

Nos. 17-1177, 17-1192

**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**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

XPO LOGISTICS FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 17-1177, 17-1192
)	
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	13-CA-196637
)	
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 in this court proceeding. The Board’s General Counsel was a party before the Board. Teamsters Local Union No. 179 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 July 6, 2017, and reported at 365 NLRB No. 105, which relies on the findings of the Board and a Regional Director in an earlier representation proceeding. The findings of the Board in the representation proceeding (*XPO Logistics Freight*,

Inc., Board Case No. 13-RC-184190) are contained in an unpublished Board Order, which issued on April 6, 2017. The findings of the Regional Director in the same proceeding are contained in an unpublished Report on Objections and Certification of Representative, which issued on November 2, 2016.

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.

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Dated at Washington, D.C.
this 8th day of February 2018

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GLOSSARY

Act or NLRA	National Labor Relations Act, (29 U.S.C. § 151 et seq.)
Board or NLRB	National Labor Relations Board
Br.	Opening brief of Petitioner/Cross Respondent XPO Logistics Freight, Inc.
JA	Joint Appendix
Union	Teamsters Local Union No. 179
XPO	XPO Logistics Freight, Inc.

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**BRIEF FOR
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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 a Board Decision and Order finding that XPO unlawfully refused to bargain with Teamsters Local Union No. 179 (“the Union”). The Order issued on July 6, 2017, and is reported at 365 NLRB No. 105.

The Board had subject-matter jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction and venue is proper under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e), (f), which allows an aggrieved party to obtain review of a Board order in this Circuit and allows the Board to cross-apply for enforcement. 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-184190. There, the Union petitioned the Board for an election to become the bargaining representative of a unit of XPO employees. After the Board held an election and 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 ISSUES 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 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 without conducting an evidentiary hearing.

STATEMENT OF THE CASE

After prevailing by a vote of 38 to 33 in a Board-conducted election, the Union was certified to represent a unit of XPO employees. 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 that the Union was improperly certified as the employees' bargaining representative because the Board erred in overruling XPO's

election objections without an evidentiary hearing. The relevant procedural history is set forth below.

I. THE REPRESENTATION HEARING

XPO operates a trucking terminal in Aurora, Illinois. (JA 58.)¹ On September 14, 2016, the Union filed a petition with the Board, seeking an election to represent a bargaining unit of full-time and regular part-time city drivers, road drivers, and hostlers at the terminal.² (JA 21; JA 4-6.) The Board conducted an election on October 12, in which 38 of 71 valid ballots were cast in favor of the Union. (JA 21; JA 7.)

On October 19, XPO filed six objections to the election, requesting that the election be rerun, or that a hearing be scheduled regarding its objections. (JA 21-22; JA 9-12.) The first four objections alleged that, during the “critical period,”³ the Union, or union agents or supporters, threatened, intimidated, or coerced employees to vote for the Union (1) outside the entrance of XPO’s facility or

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

² A hostler assists in directing trucks and trailers in docking or parking areas.

³ The critical period is the time between when the Union files its petition and the election. *See, e.g., Gibraltar Steel Corp. of Tennessee*, 323 NLRB 601, 603 (1997).

during visits to employees' homes, (2) during work hours, (3) via text messages, and (4) in a break room after an employee discarded Union literature. XPO's fifth objection asserted that the conduct alleged in its first four objections combined to create a general atmosphere of fear and coercion that interfered with employees' free choice, and its sixth objection alleged that the Union or its agents or supporters had engaged in additional, unspecified conduct that interfered with the election. (JA 21-22; JA 9-12.)⁴ XPO also submitted an offer of proof, which identified employees it expected to testify in support of its objections, gave brief descriptions of their expected testimony, and attached one employee statement. (JA 13-20.)

On November 2, 2016, the Board's Regional Director for Region 13 issued a Report on Objections and Certification of Representative, finding XPO's offer of proof insufficient to warrant an evidentiary hearing on any of its objections, much less a rerun election. He overruled the objections and certified the Union as the representative of the petitioned-for bargaining unit. (JA 21.) XPO filed a Request for Review of the Regional Director's decision with the Board and, on April 6, 2017, a three-member panel of the Board (Acting Chairman Miscimarra; Members Pearce and McFerran)⁵ denied XPO's request. (JA 47 & n.1; JA 37-46.)

⁴ XPO is not asking the Court to review the Board's disposition of objections 3 and 6.

⁵ Phillip A. Miscimarra, named Acting Chairman in January 2017 and Chairman in April 2017, dissented in part. Without reaching the merits, he found that

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING AND THE BOARD'S DECISION AND ORDER

After the Regional Director certified the Union, and again after the Board denied XPO's Request for Review, the Union requested bargaining from XPO. (JA 29-36.) XPO refused to bargain, and the Union filed unfair-labor-practice charges. (JA 50.) The Board's General Counsel issued a complaint alleging that XPO's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), and moved for summary judgment before the Board. (JA 51-57.)

On July 6, 2017, the Board (Chairman Miscimarra; Members Pearce and McFerran) issued a Decision and Order granting the General Counsel's motion for summary judgment. (JA 1.) The Board found 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 1.)

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

objections 1, 2, and 4 raised factual issues sufficient to warrant a hearing. He agreed with the majority's denial of review regarding objections 3, 5, and 6. (JA 48-49.)

exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157.

