

Nos. 19-1097, 19-1125

**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**

ELIZABETH HEANEY

Supervisory Attorney

MICHAEL R. HICKSON

Attorney

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2943

(202) 273-2985

PETER B. ROBB

General Counsel

ALICE B. STOCK

Associate General Counsel

DAVID HABENSTREIT

Acting Deputy Associate General Counsel

National Labor Relations Board

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

XPO LOGISTICS FREIGHT, INC.)	
Petitioner/Cross-Respondent)	Nos. 19-1097, 19-1125
)	
v.)	Board Case No.
)	21-CA-227312
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, Amici

XPO Logistics Freight, Inc. (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. International Brotherhood of Teamsters, Local 63 (“the Union”) was the charging party before the Board. The Company, the Board’s General Counsel, and the Union appeared before the Board in case number 21-CA-227312. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Company's petition to review and the Board's cross-application to enforce an Order the Board issued on April 23, 2019, reported at 367 NLRB No. 120. In challenging the ruling under review, the Company is contesting the Board's certification of the Union as the representative of a unit of employees in case number 21-RC-136546, as set forth in the Board's August 27, 2018 Decision, Order, and Certification of Representative (reported at 366 NLRB No. 183).

C. Related Cases

The ruling under review has not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court. *Con-Way Freight, Inc. v. NLRB*, case numbers 18-1247 and 18-1267, currently pending before this Court, involves different issues that arise out of the Board's August 27, 2018 Decision, Order, and Certification of Representative.

/s/ David Habenstreit

David Habenstreit

Acting Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street SE

Washington DC 20570

(202) 273-2960

Dated at Washington, DC
this 19th day of December, 2019

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Relevant statutory provisions.....	3
Statement of the issue	3
Statement of the case.....	3
I. The representation proceeding.....	4
A. The Board’s findings of fact.....	4
1. The Company’s operations; the Union’s organizing campaign.....	4
2. Labor consultant Camarena and drivers Placencia and Cabrera discuss Camarena joining them on a ride-along	4
3. Labor consultant Camarena and supervisor Roman claim that Placencia threatened Camarena with his knife, leading to Placencia’s arrest and discharge, and to the incident being widely discussed among the drivers	7
4. Anonymous messages on a pro-union website criticize drivers Robles and Fuentes and vow to publish the names of employees who spread lies about the Union	9
5. Driver Robles receives anonymous silent telephone calls on his personal cell phone.....	11
B. Procedural history	11
II. The unfair-labor-practice proceeding	14
III. The Board’s conclusions and order	14
Summary of argument.....	15
Argument.....	18
The Board acted within its broad discretion in overruling the Company’s election objections and, therefore, properly found that the Company unlawfully refused to bargain with the Union	18

TABLE OF CONTENTS

Headings	Page(s)
A. The Board has broad discretion in conducting representation proceedings, and the party seeking to overturn a Board-approved election bears a heavy burden	18
B. The Board did not abuse its discretion in overruling the Company’s objections concerning Placencia’s purported threatening conduct because that conduct did not actually occur.....	22
1. Substantial evidence supports the Board’s finding that Placencia never threatened Camarena with a knife, rendering it unnecessary to determine whether Placencia was a union agent.....	23
2. The Company’s alternative argument based on the false rumors concerning the purported threat is not properly before the Court and, in any event, meritless	32
C. The Board did not abuse its discretion in overruling the Company’s objections concerning the anonymous online messages and anonymous silent phone calls.....	37
1. The anonymous website posts did not render a free election impossible.....	38
2. The anonymous silent phone calls did not render a free election impossible.....	44
D. The Company’s insubstantial objections come no closer to warranting a new election simply because the vote was close	46
Conclusion	48

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>800 River Rd. Operating Co., LLC v. NLRB</i> , 846 F.3d 378 (D.C. Cir. 2017).....	19, 22
* <i>Amalgamated Clothing & Textile Workers Union v. NLRB</i> , 736 F.2d 1559 (D.C. Cir. 1984).....	20, 21, 38, 41, 44, 47
<i>Amalgamated Clothing Workers of Am. v. NLRB</i> , 424 F.2d 818 (D.C. Cir. 1970).....	20
<i>Antelope Valley Bus Co. v. NLRB</i> , 275 F.3d 1089 (D.C. Cir. 2002).....	19
<i>AOTOP, LLC v. NLRB</i> , 331 F.3d 100 (D.C. Cir. 2003).....	37
<i>APL Logistics, Inc.</i> , 341 NLRB 994 (2004), <i>enforced</i> , 142 F. App'x 869 (6th Cir. 2005).....	24
* <i>Beaird-Poulan Div.</i> , 247 NLRB 1365 (1980), <i>enforced</i> , 649 F.2d 589 (8th Cir. 1981).....	31, 34, 36, 39, 44
<i>Bloomington-Normal Seating Co. v. NLRB</i> , 357 F.3d 692 (7th Cir. 2004).....	26
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Bridgeport Fittings, Inc. v. NLRB</i> , 877 F.2d 180 (2d Cir. 1989).....	39
<i>Browning-Ferris Indus. of California, Inc. v. NLRB</i> , 911 F.3d 1195 (D.C. Cir. 2018).....	43, 44
<i>Canadian Am. Oil Co. v. NLRB</i> , 82 F.3d 469 (D.C. Cir. 1996).....	19, 21
<i>Coca-Cola Bottling Co.</i> , 273 NLRB 444 (1984).....	44

