Nemours & Co. v. NLRB</i> , 682 F.3d 65 (D.C. Cir. 2012).....	11
<i>Flowers Transportation Co. v. NLRB</i> , 739 F.2d 214 (6th Cir. 1984).....	20
<i>Harter Tomato Prods. Co. v. NLRB</i> , 133 F.3d 934 (D.C. Cir. 1998).....	11
<i>Heck's Inc.</i> , 172 NLRB 2231 (1968).....	16
<i>Int'l Transp. Serv., Inc. v. NLRB</i> , 449 F.3d 160 (D.C. Cir. 2006).....	12
<i>Jackson Hosp. Corp. v. NLRB</i> , 647 F.3d 1137 (D.C. Cir. 2011).....	12
* <i>John M. Horn Lumber Co.</i> , 280 NLRB 593 (1986) <i>rev. on other grounds</i> 859 F.2d 1242 (6th Cir. 1988).....	20

¹ Authorities upon which Petitioner chiefly relies are marked with asterisks.

TABLE OF AUTHORITIES
(CONTINUED)

	PAGE(S)
<i>Mail Contractors of America v. NLRB</i> , 514 F.3d 27 (D.C. Cir. 2008).....	11
* <i>Manorcare v. NLRB</i> , 823 F.3d 81 (D.C. Cir. 2016).....	15
<i>Mike Yurosek & Son, Inc.</i> , 292 NLRB 1074 (1989).....	14
<i>NLRB v. Downtown Bid Services Corp.</i> , 682 F.3d 109 (D.C. Cir. 2012).....	13
<i>NLRB v. Singleton Packing Corp.</i> , 418 F.2d 275 (5th Cir. 1969), cert. denied, 400 U.S. 824 (1970)	13
<i>NLRB v. United Mine Workers of Am.</i> , 429 F.2d 141 (3d Cir. 1970)	15
<i>Pacific Micronesia Corp. v. NLRB</i> , 219 F.3d 661 (D.C. Cir. 2000).....	11
<i>Picoma Industries</i> , 296 NLRB 498 (1989)	16
<i>Q. B. Rebuilders, Inc.</i> , 312 NLRB 1141 (1993).....	17
<i>Retail Clerks Local 1059 v. NLRB</i> , 348 F.2d 369 (D.C. Cir. 1965).....	10
<i>RJR Archer, Inc.</i> , 274 NLRB 335 (1985)	20
* <i>Robert Orr-Sysco Food Services, LLC</i> , 338 NLRB 614 (2002)	15, 16
* <i>Sewell Mfg. Co.</i> , 138 NLRB 66 (1962), <i>supp. by</i> 140 NLRB 220 (1962).....	13

TABLE OF AUTHORITIES
(CONTINUED)

	PAGE(S)
<i>Smithers Tire & Auto. Testing</i> , 308 NLRB 72 (1992)	17
<i>Stannah Stairlifts, Inc.</i> , 325 NLRB 572 (1998)	17
<i>Sutter E. Bay Hospitals v. NLRB</i> , 687 F.3d 424 (D.C. Cir. 2012).....	11
<i>Titanium Metals Corp. v. NLRB</i> , 392 F.3d 439 (D.C. Cir. 2004).....	11
* <i>Trim Associates, Inc. v. NLRB</i> , 351 F.3d 99 (3rd Cir. 2003).....	22
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	11
* <i>Westwood Horizons Hotel</i> , 270 NLRB 802 (1984)	13, 15, 16, 17, 21
<i>XPO Logistics Freight, Inc.</i> , 365 NLRB No. 42 (Mar. 10, 2017)	ii, 7, 8, 9
<i>YKK (U.S.A.) Inc.</i> , 269 NLRB 82 (1984).....	20

STATUTES

National Labor Relations Act of 1935, 29 U.S.C. § 151, <i>et seq.</i> (the “Act”)	<i>passim</i>
29 U.S.C. § 157 (“Section 7”)	3
29 U.S.C. § 158 (“Section 8”)	xi, 1, 3, 6, 7, 15
29 U.S.C. § 159 (“Section 9”)	1
29 U.S.C. § 160 (“Section 10”)	1, 4, 10

TABLE OF AUTHORITIES
(CONTINUED)

PAGE(S)

OTHER AUTHORITIES

*Casehandling Manual §§ 11392.6, 11395.122

Federal Rule of Appellate Procedure 26.1i

GLOSSARY OF ABBREVIATIONS

Act or NLRA	National Labor Relations Act
Board or NLRB	National Labor Relations Board
Carr	Don-Traiel Carr
Decision	The Board's Decision and Order finding that XPO unlawfully refused to bargain with the IAM under 29 U.S.C. §§ 158(a)(1) and (5),
Henderson	Shamari Henderson
IAM or Union	District 9, International Association of Machinists & Aerospace Workers AFL-CIO
Last	Joe Last
Regional Director	Regional Director Peter Sung Ohr of Region 13 of the Board
XPO	XPO Logistics Freight Inc.