(JA 2.) 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 2-3.)

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 that conduct, but contends that it did not thereby violate the Act because the Board erred in overruling its election objections without an evidentiary hearing. However, the Board acted well within its discretion.

An objecting employer is only entitled to an evidentiary hearing when its offer of proof describes facts that, if credited, would warrant setting aside the election results under the applicable substantive standard. Because XPO's proffered evidence would not support a finding that the Union or its agents were implicated in the alleged pre-election misconduct, the objections must be reviewed under the third-party standard. That standard requires, for an election to be set aside, that the employer prove the alleged misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.

In light of those well-established standards, the Board reasonably found that an evidentiary hearing, much less a rerun election, was not warranted. XPO's objections were couched in generalities, and the supporting offer of proof largely reiterated those generalities rather than proffering factual details to clarify and support the objections. The few specific incidents sketched out in XPO's offer of proof (a quoted statement, a break-room disagreement) lack details suggesting they were objectionable, even accepting every proffered fact as true. Hence, there was no reason to hold a hearing to resolve credibility issues or otherwise explore XPO's objections.

XPO's contention that its proffer was adequate to trigger a hearing because it identified witnesses by name is incorrect, as are its arguments that the Board failed to analyze the objections cumulatively or to sufficiently consider the margin of the Union's election victory. The Board did not abuse its discretion in overruling XPO's general allegations of pre-election misconduct, which were unsubstantiated by a proffer specifying objectionable conduct sufficient to impair employee free choice in the election.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if "supported by substantial evidence on the record considered as a whole." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); accord *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d

1117, 1121 (D.C. Cir. 2012) (citing Section 10(e) of the Act, 29 U.S.C. § 160(e)). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Micro Pac. Dev., Inc. v. NLRB*, 178 F.3d 1325, 1329 (D.C. Cir. 1999) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Congress has “entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Accordingly, judicial review of a Board decision and order is “especially . . . [limited] in regard to representative elections.” *NCR Corp. v. NLRB*, 840 F.3d 838, 841 (D.C. Cir. 2016) (citing *A.J. Tower Co.*, 329 U.S. at 330). This Court will overturn a Board election “only in the rarest of circumstances,” and will enforce a Board order overruling an employer’s election objections unless the Board abused its discretion and the abuse of discretion was prejudicial. *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017) (quoting *N. of Market Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1167 (D.C. Cir. 2000)). 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).⁶

⁶ XPO incorrectly asserts (Br. 31-40) that the Board’s disposition of election objections in the underlying representation proceeding is reviewed under the substantial-evidence standard.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT XPO VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO 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).⁷ Here, XPO admittedly has refused to bargain with the Union. (JA 1.) In its defense, XPO contends that the Board erred by overruling XPO’s election objections 1, 2, and 4 without holding an evidentiary hearing.⁸ But the Board acted well within its discretion in overruling those objections. Hence, substantial evidence supports the Board’s Order finding that XPO violated Section 8(a)(5) and (1) of the Act. *See, e.g., NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012).

⁷ An employer that violates Section 8(a)(5) derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

⁸ While XPO only expressly asks the Court to review the Board’s disposition of objections 1, 2, and 4 (Br. 31-40), the arguments at the end of its brief (Br. 40-44) suggest that XPO also challenges at least part of the Board’s ruling on objection 5.

A. To Justify an Evidentiary Hearing, an Employer Must Offer Facts in Support of Its Objections That, If Credited, Would Warrant Overturning the Election

The objecting party to a Board-conducted election bears a “heavy burden” of proving prejudice to the fairness of the election. *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970). To meet that burden, an objecting party is not entitled to an evidentiary hearing as a matter of right. *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016) (citing *Amalgamated Clothing Workers of Am.*, 424 F.2d at 828). The Board will hold a hearing on objections only if the accompanying offer of proof, if credited, would justify setting aside the election under the Board’s substantive criteria. *Amalgamated Clothing Workers of Am.*, 424 F.2d at 829 (citing *NLRB v. Air Control Prods., Inc.*, 335 F.2d 245, 249 (5th Cir. 1964)); *see also* 29 C.F.R. § 102.69(c)(1)(i) (Regional Director may dispose of objections without hearing if “the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing”).

To show that a hearing is required, the offer of proof must include “specific evidence of specific events from or about specific people.” *Amalgamated Clothing Workers of Am.*, 424 F.2d at 828 (quoting *United States Rubber Co. v. NLRB*, 373 F.2d 602, 606 (5th Cir. 1967)); *accord* *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000). That standard cannot be satisfied by “nebulous

and declaratory assertions.” *Amalgamated Clothing Workers*, 424 F.2d at 828 (quoting *United States Rubber Co.*, 373 F.2d at 606); accord *Sitka Sound Seafoods*, 206 F.3d at 1182. It is, moreover, solely the objecting party’s responsibility to meet that burden, for “it is not up to the Board staff to seek out evidence that would warrant setting aside the election.” *Amalgamated Clothing Workers of Am.*, 424 F.2d at 828 (quoting *United States Rubber Co.*, 373 F.2d at 606); accord *Durham Sch. Servs., LP*, 821 F.3d at 61 (objecting party “must rely on its proffered evidence to support a request for an evidentiary hearing”); see also *Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4 (9th Cir. 1978) (objecting party may not use a hearing as a “fishing expedition” to discover election improprieties).