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

TABLE OF AUTHORITIES

<i>Colquest Energy, Inc. v. NLRB</i> , 965 F.2d 116 (6th Cir. 1992)	42
<i>Cornell Forge Co.</i> , 339 NLRB 733 (2003)	43
<i>Deffenbaugh Indus., Inc. v. NLRB</i> , 122 F.3d 582 (8th Cir. 1997)	19
* <i>E.N. Bisso & Son, Inc. v. NLRB</i> , 84 F.3d 1443 (D.C. Cir. 1996)	19, 22, 24, 25, 31
<i>Elizabethtown Gas Co. v. NLRB</i> , 212 F.3d 257 (4th Cir. 2000)	46
* <i>Equinox Holdings, Inc. v. NLRB</i> , 883 F.3d 935 (D.C. Cir. 2018)	19, 20, 21, 24, 31, 44
<i>Exxon Chem. Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004)	18
<i>Flexsteel Indus.</i> , 316 NLRB 745 (1995) <i>enforced</i> , 83 F.3d 419 (5th Cir. 1996) (table)	26
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999)	3
<i>General Shoe Corp.</i> , 77 NLRB 124 (1948)	21
<i>Health Care & Ret. Corp. of Am. v. NLRB</i> , 255 F.3d 276 (6th Cir. 2000)	28
<i>King Soopers, Inc. v. NLRB</i> , 859 F.3d 23 (D.C. Cir. 2017)	27
<i>Lamar Co., LLC</i> , 340 NLRB 979 (2003)	47
<i>ManorCare of Kingston PA, LLC v. NLRB</i> , 823 F.3d 81 (D.C. Cir. 2016)	35, 36

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

TABLE OF AUTHORITIES

<i>Millard Processing Servs., Inc. v. NLRB</i> , 2 F.3d 258 (8th Cir. 1993), enforcing 304 NLRB 770 (1991)	41, 42
<i>New York Rehab. Care Mgmt., LLC v. NLRB</i> , 506 F.3d 1070 (D.C. Cir. 2007)	12, 30
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946)	18, 19
* <i>NLRB v. Downtown Bid Servs. Corp.</i> , 682 F.3d 109 (D.C. Cir. 2012)	20, 22, 35, 38, 39
<i>NLRB v. Mattison Mach. Works</i> , 365 U.S. 123 (1961)	19
<i>NLRB v. Q-1 Motor Exp., Inc.</i> , 25 F.3d 473 (7th Cir. 1994)	27
<i>NLRB v. Schwartz Bros.</i> , 475 F.2d 926 (D.C. Cir. 1973)	19
<i>NLRB v. Walton Mfg. Co.</i> , 369 U.S. 404 (1962)	25
<i>Nova Se. Univ. v. NLRB</i> , 807 F.3d 308 (D.C. Cir. 2015)	32
<i>Overnite Transp. Co. v. NLRB</i> , 140 F.3d 259 (D.C. Cir. 1998)	20, 35, 44
<i>Pallet Cos. v. NLRB</i> , 634 F. App'x 800 (D.C. Cir. 2015)	24
<i>Pierce Corp.</i> , 288 NLRB 97 (1988)	43
<i>Prime Healthcare Servs.-Encino LLC v. NLRB</i> , 890 F.3d 286 (D.C. Cir. 2018)	12
<i>Prop. Res. Corp. v. NLRB</i> , 863 F.2d 964 (D.C. Cir. 1988)	28

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

TABLE OF AUTHORITIES

* <i>PruittHealth-Virginia Park, LLC v. NLRB</i> , 888 F.3d 1285 (D.C. Cir. 2018)	22, 25, 37, 46, 47
<i>Q. B. Rebuilders</i> , 312 NLRB 1141 (1993)	36, 37
<i>Reed Seismic Co.</i> , 182 NLRB 158 (1970), <i>enforced</i> , 440 F.2d 598 (5th Cir. 1971)	36
<i>Serv. Corp. Int’l v. NLRB</i> , 495 F.3d 681 (D.C. Cir. 2007)	21
<i>Service Employees Local 87 (West Bay Maintenance)</i> , 291 NLRB 82 (1988)	43
<i>SFO Good-Nite Inn, LLC v. NLRB</i> , 700 F.3d 1 (D.C. Cir. 2012)	27
<i>Sioux Prod., Inc. v. NLRB</i> , 684 F.2d 1251 (7th Cir. 1982)	25
<i>Sitka Sound Seafoods, Inc. v. NLRB</i> , 206 F.3d 1175 (D.C. Cir. 2000)	30
<i>Stanford Hosp. & Clinics v. NLRB</i> , 325 F.3d 334 (D.C. Cir. 2003)	27
<i>Tony Scott Trucking, Inc. v. NLRB</i> , 821 F.2d 312 (6th Cir. 1987)	19, 20, 24
<i>United Builders Supply Co.</i> , 287 NLRB 1364 (1988)	34
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	22
<i>Villanueva v. Brown</i> , 103 F.3d 1128 (3d Cir. 1997)	42, 43
<i>W & M Properties of Conn., Inc. v. NLRB</i> , 514 F.3d 1341 (D.C. Cir. 2008)	32

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

TABLE OF AUTHORITIES

Westwood Horizons Hotel,
270 NLRB 802 (1984)20

**Woelke & Romero Framing, Inc. v. NLRB*,
456 U.S. 645 (1982).....32

Statutes **Page(s)**

National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.)	
29 U.S.C. § 151	2
29 U.S.C. § 157	15
29 U.S.C. § 158(a)(1).....	14, 15, 18
29 U.S.C. § 158(a)(5).....	14, 15, 18
29 U.S.C. § 159(c)	3
29 U.S.C. § 159(d)	2
29 U.S.C. § 160(a)	2
29 U.S.C. § 160(e)	2, 22, 32, 33, 35
29 U.S.C. § 160(f).....	2

Rules **Page(s)**

Fed. R. App. P. 28(a)(8)(A)30

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

GLOSSARY

A.	Joint appendix
Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Company's opening brief
Company	XPO Logistics Freight, Inc.
Con-Way	Con-Way Freight, Inc.
ULX	Company's Los Angeles, California facility
Union	International Brotherhood of Teamsters, Local 63

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

Nos. 19-1097, 19-1125

XPO LOGISTICS FREIGHT, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of XPO Logistics Freight, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board to enforce, a Board Decision and Order (367 NLRB No. 120)

issued against the Company on April 23, 2019. (A. 7-10.)¹ In its Decision and Order, the Board found that the Company unlawfully refused to recognize and bargain with International Brotherhood of Teamsters, Local 63 (“the Union”) as the duly certified collective-bargaining representative of a unit of employees.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Company’s petition and the Board’s cross-application were timely; the Act imposes no time limits for such filings. The Court has jurisdiction over the Board’s final Order pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Because the Board’s Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 21–RC–136546) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)).² *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding. Rather, it authorizes review of the Board’s actions in that proceeding for the