I. JURISDICTIONAL STATEMENT

This case is before the Court on XPO's Petition for Review ("Petition"). The Court has jurisdiction over XPO's Petition pursuant to 29 U.S.C. §§ 160(e) and (f). The Petition is timely as there are no time limits for filing such under the National Labor Relations Act ("NLRA" or the "Act"). The NLRB had jurisdiction to issue its Decision and Order ("Decision") finding that XPO unlawfully refused to bargain with the IAM under 29 U.S.C. §§ 158(a)(1) and (5), which authorizes the Board to resolve alleged unfair labor practices, including XPO's alleged refusal to bargain with the Union. The Court is authorized to review the NLRB's Decision, as well as its underlying certification decision and the 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 certification decision. Venue in this Court is proper pursuant to 29 U.S.C. § 160(f).

II. STATEMENT OF ISSUES

1. Whether the NLRB erred in failing to hold that threatening and coercive tactics by the Union and others created an atmosphere of fear, intimidation, and reprisal that affected the election outcome, destroyed laboratory conditions, and invalidated the election results.

2. Whether the NLRB erred in failing to hold that sabotage of a vocal pro-Company employee's work equipment and Company property by Union agents was objectionable, such that the election results should be set aside.

3. Whether the NLRB erred in failing to hold that the Union's threats and/or coercion of an employee with the intention of getting the employee to vote in favor of Union representation were objectionable, such that the election results should be set aside.

4. Whether the NLRB erred in concluding that the conduct by the Union and/or its agents, either singularly or cumulatively, does not establish that laboratory conditions for the election were destroyed.

5. Whether the NLRB erred in failing to conduct a hearing on XPO Logistics Freights, Inc.'s Objections to the election in Case. No. 13-RC-177753.

6. Whether the NLRB erred in overruling XPO Logistics Freights, Inc.'s Objections to the election in Case. No. 13-RC-177753.

III. STATUTES AND REGULATIONS

Section 7 of the NLRA, 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 of 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 158(a)(3) of this title.

Section 8(a) of the NLRA, 29 U.S.C. § 158(a)

It shall be an unfair labor practice for an employer – ...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(b) of the NLRA, 29 U.S.C. § 158(b)

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

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

Section 10 of the NLRA, 29 U.S.C. § 160**(f) Review of final order of Board on petition to court**

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.

IV. STATEMENT OF THE CASE

A. Procedural History

Pursuant to a Stipulated Election Agreement in Case No. 13-RC-177753, the NLRB conducted an election on June 29, 2016 to determine whether the IAM would be the exclusive bargaining representative of XPO employees in the following unit:

All full-time and regular part-time mechanics and mechanic/custodians employed by the Employer at its facility currently located at 201 Blaine Street, Gary, Indiana.

The election Tally of Ballots showed eight ballots cast for the Union, and three cast against union representation. (JA 37). There were no challenged ballots.

XPO filed four timely objections. Specifically, the objections were: (1) during the critical period, the Union, and/or its agents or supporters, threatened and/or coerced an employee with the intention of getting the employee to vote in favor of Union representation; (2) during the critical period, a vocal pro-Company employee had his work equipment and company property sabotaged by Union agents and/or supporters in retaliation for not supporting the Union; (3) through the conduct set forth in Objections 1 and 2, the Union and/or its agents created a general atmosphere of fear and coercion during the critical period and interfered with employees' ability to exercise a free, fair, and uncoerced choice in this election and, either singularly or cumulatively, destroyed the minimum laboratory

conditions necessary for a free and fair election; and (4) during the critical period, the Union and its representatives, agents and supporters engaged in additional improper or objectionable conduct that interfered with this election and rendered a free and fair election impossible. (JA 1-3).

The Board failed to conduct a hearing relating to the objections filed by XPO in this matter and, thus, XPO was not afforded the opportunity to present its proof at hearing.