The purpose of requiring an initial showing before holding an evidentiary hearing is “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 of Am.*, 424 F.2d at 828 (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 32 (5th Cir. 1969)). That goal would be “defeated if the Board were obliged to conduct an evidentiary hearing into intimidation every time . . . a worker spoke vociferously in favor of a union to co-workers,” *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000), or every time an objecting party wants “simply to ‘inquire further’ into possible election improprieties,” *Vari-*

Tronics Co., Inc. v. NLRB, 589 F.2d 991, 993 (9th Cir.1979). In the absence of a proffer that, if credited, would establish objectionable conduct, there is, as this Court has explained, “nothing to hear.” *Amalgamated Clothing Workers of Am.*, 424 F.2d at 829 (quoting *NLRB v. Air Control Prods., Inc.*, 335 F.2d at 249).

B. Because XPO Proffered No Facts Suggesting Union Agency, Its Objections Must Be Analyzed under the Third-Party Standard

The Board applies different standards to analyze election misconduct depending upon whether the misconduct was committed by a party to the election (the employer or the union) or by third parties (employees). *See, e.g., Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 264-65 (D.C. Cir. 1998). In order to determine which standard applies, the Board may need to determine whether the actor was an agent of a party to the election. Here, despite its repeated use of the phrase “Union agents” in its objections, XPO offered no proof to the Regional Director substantiating its allegations that the Union or its agents were responsible for any alleged misconduct. Hence, the Board necessarily analyzed XPO’s objections and proffer under the third-party standard to determine whether they would justify overturning the election or holding an evidentiary hearing.

As this court recognizes, agency status is determined by common-law principles and exists “when a person has either actual authority or apparent authority to act on behalf of a union.” *Downtown Bid Servs. Corp.*, 682 F.3d at

113. “For there to be apparent authority . . . the third party must not only believe that the individual acts on behalf of the principal but, in addition,” the principal must make manifestations that “‘reasonably interpreted, cause[] the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.’” *Overnite Transp. Co.*, 140 F.3d at 266 (quoting Restatement (Second) of Agency § 27 & cmt. a (1958)); *accord Downtown Bid Servs. Corp.*, 682 F.3d at 113-14. Both actual and apparent authority “must be established with regard to the specific conduct that is alleged to be unlawful.” *Id.* at 113 (quoting *Cornell Forge Co.*, 339 NLRB 733, 733 (2003)). Furthermore, “[t]he burden of proving an agency relationship is on the party asserting its existence.” *Cornell Forge Co.*, 339 NLRB at 733 (citing *Millard Processing Services*, 304 NLRB 770, 771 (1991)).

As the Board found (JA 47 & n.1; JA 21, 24-25), XPO’s offer of proof raises no substantial and material issue of fact as to whether union agents were responsible for pre-election misconduct.⁹ Rather than substantiating its bare

⁹ Focusing on the Regional Director’s use of the verb “show,” XPO argues (Br. 23-26) that the Regional Director required XPO not only to present a substantial issue of fact regarding, but to *prove*, the agency status of Union supporters. To the contrary, the Regional Director accepted XPO’s proffered facts as true throughout his analysis of XPO’s objections, and the Board explicitly applied the well-established, applicable standard, set forth above (pp.11-13), in denying review. (JA 47 n.1 (citing 29 C.F.R. § 102.69(c)(1)(i) and cases describing standard).) The Board inadvertently referred to 29 C.F.R. § 102.69(c)(1)(i) as 29 C.F.R. § 102.67(c)(1)(i).

allegations that some or all of the conduct described in the objections is attributable to union agents, XPO's offer of proof merely repeats those allegations.

Specifically, objection 1 states generally that "the Union, and/or its agents or supporters" threatened and coerced employees to influence their votes. (JA 9.) The corresponding offer of proof states, without further detail, that seven named employees will testify "that they were repeatedly harassed, intimidated and accosted by vocal Union supporters and Union agents at the entrance of XPO's facility." (JA 14.) Similarly, objection 2 states that "a vocal pro-Union employee and Union agent" threatened and coerced employees at work to influence their votes. (JA 10.) And the corresponding offer proof states that employee "Steve Ayala will testify that he and other employees were intimidated and/or harassed by a Union supporter, Juan Galicia-Guerra," who initiated confrontations with employees, created a hostile work environment, and told Ayala to "go fuck [him]self." (JA 15.) Finally, objection 4 states that "pro-Union employees and Union agents" threatened and intimidated an employee who discarded union literature. (JA 10.) And the offer of proof states that employee "Paul Biever will testify that . . . Union supporters and Union agents Ryan Janota and Jose Ramirez verbally accosted, intimidated and threatened him with respect to his discarding of Union literature." (JA 16.) Biever's own statement describing the incident, which is attached to the offer of proof, refers only to "Kenny" and "Cliff," and does not

mention either man's union affiliation. (JA 20.) No part of XPO's proffer includes facts indicating either agency status or acts by the Union that could have conferred apparent agency or otherwise substantiates its characterization of various individuals—named or not—as union agents.¹⁰