¹ “A.” references are to the joint appendix. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

² The representation proceeding was captioned under the name of the Company’s predecessor, Con-Way Freight, Inc. (“Con-Way”). The Company purchased the business of, and became a successor to, Con-Way in late 2015. (A. 7 n.2.)

limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice Order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE

Whether the Board acted within its wide discretion in overruling the Company's election objections and certifying the Union, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

STATEMENT OF THE CASE

After the Union prevailed in a secret-ballot election, the Board certified it to represent a unit of the Company's drivers at its Los Angeles, California facility. Thereafter, the Company admittedly refused to bargain with the Union, claiming that the Board abused its discretion in finding that the Company failed to meet its burden of showing that objectionable conduct occurred and that such conduct prevented a fair election. Based on its admitted refusal, the Board found that the

Company violated Section 8(a)(5) and (1) of the Act. The Board's findings in the representation and unfair-labor-practice proceedings are summarized below.

I. THE REPRESENTATION PROCEEDING

A. The Board's Findings of Fact

1. The Company's operations; the Union's organizing campaign

The Company transports freight across North America. This case involves the Company's Los Angeles facility, commonly referred to as "ULX," where it employs about 44 drivers. (A. 11, 22-23; A. 136, 210-11, 700, 705, 706-08, 717.) In 2009, the Union began a campaign to organize the drivers at that facility—efforts that ultimately culminated in the Union filing a petition with the Board on September 11, 2014, seeking a representation election. (A. 11, 15, 23, 26; A. 126-27, 686-88, 705.) The Company and the Union then entered into a stipulated agreement calling for the Board to conduct an election among the ULX drivers on October 23, 2014. (A. 11 n.5, 38; A. 47, 54.)

2. Labor consultant Camarena and drivers Placencia and Cabrera discuss Camarena joining them on a ride-along

In response to the Union's election petition, the Company hired labor consultant Luis Camarena to disseminate its anti-union message to employees. (A. 15, 26, 32-33; A. 256-59, 303-07, 338-42, 346-47, 351-55, 408-10.) Juan

Placencia was a ULX driver and known union supporter. (A. 23, 26, 36; A. 136-37, 143-67, 212-14, 254-55, 547-50.)

Typically, drivers report to the facility's dispatch office to receive their assignments after clocking in. (A. 27, 37; A. 138-40, 168-69, 322.) The dispatch office is attached to the facility's break room. A four-foot-high counter, topped by a glass wall with two openings, separates the two rooms. Freight Operations Supervisor Steve Roman and driver Sal Navarro, who usually perform dispatch duties, have work stations inside the dispatch office. (A. 23, 27; A. 120-22, 140-42, 172-73, 298-302, 551-72, 739-44.)

On October 7, Placencia and fellow driver John Cabrera clocked in and entered the break room at about 10:30 a.m. (A. 28, 37; A. 168-69, 245-46, 252-53, 260-61, 296, 731-32.) Placencia was carrying a small backpack that contained numerous work and personal items. He dumped the backpack's contents onto a table near the dispatch office, and then proceeded to organize and/or don those items, which included work equipment such as gloves, a belt clip, a flashlight, and a knife. (A. 28, 36-37; A. 169-71, 178-79, 261-62, 265-66.) Most drivers carry a knife or box cutter while on duty to cut shrink wrap and other materials that bind freight together. (A. 27; A. 128-29, 185-87, 268-71, 317-20, 501-02.) Placencia's knife had about a four-inch blade, which folded into the knife's handle when it was in the closed position, as it was at that time. (A. 28 & n.24, 36-37; A. 179-81, 187-

89, 236, 272.) Cabrera began teasing Placencia about carrying so many items in such a little backpack. Elvis Martinez and other drivers in the break room joined Cabrera and Placencia in joking and laughing about Placencia's numerous effects and his small backpack. (A. 27 & n.22, 28, 36-37; A. 169, 172-74, 260-62, 308-09, 311-12.)

Placencia asked Camarena, who, along with Roman and Navarro, was inside the dispatch office, if he wanted to ride along with him on his route that day—joking that the route covered Hollywood and Beverly Hills, so “there’s celebrities.” (A. 27-28, 36-37; A. 172-77, 183-84, 260-64, 297, 308-14, 326-27.) Cabrera followed suit, asking Camarena if he wanted to ride along with him instead, because his route covered Santa Monica and Malibu, so they could “check out the girls.” (A. 27-28, 36-37; A. 173-77, 264, 311-12.) As Placencia and Cabrera playfully touted their respective routes, Placencia was holding his closed work knife in his hand. (A. 28, 36-37; A. 177-79, 181, 264-66, 311-12, 316-17.) Camarena gestured toward Placencia's knife and, paraphrasing from the movie *Crocodile Dundee*,³ said: “That’s not a knife, this is a knife.” As he made that statement, Camarena reached behind his back and pretended to pull out a large knife, as the movie character does in the referenced scene. (A. 28, 36-37; A. 179-84, 264-65, 282, 314-15.) Placencia responded: “That’s not a knife, that’s a

³ See *Crocodile Dundee* (Rimfire Films 1986).

machete.” (A. 28, 36-37; A. 181, 266, 314.) Camarena, Placencia, and Cabrera then laughed, and the conversation ended. (A. 28, 36-37; A. 177-83, 266, 286, 313-14, 321.) During this exchange, Placencia made no threatening statements, and he kept his knife closed, neither brandishing it nor pointing it at Camarena. (A. 28 & n.25, n.26, n.29, 30, 36-39; A. 181-82, 194-95, 266-67, 275-77, 282-85, 316-17, 320-21, 722, 755-59.)