On July 20, 2016, Regional Director Peter Sung Ohr issued his Decision and Certification of Representative in the matter. (JA 16-19). The Regional Director found that Objections 1 and 2 must be overruled because the threat and act of sabotage “clearly could not have created [a] ‘general atmosphere of fear and reprisal’ required to set aside election results.” (JA 17). Additionally, the Regional Director overruled Objection 3 and determined that “the combination of an ambiguous, conditional threat and a purely speculative act of sabotage could not, when taken together, have created a general atmosphere of fear and reprisal.” (JA 18).

On August 3, 2016, XPO timely filed its Request for Review of the Regional Director’s Decision and Certification of Representative because there is merit to XPO’s objections and, at a minimum, the Region should have conducted a hearing and provided XPO a fair opportunity to present its evidence. (JA 20-27). On

November 9, 2016, the NLRB denied the Employer's Request for Review of the Regional Director's Decision and Certification of Representative. (JA 28).

On December 9, 2016, the Union filed an unfair labor practice charge against XPO in Case No. 13-CA-189647. On December 16, 2016, the NLRB General Counsel issued a Complaint against XPO alleging that it violated Sections 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union's certification in Case No. 13-RC-177753. XPO filed a timely Answer to the Complaint on December 29, 2016. On December 30, 2016, the General Counsel filed a Motion for Summary Judgment. On January 9, 2017, the NLRB issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. XPO filed a timely response.

On March 10, 2017, the Board issued its Decision and Order in Case No. 13-CA-189647. This Decision and Order was reported at 365 NLRB No. 42. (JA 29-31). In it, the Board granted the General Counsel's Motion for Summary Judgment and found that XPO failed to bargain with the Union in violation of Sections 8(a)(1) and 8(a)(5) of the Act. 365 NLRB No. 42 (Mar. 10, 2017). (JA 30).

B. Background Facts

XPO is a national provider of freight transportation services. XPO's business includes next and second day pick-up and door-to-door delivery of less than

truckload shipments of freight, providing seamless interstate and intrastate delivery services of freight to customers by truck across the United States and Canada. The freight ranges from general commodities to hazardous materials. XPO ships freight to and from all 48 of the contiguous United States from 290 facilities across the country. The facility in question in this matter is in Gary, Indiana.

During the critical period preceding the election, Shamari Henderson (“Henderson”), a vocal Union supporter, approached Don-Traiel Carr (“Carr”), a pro-Company employee, and asked Carr whether rumors that employee Joe Last (“Last”) would be leaving the facility were true. (*See* JA 5, 10, 14). Carr responded by saying he did not know whether those rumors were true. (*Id.*). Henderson responded by saying that if Last left the facility, Carr would be “alone doing most of the work” because Carr did not support the Union and Last was his only ally. (*Id.*). Carr shared this exchange with Last prior to the vote. (*Id.*). Last believed that this comment was a threat to Carr to get him to vote for the Union. (*Id.*).

In addition to Henderson’s threat, Last was also the subject of threats and coercive conduct during the critical period leading up to the election. (JA 6, 11). On the day of the election, before he voted, Last noticed that the grill on his forklift looked like it was going to fall off as he was backing it out of the facility. (*Id.*). Upon inspection, Last noticed that two bolts from the forklift were missing and the

rest had been intentionally loosened. (*Id.*) Last checked these same bolts the evening prior and they were securely fastened to the grill of his forklift. (*Id.*) In the intervening evening, while he was away from the facility, the bolts could only have been loosened and/or removed by a person in the facility. (*Id.*) Moreover, Last had been targeted in the past for being a pro-Company employee. (*Id.*) Last believes that a pro-Union employee intentionally sabotaged his forklift by removing and/or loosening screws to make it appear that Last was not completing his job duties or so the grill would fall off and Last would be disciplined for the same, all in retaliation for not supporting the Union. (*Id.*)

V. SUMMARY OF THE ARGUMENT

Prejudicial error tainted the Regional Director's and Board's decisions to certify the results of the election in this case and, therefore, to find that XPO engaged in an unfair labor practice by virtue of refusing to bargain with the Union.

First, the Regional Director's finding that the threat made against a Company supporter was not objectionable is not supported by substantial evidence or applicable precedent. Union agents threatened to compel a Company supporter to support the Union by virtue of their threats to make the pro-Company employees do all the work and, essentially, run them out of town. In doing so, the Union supporter engaged in objectionable conduct and destroyed the laboratory conditions of the election.