In other words, contrary to XPO's arguments, the offer of proof utterly fails to "show that there is substance to its allegations and not mere rhetoric." (Br. 32 (quoting *NLRB v. J-Wood*, 720 F.2d 309, 315 (3d Cir. 1983)).) Accordingly, the Board's failure to hold a hearing to determine agency status based on that proffer was well within its discretion and consistent with precedent. *See, e.g., NLRB v. ARA Servs., Inc.*, 717 F.2d 57, 67 (3d Cir. 1983) (no abuse of discretion by not holding evidentiary hearing over agency status of union supporters where only evidence proffered in support of agency was an employee statement asserting that they were "pro-union spokesmen" and assertion that "several of the pro union" employees made promises of gifts). The cases XPO cites (Br. 25-27) to support its contention that it proffered sufficient evidence regarding agency to trigger a

¹⁰ XPO incorrectly claims (Br. 24, 27) that the Regional Director did not consider whether Union supporters might have acted with the Union's *apparent* authority. The Regional Director's analysis encompassed apparent authority, as evidenced by his finding that XPO proffered no proof that misconduct "is attributable to," or "can be attributed to," the Union. (JA 23.) As demonstrated (pp.14-16), nothing in XPO's proffer supports its assertion that "employees *reasonably believed* the individuals identified in the Objections were *agents of the Union*" (Br. 28), let alone that such beliefs stemmed from manifestations made by the Union.

hearing serve instead to bolster the Board's decision. In each one, a court remanded for a hearing where the objecting party had, unlike XPO, proffered some facts indicating agency (or apparent authority). *See, e.g., AOTOP, LLC v. NLRB*, 331 F.3d 100, 102, 104 (D.C. Cir. 2003) (employer entitled to a hearing on agency status of union supporter based on proffered evidence that she was "one of the most active employees in support of the Union's election campaign efforts," and "an observer for the Union on the day of the election").

Notably, in *J-Wood*, a case XPO discusses at length (Br. 26-27), the court treated two allegations of union-agent status differently based on whether or not there was a foundational factual proffer. In that case, the court held that the employer was entitled to a hearing to determine the agency status of one employee who had allegedly threatened coworkers with job loss. 720 F.2d at 313-14. The employer had proffered an article from a union publication claiming that the alleged agent was "responsible for the Union's election success" and was "a member of the 'plant committee.'" *Id.* at 311, 314. However, regarding two other employees who had made similar threats, the court in found that "the Regional Director acted within his discretion in declining to conduct an evidentiary hearing to determine whether [they] were agents of the Union," because the employer had "proffered no evidence to the Regional Director to support its contention that the[ir] acts . . . were attributable to the Union." *Id.* at 313. Like the Board, the

court rejected as insufficient the employer's proffer regarding those two employees, which "merely indicated a willingness to offer proof at the time of an evidentiary hearing that these individuals were 'known throughout the plant as union agents.'" *Id.*¹¹ Like the proffer that was insufficient to justify a hearing in *J-Wood*, XPO's offer of proof neither recounted specific statements made by Union supporters, nor provided any other evidence of Union agency beyond a promise of testimony that they were considered agents. (JA 14.)

To make up for the lack of evidence in its proffer, XPO asserts a number of additional facts in its brief, purporting to show that the individuals who committed the alleged misconduct described in the objections were Union agents. Those new factual assertions include a claim that a union election observer and an unnamed, non-employee union official confronted employee Paul Biever (Br. 11-12, 29), and that three pro-union employees (Galicia-Guerra, Janota, and Ramirez) were

¹¹ Although XPO cites *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976), for the proposition that employees' belief that individuals are agents of a union establishes apparent authority (Br. 28), the standard for apparent authority is an objective one based on representations by the union. Moreover, the case does not support XPO's argument that a factual proffer is unnecessary to establish agency: there, the court found that employees were union agents where there was evidence that they were members of an in-house organizing committee and that, "in the eyes of other employees[, they] were the representatives of the union on the scene and the union authorized them to occupy that position." *Id.* at 1244.

members of an in-house organizing committee, (Br. 23).¹² XPO also now provides five web links purporting to show that the Union held out Janota and Ramirez as spokespersons and leaders of its organizational drive. (Br. 29-30.) *None* of those additional facts were included in XPO's offer of proof—even though XPO cites to its proffer to support them—and hence they were not before the Regional Director when he decided to not hold an evidentiary hearing.¹³ Therefore, his failure to consider them in determining whether XPO had raised a substantial and material issue of fact regarding agency status cannot demonstrate an abuse of discretion.

In sum, because nothing in XPO's proffer suggested agency status, the Board did not abuse its discretion in declining to hold an evidentiary hearing on that question and reasonably analyzed each of XPO's objections using the standard applicable to alleged third-party misconduct.

¹² Paradoxically, XPO later argues that a hearing would be necessary to establish whether there is an in-house organizing committee. (Br. 29.)

¹³ The Court cannot review a Board decision based on materials that were not before the Board. The record before the Court on review of a Board order consists only of the order itself, “any findings or report on which it is based,” and “the pleadings, evidence, and other parts of the proceedings before the [Board].” Fed. R. App. P. 16(a). “There is,” as the Advisory Committee noted upon adoption of Rule 16(a) in 1967, “no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same.” Advisory Committee Notes to Fed. R. App. P. 16(a).