3. Labor consultant Camarena and supervisor Roman claim that Placencia threatened Camarena with his knife, leading to Placencia’s arrest and discharge, and to the incident being widely discussed among the drivers

Soon after the discussion among Camarena, Placencia, and Cabrera ended, Camarena and Roman each reported to Service Center Manager Paul Styers that Placencia had threatened Camarena with a knife. Styers requested written statements, and later that day, Camarena and Roman provided them—claiming that Placencia had flipped open his knife, brandished or pointed it at Camarena, and made a threatening statement. (A. 28-29, 36-37; A. 370-72, 375-76, 391-92, 595-99, 621-31, 733, 745, 751-52.)

Later that afternoon, Camarena filed a report with the police regarding Placencia’s supposed threat. (A. 29; A. 120-22, 224-27, 377-91, 399-400, 620, 631-34, 734.) The police arrested Placencia that evening, while he was still on duty; before the officers took him to jail, Roman claimed to the police that he had witnessed Placencia threaten Camarena, and identified Placencia’s work knife as

the object used in carrying out the alleged threat. The Company suspended Placencia simultaneous with his arrest, purportedly for “[c]riminal threats in the work place.” (A. 29-30, 38; A. 217-35, 237, 631-49, 723-28, 750.)

The next day, October 8, Cabrera went to Styers’ office and told him that the accusation against Placencia was false, that Placencia had never threatened Camarena, and that he (Cabrera) would not stay silent about it. (A. 30; A. 275-78, 650-52.) Over the following days, the Company interviewed and took statements from Placencia, Cabrera, Navarro, and Martinez, all of whom denied that Placencia had engaged in threatening conduct. (A. 30, 37; A. 190-96, 203-07, 273-80, 323-25, 663-72, 679-82, 722, 753-59.) Nevertheless, the Company discharged Placencia on about October 15, purportedly relying on Camarena and Roman’s claim that Placencia had threatened Camarena with his knife.⁴ (A. 30, 37-39; A. 194, 653-55, 661-62, 673-78, 729-30, 750-54.) Following Placencia’s arrest, suspension, and discharge, rumors spread among the drivers that Placencia had threatened Camarena, or that he may have done so. (A. 39; A. 433-37, 458-63, 479-82, 497-99, 502-03, 533, 535, 539.) The criminal charges against Placencia were dismissed. (A. 30; A. 197-99.)

⁴ To the extent that the Company contends, as fact, that Placencia “was . . . terminated from employment for workplace violence” (Br. 15 n.13), the judge found that he was terminated because of his union activity, and the Board did not have the opportunity to pass on that finding. (See p. 13 n.7 below.)

4. Anonymous messages on a pro-union website criticize drivers Robles and Fuentes and vow to publish the names of employees who spread lies about the Union

An anonymously published website, entitled “Change Conway To Win,” displayed pro-union and anti-management messages regarding the Company. (A. 39-40; A. 422-23, 438, 441, 446, 465, 508, 541, 735-38.) The Union did not create or administer this website. (A. 39-40; A. 686-88, 691-93, 697.) The website’s content was not limited to addressing the ULX facility, but rather, discussed union-organizing efforts at company facilities across the nation. (A. 11, 23 & n.3, n.6, 39; A. 145-50, 438-39, 507, 523, 694.) The site’s anonymous administrator controlled what was published. Individuals could submit anonymous comments, subject to the administrator’s approval, in response to the administrator’s posts. The website identified commenters by a first name or another pseudonym, or not at all. (A. 39 & n.56, 40; A. 429, 432, 441, 475-76, 496, 514, 735-38.)

A post on the website dated September 19, 2014, was entitled “Outing The Rats at ULX.” The entry named two individuals employed at the Company’s Los Angeles facility—Service Center Manager Styers and driver Ramsey Robles—criticizing them for allegedly disseminating lies about the Union. (A. 23, 39-40; A. 120-22, 126, 425-26, 446-49, 619, 735.) The post stated:

Paul Styers and his henchmen have done it again. They are out spreading lies about the union. Styers’ [sic] lead liar and master kiss-ass, Ramsy [sic] Robles are deceiving employees regarding the union. They are reaching into their bag of tricks and pulling out some of the most common lies. . . . They

need to be a little more original, these are old, tired, and frankly just lazy lies. . . . Paul Styers . . . is a known liar and bigot . . . not fit to be a manager with his dirty tricks. As for Ramsy [sic] Robles, he is a lazy employee that is only kept around because he does Steyers' [sic] dirty work. . . . [W]e will be outing any employees that are knowingly lying about the union. If they can go around spreading lies, then they can proudly look at their names here and stand behind their words and actions. Out with the rats!

(A. 39-40; A. 735.)

The administrator published numerous comments in response to this post.

(A. 39; A. 431, 484-85, 735-38.) Two such comments reference ULX driver

Clemente Fuentes. The first of those, dated October 10 and attributed to

“Richard,” stated: “Clemente Fuentes from ulx, I thought you were a man you

sorry ass punk.” The next comment, dated October 12 and attributed to “Jaime,”

read: “Clemente pay the child support that you’re complaining about and don’t be

ignorant saying that you will pay someone else’s pension, you stupid fool.” (A.

39; A. 428, 469-70, 473-78, 737.)

Many ULX drivers voluntarily chose to visit the “Change Conway To Win”

website and viewed the post and/or comments highlighted above during the

timeframe between their publication and the representation election. (A. 39-40; A.

425-28, 445, 448-49, 452-53, 464, 471-74, 483-87, 490-96, 509-11, 522, 524-26,

529-31.) For example, driver Gerardo Lopez viewed the post after someone sent

him a text message on his personal cell phone that contained a hyperlink to it. (A.

39; A. 419-21, 425-26, 430-31, 440, 442-44.)

5. Driver Robles receives anonymous silent telephone calls on his personal cell phone

At some point after the Union filed its election petition, Robles began receiving on his personal cell phone anonymous silent telephone calls—that is, calls where the caller would simply say nothing. Those silent phone calls occurred 2 or 3 times per day for a couple of weeks, then ended prior to the election. When receiving those calls, a caller's phone number would display on Robles' phone, but Robles did not recognize the number, and he never tried to identify the caller. Robles told Styers about the calls, but Styers did not ask Robles for the phone number from which the calls originated or take any other action. (A. 40; A. 454-57, 466-68, 657.)