Second, the Regional Director's finding that the sabotage of a Company supporter's equipment was not objectionable is not supported by substantial evidence or applicable precedent. Again, this conduct was objectionable and destroyed the laboratory conditions of the election.

Third, the Regional Director failed to properly consider the evidence of objectionable conduct in the aggregate when analyzing the conduct identified by XPO. The objectionable conduct occurring during the critical period demonstrated that the laboratory conditions for the election were destroyed and makes plain that the Board based its March 10, 2017 Decision and Order on a flawed certification decision. The Court should set aside its certification decision—as well as the Decision and Order—and order a new election.

Fourth, the Regional Director erred when he failed to properly consider XPO's Offer of Proof and order a hearing relating to the objections made by XPO. By refusing to order a hearing, the Regional Director made his Decision and Order on an incomplete record. In doing so, the Regional Director held XPO to higher standard than that typically applied to unions as hearings often are granted for union objections on questionably minimal evidentiary offerings. In stark contrast, the Regional Director essentially required XPO to prove its objections without having the opportunity to cross-examine witnesses and fully develop its testimony. Thus, at a minimum, the Court should set aside the certification decision and

Decision and Order, and order that XPO be given an opportunity to present its evidence at a hearing in this matter.

VI. STANDING

XPO has standing to seek review in this Court as an aggrieved party to a final order of the Board pursuant to 29 U.S.C. § 160(f). *See Retail Clerks Local 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

VII. ARGUMENT

A. Standard of Review

This Court denies enforcement and vacates Board orders when the Board's decision has "no reasonable basis in law or when the Board has failed to apply the proper legal standard." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-46 (D.C. Cir. 2004); *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001). The Board's departure from its own established precedent without a reasoned analysis renders its decision arbitrary and unenforceable. *See E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 66-67 (D.C. Cir. 2012); *Mail Contractors of America v. NLRB*, 514 F.3d 27, 31 (D.C. Cir. 2008). Similarly, a Board decision is reversible when the Board's application of law to facts is arbitrary or otherwise erroneous. *Sutter E. Bay Hospitals v. NLRB*, 687 F.3d 424, 437 (D.C. Cir. 2012); *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir. 1998).

The Board's factual determinations should be afforded deference only if they are supported by substantial evidence in the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). "Substantial evidence" is more than "a mere scintilla" of evidence. *Pacific Micronesia Corp. v. NLRB*, 219 F.3d 661, 665 (D.C. Cir. 2000). Accordingly, a Board decision is not entitled to deference when it rests upon a finding unsupported by substantial evidence in the record. *See Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1141 (D.C. Cir. 2011); *Int'l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006). Here, there is essentially no "record" because the Regional Director and Board refused XPO the opportunity to present its evidence at a hearing. As such, XPO submits that the Board and Regional Director's Decisions cannot be supported by "substantial evidence" such that it would be entitled to deference. Thus, at best, this Court must rely upon the Offer of Proof and related materials submitted by XPO. Given this, and the Board's incorrect application of its precedent, this Court should set aside the Certification Decision and Decision and Order, and order that XPO be given an opportunity to present its evidence at a hearing in this matter.

B. The Board And Regional Director's Decision That Objectionable Threats Were Not Made During The Critical Period Is Not Supported By Substantial Evidence

The Regional Director erred in holding that the threat to Carr was not objectionable. (JA 17-18). Specifically, the Regional Director held that the threat

made to Carr was “vague” and was not objectionable because it “hardly even qualifies as a threat” and was not “aggravated.” (*Id.*). Substantial evidence does not support these findings. Quite the opposite, the Offer of Proof submitted by XPO demonstrates that the threat made to Carr was clear in context and content.

The Board has long-recognized that coercive, threatening, or intimidating conduct that destroys laboratory conditions and interferes with employees’ free choice in the election warrants overturning an election. *Sewell Mfg. Co.*, 138 NLRB 66 (1962), *supp. by* 140 NLRB 220 (1962); *NLRB v. Singleton Packing Corp.*, 418 F.2d 275, 281 (5th Cir. 1969), *cert. denied*, 400 U.S. 824 (1970).

If a *party* interferes with voters’ free and uncoerced choice, the Board must set aside the election. *Baja’s Place, Inc.*, 268 NLRB 868, 868 (1984). Where misconduct is attributable to *third parties*, the NLRB will overturn an election if the misconduct is “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).