C. Because XPO Did Not Offer Proof Showing That There Was a General Atmosphere of Fear Sufficient to Impair Employee Free Choice, The Board Did Not Abuse Its Discretion in Overruling XPO's Objections without an Evidentiary Hearing

The Board will only set aside an election based on third-party misconduct if “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); accord *Overnite Transp. Co.*, 140 F.3d at 265; *Tampa Crown Distributors, Inc.*, 118 NLRB 1420, 1421 (1957). When determining whether a threat made by a third party is objectionable, the Board considers the following factors: “[1] the nature of the threat itself . . . [2] whether the threat encompassed the entire bargaining unit; [3] whether reports of the threat were disseminated widely within the unit; [4] whether the person making the threat was capable of carrying it out; . . . [5] whether it is likely that the employees acted in fear of his capability of carrying it out; and [6] whether the threat was ‘rejuvenated’ at or near the time of the election.” *Westwood Horizons Hotel*, 270 NLRB at 803. Moreover, “[t]he test for whether objectionable conduct occurred is an objective one . . . and the subjective reactions of employees are irrelevant to that issue.” *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231, 1231 n.2 (1999); see also *AOTOP, LLC*, 331 F.3d at 104 (“Subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.”) (quoting *Kmart Corp.*, 322 NLRB 1014, 1015 (1997)).

XPO raised several objections to the election alleging pre-election misconduct. But, as demonstrated below, it failed to proffer facts that, if credited, would warrant overturning the election. And while XPO argues that the Board failed to analyze its proffered evidence cumulatively, or take into account the closeness of the election, in fact the Board did consider those issues to the degree necessary. Accordingly, a hearing was unjustified, and the Board acted well within its discretion in overruling XPO's objections.

1. XPO's proffered facts in support of objection 1, if credited, would not warrant overturning the election

Objection 1 states that employees were "threatened and/or coerced . . . with the intention of making employees vote in favor of Union representation," or to support the Union. (JA 9.) In support of that objection, XPO's offer of proof states, without further detail, that seven named employees will testify "that they were repeatedly harassed, intimidated and accosted . . . at the entrance of XPO's facility," and that "[t]his behavior was routine and threatened and intimidated employees throughout the proposed unit."¹⁴ (JA 14.)

¹⁴ XPO does not ask the Court to review the Regional Director's analysis of the second allegation made in Objection 1, that "in an attempt to threaten and coerce their vote, the Union visited their homes without invitation," and that "[t]hese visits were perceived to be threatening." (JA 22-23; JA 14.) Accordingly, XPO has waived any further challenge to the Union's certification based on that allegation. *See Sitka Sound Seafoods, Inc.*, 206 F.3d at 1181 (holding that arguments raised in opening brief merely by reference are waived and cannot be argued in reply brief); *Parsippany Hotel Mgmt Co. v. NLRB*, 99 F.3d 413, 418

The Board acted well within its discretion in overruling objection 1 for, as the Board and Regional Director noted (JA 47 n.1; JA 22), the offer of proof fails to identify the individuals who allegedly engaged in misconduct, or to state what they allegedly said or did. It does not describe the subject matter or language of even one alleged threat or coercive statement, or the nature of any non-verbal act of harassment or intimidation, much less provide details that, if credited, would support a finding of misconduct aggravated enough to impair employee free choice and warrant overturning an election. As noted (pp.11-13), conclusory allegations like XPO's do not satisfy an objecting party's burden to proffer evidence sufficient to trigger an evidentiary hearing.

XPO's principal argument regarding this objection is that a hearing is warranted because the offer of proof identifies specific witnesses purportedly willing to substantiate its vague allegations of coercion. But the cases it cites (Br. 32-33) do not support the proposition that merely identifying witnesses suffices to trigger a hearing; in each one, the objecting party provided details suggesting objectionable conduct. In *Transcare New York, Inc.*, 355 NLRB 326 (2010), for example, the objecting union identified witnesses in support of its objection alleging coercive surveillance "who directly observed . . . senior

(D.C. Cir. 1996) ("[E]ven had [the employer] raised the . . . issue before the Board, it would nonetheless be barred from consideration by this court, as it did not raise the issue in its opening brief.").

managers stationing themselves outside of the polling areas . . . in view of the employees as they entered and exited” on election day, and “provided an email sent from its attorney to a Board Agent on . . . the first day of the manual balloting, complaining that supervisors were stationed outside of the polling area.” *Id.* at 327. Unlike XPO, therefore, the union in *Transcare* supported its objection not only with a list of witness, but also with a description of *specific* objectionable conduct, undertaken by formal party agents, to which the witnesses could attest—and a contemporaneous email corroborating the same. *See also J-Wood, supra* pp.17-18 (remanding for hearing on agency status of one employee based on his membership on union committee and statement in union publication highlighting employee’s role in union campaign).

Similarly, XPO’s use (Br. 33) of *Heartland of Martinsburg*, 313 NLRB 655 (1994), and *Holladay Corp.*, 266 NLRB 621 (1983), is unavailing. Those cases establish that an objecting party need not submit signed witness statements or affidavits in support of election objections, *Heartland of Martinsburg*, 313 NLRB at 655, and can rely on hearsay to state its prima facie case, especially if it can provide corroborating witnesses, *Holladay Corp.*, 266 NLRB at 621-22. However, they do not suggest that merely naming witnesses who can testify to unspecified “threats” or “coercion” is sufficient to trigger a hearing, much less overturn an election. In *Heartland*, the offer of proof provided a “13-page evidentiary

statement and three attached documents . . . provid[ing] specific descriptions of allegedly objectionable activity.” 313 NLRB at 655. In *Holladay*, the proffer described “with specificity the objectionable statements attributed to the [union]’s representative and the date they occurred.” 266 NLRB at 622. Here, the Regional Director did not demand signed witness statements, affidavits, or any other particular form of proffer; rather, he observed that XPO’s offer of proof did not provide sufficiently specific descriptions of alleged misconduct that the proffered facts, if credited, would warrant overturning the election.