B. Procedural History

Pursuant to the parties' stipulated election agreement, the Board conducted a secret-ballot election among the ULX drivers on October 23. The tally of ballots showed 22 votes for the Union and 20 votes against representation. (A. 11 n.5, 38; A. 86.)⁵ The Company timely filed objections, claiming that the Union, its agents, supporters, or others had engaged in objectionable conduct that required that the

⁵ The initial tally of ballots also reflected two determinative challenged ballots, which had been cast by Placencia and another discharged employee. Subsequently, however, the parties entered into a stipulation, approved by the Board, agreeing that the two challenged ballots would not be opened or counted. (A. 11 n.5, 38; A. 48, 83-85.)

election be set aside. (A. 22, 38-39; A. 49-62, 66-68.) Specifically, the Company alleged as objectionable conduct: (1) that Placencia threatened Camarena with a knife, and that this threatening conduct was widely disseminated among the unit employees; (2) that objectionable messages were posted on the “Change Conway To Win” website; and (3) that Robles received silent phone calls during the period preceding the election.⁶

Two employees also filed charges, and the General Counsel issued a complaint, alleging that the Company committed numerous unfair labor practices during the Union’s campaign. The Board’s Regional Director ordered a consolidated hearing on the Company’s election objections and the related unfair-labor-practice allegations. (A. 7 n.2, 22, 38-39; A. 52-55, 61-62, 70-76.)

An 8-day hearing was held before an administrative law judge, who sat as a hearing officer with respect to the election objections. After the hearing, the judge

⁶ The Company does not make (and has therefore waived) any argument that the Board erred in overruling the Company’s objections based on the other categories of purported objectionable conduct that it initially alleged in the representation proceedings. (See A. 38-39.) See also *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not made in opening brief are waived). Indeed, on exceptions before the Board, the Company expressly abandoned its reliance on such other purported conduct, conceding that it had “introduced evidence only with respect to” the three categories of conduct enumerated above. (See A. 97.) See also *Prime Healthcare Servs.-Encino LLC v. NLRB*, 890 F.3d 286, 295 (D.C. Cir. 2018) (argument abandoned before Board is not properly before Court). Thus, only those three categories of alleged objectionable conduct are before the Court.

issued a decision and report recommending that the Board overrule all of the Company's objections and certify the Union. (A. 7 & n.2, 11, 22, 38-40.) The Company filed exceptions to portions of the judge's decision and report. (A. 11; A. 87-103, 760-70.)

On review, the Board (Chairman Ring, and Members Pearce and McFerran) issued a decision and certification of representative on August 27, 2018, adopting the judge's recommendation to overrule the Company's election objections, and certifying the Union as the employees' exclusive collective-bargaining representative.⁷ (A. 8, 11 & n.5, 17.)

⁷ The Board also found that the Company committed several unfair labor practices. Those findings are not part of this case and instead are addressed in a separate appeal currently pending before the Court. *See Con-Way Freight, Inc. v. NLRB*, case numbers 18-1247 and 18-1267. Two additional unfair-labor-practice allegations initially pending before the Board addressed the judge's finding that the Company unlawfully suspended and discharged Placencia, and unlawfully filed criminal charges against him, resulting in his arrest. Pursuant to the parties' joint motion, however, the Board severed those allegations from the case and remanded them to the Regional Director, where they were ultimately withdrawn. (A. 11 n.2; A. 786-96.) Under the terms of that joint motion and the subsequent Regional Director's Order, the severance and withdrawal of those allegations does not affect the election objections concerning Placencia. (A. 786-89, 789 n.2, 794.)

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

On September 10, 2018, the Union requested that the Company bargain with it as the representative of the employees in the certified unit. The Company refused. (A. 7-8; A. 104-12.) After the Union filed a charge, the Board's General Counsel issued an unfair-labor-practice complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause why the motion should not be granted. (A. 7; A. 43, 113-18.) In its responses, the Company admitted its refusal to bargain, but reasserted its contention, based on its objections to the election, that the Board had improperly certified the Union. (A. 7; A. 44-45.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On April 23, 2019, the Board (Chairman Ring and Members McFerran and Kaplan) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A. 7-8.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company did not offer any newly discovered and previously unavailable evidence or allege

any special circumstances that would require the Board to reexamine the decision to certify the Union. (A. 7.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A. 8.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, to embody any understanding reached in a signed agreement, and to post a remedial notice. (A. 8-9.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158 (a)(5) and (1)) by admittedly refusing to bargain with the Union, which the Board certified as the collective-bargaining representative of a unit of the Company's drivers in the underlying representation proceeding. Before this Court, the Company challenges the Board's decision overruling its election objections. Because the credited evidence does not substantiate any of the Company's objections, the Board acted well within its wide discretion in overruling them and certifying the Union.

The Board did not abuse its discretion in rejecting the Company's unfounded objections claiming that employee Placencia threatened a labor consultant with a

knife. That claim rests entirely on testimony that the administrative law judge soundly discredited, and the Company failed to meet its extraordinary burden of showing those credibility determinations were patently insupportable. Because Placencia's purported objectionable conduct did not actually occur, the Board properly reasoned that it was unnecessary to determine whether Placencia was a union agent whose conduct should be evaluated under the party standard.

The Court lacks jurisdiction to consider the Company's belated, alternative contention that, applying either the party or third-party standard, even if Placencia's purported threat did not occur, the election still should be overturned based on the false rumors suggesting that Placencia did engage in such conduct. The Company failed to raise that argument to the Board and, in any event, the contention is utterly meritless. As the Board found, the Company itself was the source of such baseless gossip. Accordingly, it cannot now evade the election's result by pointing to the dissemination of a wholly fabricated story that it created and perpetuated.

The Board also did not abuse its discretion by overruling the Company's objections concerning the insignificant conduct of anonymous parties. First, the Company failed to show that either the website or the phone calls were attributable to the Union; therefore, the Board properly applied the third-party standard to both. The Board reasonably found that the anonymous online messages—which were

posted on a website that the Union did not create, administer, or control—did not make a free election impossible. The purportedly objectionable online statements largely amounted to mere criticisms or insults directed at union opponents, and the only “threat” was simply to publish the names of employees who spread lies about the Union. As for the anonymous silent telephone calls that one driver received, the Board appropriately found that they would not reasonably be perceived as a threat, and furthermore, the Company failed to establish that the calls even had anything to do with the Union or the election.