Specifically, the Board considers: (1) the nature of the threat, (2) whether the threat was directed at an entire unit, (3) the extent of the dissemination of the threat, (4) whether the person making the threat was capable of carrying it out (and whether employees likely acted on that fear), and (5) whether the threat was made

near the time of the election. *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 116 (D.C. Cir. 2012).

In the instant case, XPO's first objection and its Offer of Proof demonstrate that Henderson, a Union supporter, made unlawful threats during the critical period, and these threats were sufficiently severe that they destroyed the laboratory conditions of the election and warrant setting aside the election results. (JA 1, 4-5). During the critical period, Henderson, a pro-Union employee, told Carr, a pro-Company employee, that he would be "alone doing most of the work" if he did not support the Union because fellow pro-Company employee Last was planning on retiring. Upon receiving this threat, Carr shared the threat with Last. (JA 5, 10, 14).

Contrary to the Regional Director's Decision, this threat was not a "vague statement" but rather a concrete threat that the pro-Union employees would force the pro-Company employee to do their share of the work, if the pro-Company employee did not switch his vote. Indeed, Last's affidavit specifically notes that he believes the comments were "meant as a threat" to get Carr to vote for the Union. (JA 10-11).

Moreover, the threat is "aggravated" in nature because it implies that those who do not switch their allegiances to the Union will end up responsible for the workload of pro-Union employees, or that pro-Union employees will blame pro-

Company employees in the event work is not complete. The implication is clear—switch your vote or we will run you out of town. By its very nature, the threat is akin to a threat of job loss because it threatens the prospect of future employment for pro-Company employees. *Mike Yurosek & Son, Inc.*, 292 NLRB 1074, 1074 (1989) (new election ordered where antiunion activist told: “we know who you guys are ... after the Union wins the election some of you may not be here”).

The threat made to Carr was objectionable. Indeed, *Westwood Horizons* held that threats will interfere with a free election when they are “serious and likely to intimidate prospective voters to cast their ballots in a particular manner.” 270 NLRB at 803. That is exactly what happened in this case. *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 160-61 (1997) (“we know who you are and we know where you live” found to be an unlawful threat made by a picket to an employee.); *NLRB v. United Mine Workers of Am.*, 429 F.2d 141, 146 (3d Cir. 1970) (statement having reasonable tendency to coerce or intimidate employee violates Section 8(b)(1)(A)).

In considering the *Westwood Horizons* standard, the Board takes “into consideration the closeness of the election results. Objections must be carefully scrutinized in close elections.” *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614, 615 (2002). While the threats were not made to the entire unit or disseminated throughout the unit, that fact is immaterial. The threats at issue here

were directed at a determinative number of voters. *Manorcare* recognized that in close elections, “the requirement of ‘widespread determination’ is satisfied at a related threshold.” *Manorcare v. NLRB*, 823 F.3d 81, 86 (D.C. Cir. 2016). Whether the misconduct is directed at a determinative number of voters weighs heavily in that analysis, as the Board “has repeatedly found ... that voting-related threats of substantial harm directed at a determinative number of voters create an atmosphere of fear and reprisal sufficient to set aside an election.” *Id.* at 616; *Picoma Industries*, 296 NLRB 498, 500 (1989).

Here, the threat was also sufficiently disseminated that it created a general atmosphere of fear and reprisal. Carr told Last about the threat, which means that in this small unit nearly 30 percent of the voters (Henderson, Carr and Last) were aware of the threat. *Heck's Inc.*, 172 NLRB 2231, 2238 (1968) (threat that was disseminated to “nearly one-fifth of the entire bargaining unit” were sufficiently severe to “destroy[] the Union's previously existing majority status”). Considering the remaining factors in *Westwood*, it is clear that Union supporters were capable of carrying out the threat, as they were more-than-capable of targeting pro-Company employees if they did not switch their allegiances. It is undisputed that the threat was made in the critical period. Moreover, there is no question that the threat concerned Carr enough that he approached Last and relayed the threat. In short, the threat was aggravated, disseminated, viable, made during the critical

period, and was objectionable as a matter of law. Given the foregoing, the Court should therefore reverse the Regional Director's erroneous holding, vacate the Board's resulting Decision and Order, and order a new election in this matter.