XPO also does not advance its argument by dwelling (Br. 32-34) on the Board’s observation that the offer of proof did not “identify” (JA 22) the actors referenced in objection 1. The Board never suggested, as XPO contends, that the lack of a specific, named actor in XPO’s proffer is “dispositive.” (Br. 32.) And, as XPO concedes (Br. 33), the failure to provide not just names for, but any details regarding, the actors in objection 1 was relevant to the Board’s decision to apply the non-party standard in analyzing the objection.¹⁵ In any event, unlike here, the

¹⁵ Contrary to XPO’s claim (Br. 34), the Regional Director’s observation that XPO did not identify the individuals who engaged in misconduct should not be interpreted as requiring that XPO name them or provide information it could not uncover without a hearing. As discussed above (pp.24-25), XPO did not identify the individuals *in any way*—*e.g.*, by name, formal union position, or prominent role in union campaign—and the failure to identify actors may decrease the weight of allegedly objectionable conduct in the Board’s assessment of free choice in an election. *See Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984) (less weight given to misconduct attributed to

cases XPO cites (Br. 33-34) to argue that anonymous conduct may serve to overturn an election involved documented acts of violence, threats of violence, vandalism, and picket line misconduct, and hence do not support its argument. *See, e.g., Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 596-97 (2004); *Shepherd Tissue, Inc.*, 327 NLRB 98, 107 (1998).

In sum, the Board did not abuse its discretion in overruling objection 1 without a hearing because XPO's did not meet its burden to proffer evidence of specific events that, if credited, would warrant overturning the election.

2. XPO's proffered facts in support of objection 2, if credited, would not warrant overturning the election

Objection 2 states that employees were "threatened, intimidated and/or coerced . . . during work hours with the intention of making employees vote in favor of Union representation," or to support the Union. (JA 10.) In support of this objection, the offer proof states that employee "Steve Ayala will testify that he and other employees were intimidated and/or harassed by a Union supporter, Juan Galicia-Guerra," who intimidated voters by telling Ayala to "go fuck [him]self", getting into arguments with other employees relating to job duties, and otherwise creating a threatening and coercive work environment." (JA 15.)

anonymous actors than to known third parties, and even less to anonymous conduct that may not be related to union).

The Board acted well within its discretion in overruling this objection without a hearing. Again, XPO's offer of proof did little more than repeat the objection's conclusory allegations, and the Regional Director found the proffered evidence "insufficient to establish that the statements rise to the level of a threat," let alone an aggravated threat. (JA 23.) While Galicia-Guerra's comment to Ayala might communicate frustration or anger, it was not, on its face, a threat—it neither warns, explicitly or implicitly, of any adverse consequences, nor gives any ultimatum. Because Galicia-Guerra never made a threat, some of the specific *Westwood* factors used to determine whether a threat is aggravated are inapplicable. *See Westwood Horizons Hotel*, 270 NLRB at 803 (relevant factors for assessing objectionability include "whether the person making the threat was capable of carrying it out" and whether fear of that capability motivated employees); *accord Downtown Bid Servs.*, 682 F.3d at 116 (inability to carry out threat diminishes coerciveness of the alleged threat). And because "[a] certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election," Galicia-Guerra's resort to an insult is not, without more, a basis for overturning an election. *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984) (finding that comments by union supporters to pro-company employee that he "betrayed" them and his "name is being mentioned by everyone on the street" did not warrant evidentiary hearing); *accord Mastec N. Am., Inc.*, 356

NLRB 809, 813 (2011) (overruling objection to election despite employees' use of profanity and insulting statements against pro-employer employee).

XPO did not offer any facts showing that Galicia-Guerra's statement or his other alleged conduct was sufficiently aggravated to overturn an election. As the Regional Director noted (JA 23), the offer of proof failed to describe the context of the conversation in which the one specifically alleged statement was made to Ayala, and contained no examples of any other comments Galicia-Guerra made to Ayala or other employees. No proffered fact connects the quoted statement or any other conduct to the Union or the election (pp.15, 25), much less supports XPO's characterization (Br. 36) of Galicia-Guerra's actions as intended to influence employee votes. Nor did the proffer provide details of "arguments" he purportedly engaged in, describe other acts substantiating allegations of harassment and intimidation, quantify the number of employees exposed to his alleged misconduct, or show that Galicia-Guerra made similar statements close to the time of the election. *See Lamar Co., LLC*, 340 NLRB 979, 981 (2003) (lack of evidence that threat was disseminated to other employees or rejuvenated around the election diminishes its coerciveness under *Westwood*); *accord NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 796 (7th Cir. 1991); *Duralam, Inc.*, 284 NLRB 1419, 1419 (1987).