Finally, the closeness of the vote, contrary to the Company’s suggestion, does not show that the Board abused its broad discretion in certifying the Union. The Union’s narrow margin of victory does not transform the Company’s unfounded or otherwise insubstantial objections into grounds for a new election.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTIONS AND, THEREFORE, PROPERLY FOUND THAT THE COMPANY UNLAWFULLY REFUSED 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).⁸ Here, the Company admits (Br. 5) its refusal to bargain, but contests the Board’s certification of the Union as the representative of its employees by challenging the Board’s overruling of its election objections. As the Board reasonably found, however, the Company failed to meet its heavy burden of showing that objectionable conduct occurred that warranted overturning the election.

A. The Board Has Broad Discretion in Conducting Representation Proceedings, and the Party Seeking To Overturn a Board-Approved Election Bears a Heavy Burden

“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

⁸ An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. 29 U.S.C. § 158(a)(1); see *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

U.S. 324, 330 (1946). Thus, on questions that arise in the context of representation elections, the Court “accord[s] the Board an especially ‘wide degree of discretion.’” *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996) (quoting *A.J. Tower*, 329 U.S. at 330); accord *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 385 (D.C. Cir. 2017).

There is a “strong presumption” that a Board-certified election “reflects the employees’ true desires regarding representation.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997); accord *NLRB v. Schwartz Bros.*, 475 F.2d 926, 930 (D.C. Cir. 1973) (Board-certified elections are presumptively valid). A party seeking to overturn such an election therefore bears a “heavy burden.” *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002) (quotation marks omitted); see also *NLRB v. Mattison Mach. Works*, 365 U.S. 123, 123-24 (1961) (objecting party bears burden of proving election unfair). An objecting party of course fails to meet that burden where it fails to establish, in the first instance, that the alleged election misconduct in fact occurred. See *Equinox Holdings, Inc. v. NLRB*, 883 F.3d 935, 937-39 (D.C. Cir. 2018); *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444-45 (D.C. Cir. 1996); *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 314-16 (6th Cir. 1987).

The objecting party must further demonstrate, however, not only that improprieties occurred, but also that they “interfered with the employees’ exercise

of free choice to such an extent that they materially affected the results of the election.” *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970) (quotation marks omitted); *accord Tony Scott*, 821 F.2d at 316. When an employer’s objections are based on the alleged misconduct of a union agent, the Board will overturn the election if the conduct had “the tendency to interfere with employees’ freedom of choice.” *Equinox*, 883 F.3d at 940 n.5 (quotation marks omitted). But when, as here, the conduct at issue is the action of a third party, not a union agent, the Board will overturn the election only if the conduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Id.* (quoting *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)); *accord Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1998).

In assessing whether a party has satisfied that heightened burden, this Court gives little weight to anonymous misconduct. *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 117 (D.C. Cir. 2012); *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984). As the Court has recognized, “ordering a rerun election on the basis of anonymous incidents” could be “futil[e],” because “such incidents could easily recur despite the best efforts of the union and its supporters.” *Amalgamated*, 736 F.2d 1559, 1568. It also could be “devastatingly unfair” to the majority of employees who have voted for the

union, because “an unscrupulous employer could encourage anonymous pro-union incidents in order to give it grounds . . . later to reverse the election result if it loses.” *Id.* In circumstances where the anonymous conduct “may have nothing to do with the election” the Court gives it even less weight. *Id.*

The standard for overturning an election is demanding in part because ordering a rerun election poses its own danger to the effectuation of employee free choice. *Id.* at 1562-63. As the Court has recognized, the delay inherent in holding a second election after employees have voted for union representation “almost inevitably works to the benefit of the employer and may frustrate the majority’s right to choose to be represented by a union,” by “play[ing] into the hands of employers who capitalize on the delay.” *Id.* at 1563. Moreover, although election proceedings should be conducted in “laboratory . . . conditions as nearly ideal as possible,” the Court has acknowledged that this “noble ideal . . . must be applied flexibly,” and that “[i]t is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election.” *Id.* at 1562 (quoting *General Shoe Corp.*, 77 NLRB 124, 127 (1948)); accord *Equinox*, 883 F.3d at 940; *Serv. Corp. Int’l v. NLRB*, 495 F.3d 681, 684-85 (D.C. Cir. 2007).

Accordingly, the Court reviews the Board’s decision to overrule election objections for abuse of the Board’s wide discretion, *Canadian Am. Oil*, 82 F.3d at

473, and will uphold the Board’s decision to certify election results except in “the rarest of circumstances.” *800 River Rd.*, 846 F.3d at 385-86 (quotation marks omitted); *accord Downtown Bid*, 682 F.3d at 112 (review of Board’s election rulings is “extremely limited”). The Board’s findings of fact are “conclusive” if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-85 (1951). A reviewing court may not “displace the Board’s choice between two fairly conflicting views [of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488.

Moreover, this Court will accept Board-approved credibility determinations “absent the most extraordinary circumstances.” *E.N. Bisso*, 84 F.3d at 1444-45 (quotation marks omitted). Accordingly, it will overturn such determinations only if they are “hopelessly incredible, self-contradictory, or patently insupportable.” *PruittHealth-Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018).

B. The Board Did Not Abuse Its Discretion in Overruling the Company’s Objections Concerning Placencia’s Purported Threatening Conduct Because that Conduct Did Not Actually Occur

The Company’s arguments seeking to overturn the election primarily focus on Placencia’s purported act of threatening Camarena with a knife. The Board appropriately overruled those objections because, given the judge’s sound

credibility determination, the supposed threat never happened. The Company alternatively claims that, even if the threatening conduct did not occur, the election results still should be thrown out because employees exchanged baseless rumors that such a threat did occur. That claim is not properly before the Court because the Company never raised it to the Board—and, in any event, it is meritless.