C. The Board And Regional Director's Decision That The Equipment Sabotage Was Not Objectionable Is Not Supported By Substantial Evidence

In addition to improperly rejecting XPO's evidence of threats made by Union supporters, the Regional Director and Board also erred when they rejected XPO's evidence of sabotage. In his Decision and Order, the Regional Director noted that "a few loose screws on a grille are insufficient to render free choice impossible." (JA 18). Substantial evidence does not support this finding. Quite the opposite, XPO's Offer of Proof establishes that the sabotage was more than "loose screws" and targeted Last, a known Company supporter. (JA-6).

Additionally, the conduct alleged in XPO's Objection 2—the sabotage of a Company supporter's equipment on the day of the election—also created a general atmosphere of fear and reprisal sufficient to render a free election impossible. (JA 2, 5-6). Even when applying the *Westwood Horizons* third-party test, the Board has consistently considered threats and acts of property damage, like those committed here, sufficient to create an atmosphere of fear and reprisal sufficient to set aside an election. *Stannah Stairlifts, Inc.*, 325 NLRB 572 (1998); *Q. B. Rebuilders, Inc.*, 312 NLRB 1141 (1993) (threats of physical violence, property

damage, surveillance, loss of employment, or other untoward consequences are probative in determining the existence of a general atmosphere of fear and reprisal and warrant setting aside an election); *Smithers Tire & Auto. Testing*, 308 NLRB 72, 73 (1992) (sustaining an employer's objections and ordering a new election after pro-union employees threatened to flatten the tires of employee's automobile). Last's affidavit, which was submitted with XPO's Offer of Proof, establishes that his forklift was tampered with on the morning of the election, before he voted, and that he had been previously targeted by pro-Union employees.

Upon considering the facts here, the only reasonable conclusion that one could make is that pro-Union employees sabotaged Last's equipment before he voted in an effort to stop Last from voting at all, in the hopes that he would either: (1) be injured when the forklift grill fell and was run over; (2) be disciplined or discharged for damaging company property or otherwise be distracted by the incident so as not to vote at all. This serious misconduct independently warranted setting aside the election as it is among the most direct interferences with employee voting rights. Yet, despite the gravity of the evidence, the Regional Director failed to order a new election—and failed to grant a hearing on the merits of this objection. Instead, in his cursory certification decision, the Regional Director rejected the Offer of Proof without even giving XPO the opportunity to enter evidence or cross-examine witnesses on this topic.

In rejecting the evidence supporting Objection 2, and minimizing the dangerous effect that sabotaging equipment could have on employees and the workplace, the Regional Director ignored other relevant evidence of retaliation relating to Last's refusal to support the Union. Namely, XPO submitted evidence in its Offer of Proof that Union supporters tampered with Last's toolbox following the election in retaliation for his Company support. (JA 11). The failure to even refer to this evidence, which XPO submitted with its Offer of Proof, further demonstrates that the Regional Director did not even fully consider the relevant evidence proffered by XPO prior to making his Decision and, thereby, acted in a prejudicial and non-objective manner.

Given the foregoing, the Court should reverse the Regional Director's erroneous certification decision, vacate the Board's resulting Decision and Order, and order a new election in this matter.

D. The Board And Regional Director Erred by Failing To Set Aside The Election As A Result Of The Cumulative Effect Of The Conduct Of The Union's Supporters

The Regional Director also erred in overruling Objection 3 and holding that, when reviewing the conduct identified in Objections 1 and 2 cumulatively, there was no objectionable conduct. Indeed, in his Decision, the Regional Director determined that the two coercive acts described above did not create a *general* atmosphere of fear and reprisal because XPO's "offer of proof [was allegedly]

devoid of any evidence that other members of the proposed bargaining unit have any knowledge whatsoever of the ‘threat’ and ‘sabotage.’” (JA 17-18).

In so holding, the Regional Director obviously ignored the Offer of Proof’s demonstration that approximately 30 percent of the unit was aware of the conduct. Thus, as noted above, the conduct identified in Objections 1 and 2 covered a substantial portion of the very small voting unit and involved a serious threat implying that pro-Company employees would be “run out of town” by pro-Union employees. Both the Board and courts have emphasized repeatedly the intensified effect of threats in a small unit, “[w]here a small change in votes would lead to a contrary election result, otherwise isolated misconduct must be scrutinized with special attention.” *John M. Horn Lumber Co.*, 280 NLRB 593, 594 (1986) *rev. on other grounds* 859 F.2d 1242, 1244 (6th Cir. 1988); *Duralam, Inc.*, 284 NLRB 1419, 1420 (1987); *RJR Archer, Inc.*, 274 NLRB 335 (1985); *YKK (U.S.A.) Inc.*, 269 NLRB 82 (1984); *Flowers Transportation Co. v. NLRB*, 739 F.2d 214 (6th Cir. 1984). Moreover, the threat was backed up by sabotage of a pro-Company employee’s work machinery on the day of the election, before the employee had voted.