Given the conclusory offer of proof for objection 2, the Board reasonably found that the conduct attributed to Galicia-Guerra was not “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible,” and hence would not warrant setting aside the election or a hearing. (JA 47 n.1; JA 23 (quoting *Tampa Crown Distributors, Inc.*, 118 NLRB at 1421).)

3. XPO’s proffered facts in support of objection 4, if credited, would not warrant overturning the election

Objection 4 states that an employee was “threatened, intimidated, and/or coerced . . . in the exercise of his Section 7 rights with respect to the discarding of union flyers and materials.” (JA 10.) In support of this objection, the offer of proof states that employee “Paul Biever will testify that . . . Union supporters and Union agents Ryan Janota and Jose Ramirez verbally accosted, intimidated and threatened him with respect to his discarding of Union literature,” and that, when he objected, he was “intimidated, accosted and threatened by the Union supporters with respect to his perceived support for the Employer.” The offer of proof also states that Biever “shared the contents of this threatening altercation with employees prior to the vote and that employees were aware of the incident.” (JA 16.) Like the rest of XPO’s offer of proof, this proffer offers few factual details. While it does link the incident it describes to “Union literature,” it does not substantiate XPO’s conclusory characterizations of the encounter as coercive.

XPO attached to its offer of proof Biever's own statement describing the incident. In the statement, Biever wrote that while he was in the break room, he "put a paper that was on the table in the trash can." When he did, a person named "Kenny," whom Biever considered a "good friend[]," "got in [Biever's] face" and told him that he could not discard the paper, a claim someone named "Cliff" repeated. Kenny then twice asked Biever what he "was going to do about it," and Biever replied "nothing." Biever wrote that he felt "harassed" and "upset," and stated that he hoped that he and Kenny could still be friends. (JA 20.) Biever's statement does not mention Janota or Ramirez or the Union, or identify the contents of the paper in question. Nor does it describe how Biever characterized this disagreement with his friend to coworkers, or how many employees he spoke to about the incident. (JA 20.)

The Board acted within its discretion in overruling this objection without a hearing. As the Board found (JA 47 n.1; JA 24), the statements described by XPO were insufficient to create an atmosphere of fear impeding employee free choice in the election. As the Regional Director further explained, the statements in the break room did not constitute a threat, let alone an aggravated threat sufficient to warrant overturning the election. (JA 24.) Considering the *Westwood* factors (p.20) helps explain why.

Like Galicia-Guerra in objection 2, the individuals who spoke to Biever in the break room did not specify a threat of adverse consequences, much less one that they had the capacity to effectuate. Regarding the nature of the alleged threat or incident, neither Janota nor Ramirez made any statement expressing their intention to inflict harm, physical or otherwise, on Biever for discarding the paper, nor did they make physical contact with him. *See, e.g., Duralam, Inc.*, 284 NLRB at 1420 (hostile but vague comments “we will take care of you” or “we will remember you,” without reference to violence not a threat under *Westwood* without additional circumstances showing why a reasonable person would understand comments as a threat); *Cal-W. Periodicals, Inc.*, 330 NLRB 599, 599 (2000) (comment to employee that he should “wait and see” if he did not vote for the union, without incidents of violence or other threats, not a threat under *Westwood*); *see also Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003) (lack of actual physical violence weighed in favor of finding comments about damaging an employee’s car “overzealous partisanship rather than meaningful threats”) (citing *American Wholesalers, Inc.*, 218 NLRB 292 (1975), *enforced*, 546 F.2d 574 (4th Cir. 1976)). That is, there was no objective threat to consider, obviating the need to consider the fourth, fifth, and sixth *Westwood* factors (whether the person making the threat was capable of carrying it out, whether the threatened individual acted out of fear that the threat could be carried out, and whether the threat was rejuvenated close to

the election). There is also no dispute that the break-room encounter only involved Biever and did not encompass the entire bargaining unit. And while XPO claims that Biever told other employees about the incident (JA 16), it is unclear who he told or what he reported, for there was no objective threat to report.¹⁶

In its Brief, XPO embellishes its account of this incident with facts not contained in the offer of proof. For example, the proffer does not support XPO's assertions (Br. 37-38) that the two employees in the break room approached Biever at the same time, physically blocked his path, and threatened him with physical harm, or that one of them later surveilled Biever as he cast his vote. Most notably, XPO describes an entirely unsubstantiated second incident, not referenced in its offer of proof or Biever's statement, when it asserts that "Biever was confronted about his discarding of Union literature by a Union official standing at the exit gate to the facility." (Br. 38.) Because it was not included in the offer of proof, that

¹⁶ XPO argues also that because objection 4 alleges conduct that "could be" a violation of the Act, the same conduct is necessarily "threatening and aggravated" election misconduct. (Br. 39.) Neither XPO nor Biever filed unfair-labor-practice charges over this incident, and hence the Board was not asked to determine whether there was an independent violation of the Act. XPO cites no case law supporting the claim that all unfair labor practices meet the third-party election-misconduct standard, let alone that all conduct that *could be* an unfair labor practice meets this standard. Moreover, while it is unclear whether Biever was expressing his opposition to the Union, XPO cites no case supporting the proposition that employees have an absolute right to remove union literature placed in a break room for all employees to access. On the other hand, it is well settled that employees have a right to receive union literature. *See, e.g., Hanson Aggregates Cent., Inc.*, 337 NLRB 870, 876 (2002); *Romar Refuse Removal, Inc.*, 314 NLRB 658, 665 (1994).

purported encounter could not have figured into the Regional Director's decision to not hold a hearing. In any event, XPO's present vague account of the second incident—devoid of specific language or conduct—adds little to its description of the break-room exchange.