1. Substantial evidence supports the Board’s finding that Placencia never threatened Camarena with a knife, rendering it unnecessary to determine whether Placencia was a union agent

The Board properly rejected the Company’s bid to set aside the election based on Placencia’s purported threatening conduct. As the Board found, that purported conduct did not occur, and having found it did not occur, it was unnecessary to determine whether Placencia was a union agent whose conduct should be evaluated pursuant to the party standard. Substantial evidence supports the Board’s finding.

The credited evidence “shows [that] Placencia never threatened Camarena with a knife.” (A. 39.) The administrative law judge, adopted by the Board, wholly discredited the testimony of Camarena and Roman that Placencia opened his work knife and brandished or pointed it at Camarena, and that he uttered the threatening statements. (A. 28 & n.25, n.26, n.29, 30, 36-39.) Instead, the credited testimony of Placencia, Cabrera, and Navarro shows that Placencia merely held his closed work knife in his hand during an entirely unremarkable, lighthearted verbal

exchange with Camarena, in which nothing threatening happened. (Id.) (See pp. 5-7.)

As noted, the Company's burden in seeking to overturn the election demanded that it prove, in the first instance, "that the [alleged] coercive acts actually occurred." *Tony Scott*, 821 F.2d at 316; accord *APL Logistics, Inc.*, 341 NLRB 994, 994 & n.3 (2004), *enforced*, 142 F. App'x 869, 873-74 (6th Cir. 2005). In light of the Board-approved credibility determination that Placencia never engaged in the purported threatening conduct, the Company failed to satisfy this threshold requirement, as it was "unable to establish the facts necessary to support its theory" of objectionable conduct. *E.N. Bisso*, 84 F.3d at 1444. Accordingly, the Board properly found that the Company's objections that were "based on [the discredited] allegation" that Placencia had threatened Camarena "lack[ed] a factual foundation" and should be overruled. (A. 39.) See *Equinox*, 883 F.3d at 937-39 (Board properly rejected objection that was based on discredited testimony concerning the occurrence of purported threats); *Pallet Cos. v. NLRB*, 634 F. App'x 800, 801 (D.C. Cir. 2015) (same).

There is no merit to the Company's challenge (Br. 41-42) to the Board's decision to affirm (A. 11 & n.3) the judge's credibility determination that Placencia did not engage in the alleged objectionable acts. The Company fails to acknowledge the "extraordinary" weight of its burden in seeking to upend that

decision. *E.N. Bisso*, 84 F.3d at 1444-45. And it has not come close to demonstrating, as it must, that the credibility determination was “hopelessly incredible, self-contradictory, or patently insupportable.” *PruittHealth-Virginia Park*, 888 F.3d at 1294.

To the contrary, the judge’s credibility resolution was exhaustive and well reasoned. (A. 30, 33-34, 36-38.) The judge described Placencia’s testimony as “clear and forthright” (A. 34), and found his narrative of what occurred to be “better corroborated” (A. 36) than the alternative narrative offered by the Company. Indeed, the judge reasonably found (A. 36) that, with respect to the material issues, both Cabrera and Navarro’s testimony supported Placencia’s testimony. Moreover, in finding Cabrera and Navarro to be “very credible” and “high[ly] reliab[le]” witnesses (A. 36), the judge noted the “resolute” nature of Cabrera’s testimony, and Navarro’s “open and forthcoming demeanor.” (A. 36.) *See, e.g., NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (reviewing court owes particular deference to judge’s demeanor-based credibility findings, because judge “sees the witnesses and hears them testify,” whereas court “look[s] only at cold records”); *Sioux Prod., Inc. v. NLRB*, 684 F.2d 1251, 1253-55, 1257 (7th Cir. 1982) (judge’s “demeanor-based evaluation of credibility” is entitled to “especial weight” and may not be rejected “absent the most exceptional circumstances”). She also properly found that the reliability of those two coworkers’ mutually

corroborative testimony was further enhanced by their status as “current employee[s]” testifying adversely to their employer’s position, and thus “testifying against [their] own pecuniary interests.” (A. 30, 36; A. 252-53, 281, 298-300.) *See, e.g., Bloomington-Normal Seating Co. v. NLRB*, 357 F.3d 692, 695 (7th Cir. 2004) (“status as a current employee may be a significant factor” supporting credibility of a witness who testifies adversely to his employer) (quoting *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *enforced*, 83 F.3d 419 (5th Cir. 1996) (table)).⁹

Furthermore, the judge reasonably found that the three drivers’ account of what transpired was “much more plausible” than the Company’s account. (A. 37.) Thus, Camarena’s admitted actions (A. 361-63, 402-04, 584) of pretending to grab a knife from behind his back and mimicking the line from *Crocodile Dundee* (see pp. 6-7) “fits with the [drivers’] description of lighthearted banter;” whereas “Camarena’s attempt to couch his actions as a frightened and shocked response made to [defuse] a tense situation does not ring true.” (A. 37.)

In finding Camarena to be a witness who “generally lack[ed] credibility,” the judge highlighted specific transcript excerpts exemplifying the “evasive, slippery, and at times outright dishonest qualities” of Camarena’s testimony. (A.

⁹ The Company offers no support for its suggestion (Br. 41) that this well-established principle—which the judge considered as just one aspect of her multi-faceted credibility analysis—cannot reasonably be applied to Cabrera or Navarro merely because they, like Placencia, served on the union-organizing committee. (See A. 689-90.)

33-34, 36; A. 406-10, 415-18.) *See, e.g., SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 10 (D.C. Cir. 2012) (judge properly discredited manager’s testimony in part due to its “shifting” and “evasive” nature). The judge also noted that “[t]he manner in which [Camarena] testified” regarding the alleged threat, in particular, struck her as “disingenuous” and “grossly exaggerated.” (A. 36-37.) *See, e.g., Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003) (“Decisions regarding witness credibility and demeanor are entitled to great deference, as long as relevant factors are considered and the resolutions are explained.”) (quotation marks omitted); *NLRB v. Q-1 Motor Exp., Inc.*, 25 F.3d 473, 479 (7th Cir. 1994) (“[c]redibility . . . is a function not only of what a witness says but of how a witness says it”) (quotation marks omitted).