In the face of this evidence, the Regional Director, as discussed in more detail below, somehow determined that a hearing to fully explore the merits of XPO’s objections was unnecessary. Rather, the Regional Director rejected XPO’s

Objection 3 and determined the cumulative effect of the conduct affecting the election did not create a general atmosphere of fear and reprisal without the benefit of a hearing. (JA 18).

In sum, the record evidence—which is limited because, as discussed below, the Regional Director and Board refused to provide XPO with the opportunity to present its evidence at a hearing in this matter—establishes that a serious threat was made and that this was followed by an act of directed sabotage. When analyzed under the *Westwood Horizons* standard, the threats made to Carr and sabotage of Last's equipment were “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” These actions were sufficiently severe that they could cause one or more employees to change his or her vote. A change in the votes of just three employees could have altered the outcome of the election. The Regional Director and Board's finding to the contrary lacks substantial supporting evidence.

E. The Regional Director And National Labor Relations Board Prejudicially Denied XPO The Chance To Submit Relevant Evidence At A Hearing

As noted above, the Regional Director in this matter prejudicially refused to give XPO an opportunity to present its evidence at a hearing in this matter. Rather, he, without a full record or opportunity to consider all of the evidence in this matter, issued his certification decision, which denied XPO's objections.

Thereafter, the Board rubberstamped this decision, again failing to provide XPO with the opportunity to present its evidence in this matter when it denied XPO's Request for Review. (JA 28).

At a minimum, XPO provided sufficient information to require the Regional Director and Board to hold a hearing and allow XPO to proffer evidence it has identified in support of its objections. In fact, the Board's Rules and Regulations call for a hearing when a party's objection raises substantial and material issues of fact. A hearing should be held if the objecting party has established that it "could" produce at hearing evidence that, if credited, would warrant setting aside the election. Casehandling Manual §§ 11392.6 , 11395.1; *Trim Associates, Inc. v. NLRB*, 351 F.3d 99, 105 (3rd Cir. 2003) ("it is unreasonable to expect the employer to document its objections with the kind of evidence that realistically could only be uncovered by subpoena in an adversarial hearing. All that [our court] requires is that the 'objector's proffer of evidence must *prima facie* warrant setting aside the election' and may not be 'conclusory' or 'vague' but must point to specific events and specific people.").

XPO's Offers of Proof clearly provided evidence establishing that objectionable conduct affected at least 30 percent of the bargaining unit. The Employer is entitled to a hearing because the testimony and evidence it would proffer at the hearing could warrant setting aside the election, particularly if

Henderson admits to other threats or misconduct or to the sabotage of Last's work materials. Moreover, a hearing in this matter would provide a complete record on which the Regional Director, the Board and the Court could better determine the aggravated nature of the alleged conduct and how widely it was disseminated. Without a hearing, XPO has been prejudiced by being precluded from fully supporting its objections and demonstrating their effect on the election.

VIII. CONCLUSION

For each of the reasons set forth above, XPO's Petition should be granted and the Board's Order should be denied enforcement, and a new election should be granted. In the event a new election is not ordered, XPO respectfully requests that it be given an opportunity to present evidence of its Objections in Case No. 13-RC-177753 at a hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,332 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. 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 a proportionally spaced typeface using the Word 2010 in Times New Roman, Font 14.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of October, 2017, I electronically filed a true and correct copy of the foregoing *Brief of Petitioner/Cross-Respondent* using the United States Court of Appeals for the District of Columbia Circuit's CM/ECF filing system, thereby sending notification of such filing to all counsel of record.

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ECF CERTIFICATION

I hereby certify that the required privacy redactions have been made in accordance with D.C. Cir. Rule 25, that the electronic submission is an exact copy of the paper document, and that the document has been scanned for viruses and is free of viruses, and that the paper document will be maintained for three years after the mandate or order closing the case issues.

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