In sum, based on the offer of proof, the Board reasonably found that the incident alleged in objection 4 did not create, objectively, an atmosphere of fear and reprisal that would warrant overturning the election, despite Biever's subjective interpretation of what happened. *See Overnite Transportation Co.*, 328 NLRB at 1231 n.2 (test for objectionable conduct is objective, not subjective). Accordingly, the objection was overruled.

4. XPO's "cumulative evidence" and "closeness of the election" arguments disregard the Board's ruling on objection 5

The Board fully satisfied its obligation to ensure a free and fair representation election. XPO misreads the Regional Director's Report in asserting that he made "no cumulative analysis of whether the conduct alleged, on the whole, interfered with employee free choice" (Br. 44), and fails to show that the closeness of the Union's election victory warranted a hearing on unsubstantiated objections (Br. 40-42).

In its fifth objection, XPO alleged that the misconduct described in objections 1 through 4 "created a general atmosphere of fear and coercion" that

interfered with employees' free choice and, "either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election." (JA 10.) In support of that objection, XPO referred back to the proof offered for objections 1 through 4. (JA 17.) In overruling objection 5, therefore, the Regional Director necessarily considered the evidence proffered in support of the first four objections and found that, cumulatively, they "would not have destroyed the minimum laboratory conditions necessary for a free and fair election." (JA 25.)¹⁷ The minimal nature of the alleged misconduct did not call for a more detailed analysis. *See NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207, 214 (1st Cir. 2015) (given the "non-existent or minimal" impact of electioneering and name-calling, "the Board was not compelled to find that, cumulatively, they precluded the holding of a fair election"); *NLRB v. WFMT*, 997 F.2d 269, 279 (7th Cir. 1993) (cumulative impact argument requires "at the very least . . . conduct that is legally actionable in its component parts . . .").

Indeed, XPO represented to the Board, in its request for review, that the Regional Director "review[ed] the conduct identified in Objections 1 through 4

¹⁷ XPO has provided no reason for this court to question the presumption of regularity afforded to administrative agencies. *See, e.g., Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770 (D.C. Cir. 2012) ("We presume 'that agency officials and those who assist them have acted properly.'") (quoting *United Steelworkers v. Marshall*, 647 F.2d 1189, 1217 (D.C. Cir. 1980)); *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 460 (1967) ("A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues.").

cumulatively.” (JA 43.) And in denying review, the Board explicitly affirmed, after briefly discussing objections 1, 2, and 4—and without limiting its finding to any one objection—that “the alleged misconduct by Union supporters, if proven, is insufficient to create an atmosphere of fear and reprisal warranting setting aside the election.” (JA 47 n.1.) XPO’s contention that the Board did not properly consider the cumulative effect of all alleged misconduct on laboratory conditions is therefore unfounded.

Regarding the closeness of the election, it is well settled that “[a]lthough the Board will pay particular attention to the fairness of close elections[,] . . . the *Westwood Horizons* standard applies even where the election margin is narrow.” *Accubuilt, Inc.*, 340 NLRB at 1337. That is, the Board must first determine “whether a general atmosphere of fear and reprisal existed,” even if it also considers the margin of victory as a non-dispositive factor. *Id.*

Here, the Regional Director specifically noted that the Union won by a five-vote margin (JA 21), but had no occasion to discuss the weight of that factor at length. Because he found that the alleged misconduct, considered singly or cumulatively, did not create a general atmosphere of fear likely to impair employee free choice—and that the few specific, proffered statements were not threats, much less aggravated threats—the Regional Director had no reason to consider precisely

how the closeness of the election should be factored against other considerations such as the severity or scope of the alleged misconduct.

In sum, neither a cumulative analysis or a close electoral margin can, as XPO suggests, substitute for a proffer devoid of factual detail substantiating allegations of objectionable misconduct. *See LifeSource v. NLRB*, No. 15-1178, 2016 WL 6803740, at *2 (D.C. Cir. Oct. 21, 2016) (“[C]loser scrutiny because of the three flaws’ [in the election procedure] cumulative effect and the election’s close result does not transform . . . hypothetical harms into specific evidence.”).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny XPO's petition for review and enforce the Board's Order in full.

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February 2018

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

XPO LOGISTICS FREIGHT, INC.,)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-1177, 17-1192
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,)	13-CA-196637
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 8,505 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 8th day of February, 2018

ADDENDUM

STATUTES AND REGULATIONS

Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2012):

Sec. 7. [§ 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 158(a)(3) of this title].

Sec. 8. [§ 158] (a) 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 [section 157 of this title];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9. [§ 159] (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 subsection (a), 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 subsection (a); 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 subsection (a);

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.

(d) Whenever an order of the Board made pursuant to 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 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.

Sec. 10. [§ 160](a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(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 proceedings, as provided in section 2112 of title 28. 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 questions 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.

**Relevant provisions of the Rules and Regulations of the National Labor
Relations Board
29 C.F.R. §§ 101-103 (July 1, 2017)**

29 C.F.R. § 102.69(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.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the 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:

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Dated at Washington, DC
 this 8th day of February, 2018