As for Roman, the judge discredited his narrative because it was shifting and inconsistent. (A. 36.) For example, Roman initially told the human resources department via email, just a few days after the alleged incident, that Placencia “did not point the knife at [Camarena],” but at trial, he claimed just the opposite. (A. 29, 36; A. 579-83, 602-06, 747.) *See, e.g., King Soopers, Inc. v. NLRB*, 859 F.3d 23, 33 (D.C. Cir. 2017) (“the presence of . . . inconsistencies in a witness’ story” is important factor in resolving credibility). And, as the judge reasonably concluded, Roman’s attempt to explain this contradiction by claiming that his email assertion

meant only that Placencia's arm was bent at the elbow, rather than extended straight out, "rings false." (A. 36; A. 605-06.)

Finally, the judge noted that Camarena and Roman contradicted one another in their testimony—including with respect to key elements of Placencia's alleged threat. (A. 28, 36-37.) Perhaps most glaringly, they testified to two different threatening statements purportedly uttered by Placencia, and they each specifically denied that Placencia said the statement to which the other testified. (A. 28 & n.26, 37; A. 360-61, 396, 398, 412, 579-82, 612, 733, 747-48.) Camarena and Roman also contradicted one another concerning the number of times that Placencia allegedly flipped open his knife. (A. 28 & n.30, 37; A. 360-64, 412, 579-82.) *See, e.g., Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (Board properly discredited manager's testimony that was "inconsistent with other evidence"); *Health Care & Ret. Corp. of Am. v. NLRB*, 255 F.3d 276, 283 (6th Cir. 2000) (hearing officer properly discredited company's narrative in part because company witnesses "contradicted each other").

The Company utterly fails in its effort (Br. 41-42) to undermine the judge's thorough and well-supported credibility determination. It erroneously fixates (Br. 41) on minor inconsistencies in the testimony of Placencia, Cabrera, and Navarro regarding such highly specific, immaterial details as in which hand Placencia held his closed knife, or individuals' exact locations within the break room or dispatch

office at precise moments. As the judge found, “[i]t is not realistic to expect witnesses to recall in such detail the minutiae of what, at the time, seemed like just any other morning at work.” (A. 36.) Accordingly, the judge did “not . . . overlook[]” the testimony concerning those details, but properly deemed it to be immaterial (A. 36 & n.51)—in stark contrast to the important contradictions in Camarena and Roman’s testimony regarding the heart of the factual dispute. (A. 28, 36-37.)

Additionally, the Company is simply wrong in contending that drivers Gerardo Lopez and Victor Cruz testified “that Cabrera told them Placencia had displayed his knife to Camarena with the blade open, not closed.” (Br. 41.) Lopez testified that Cabrera told him “yes, [Placencia] was arrested but that the charges were false” (A. 435)—then vaguely added that Cabrera also said “that [Placencia] was coerced into showing [Camarena] his knife,” or that Camarena had “used some kind of trickery to get him to expose his knife so that we can say that he was threatened by the knife.” (A. 435-36.) Cruz, meanwhile, testified that he “[didn’t] know whether the blade was showing” according to what Cabrera said, and that he (Cruz) simply “assume[d]” that the blade was open. (A. 538.) Contrary to the Company’s claims (Br. 19 & n.19, 41), therefore, there was no reason for the Union or General Counsel to recall Cabrera to “rebut” Lopez or Cruz’s testimony (Br. 19 n.19), and their testimony does not undercut the judge’s sound credibility

findings regarding the events of October 7. Moreover, the Company has waived any contention that the Board should have drawn an “adverse inference” based on the failure to recall Cabrera—which the Company only mentions, in cursory fashion and without citation to authority, in a footnote in the facts section of its opening brief. (Br. 19 n.19.)¹⁰

There is likewise no merit to the Company’s absurd assertion that Placencia’s knife “had to be open with the blade exposed,” because otherwise, Camarena’s *Crocodile Dundee* reference would not make sense. (Br. 42.) Obviously, Camarena’s attempted joke cannot—through some non-existent law of comedic logic, and contrary to the judge’s painstaking credibility analysis—retroactively conform the facts to a circumstance that would maximize the joke’s pertinence or humorous effect. In sum, “there is nothing even approaching an ‘extraordinary circumstance’ warranting judicial review” of the administrative law judge’s credibility determination here. *E.N. Bisso*, 84 F.3d at 1445. Accordingly,

¹⁰ See *New York Rehab.*, 506 F.3d at 1076 (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work.”) (quotation marks omitted); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (arguments merely referenced in opening brief are waived); Fed. R. App. P. 28(a)(8)(A) (“appellant’s [opening] brief must contain . . . the argument, which must contain . . . appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).

the Company's challenge to that Board-approved determination is "at best specious." *Id.*

And, in light of the credibility-based finding that Placencia never engaged in the alleged objectionable conduct, the Board properly found it "unnecessary to determine whether [he] was an agent of the Union." (A. 39.) *See Beaird-Poulan Div.*, 247 NLRB 1365, 1370 (1980) ("unnecessary . . . to consider" whether employee was union agent, because evidence showed he did not commit the alleged objectionable acts), *enforced*, 649 F.2d 589 (8th Cir. 1981); *cf. Equinox*, 883 F.3d at 939-40 (because there was no connection between employee's potential conduct and union election, there was "[no] need . . . [to] reach the question whether to analyze that conduct under the agent or third-party standard"). Thus, the Company's contentions (Br. 36-40) that Placencia was a union agent, and that the Court either should make such a determination de novo or remand the issue to the Board, are irrelevant. There is no need to determine Placencia's agency status when, as the Board found, there is no credited evidence that "any of the conduct attributed to him occurred." (A. 39.)

2. The Company's alternative argument based on the false rumors concerning the purported threat is not properly before the Court and, in any event, meritless

Before this Court, the Company alternatively contends that “even if the Court accepts the [Board’s] conclusion” that Placencia did not engage in the alleged threatening conduct (Br. 42), the Court nonetheless should overturn the election based solely on the false rumors that circulated among the employees that Placencia had threatened Camarena. (Br. 42-45.) The Company argues (Br. 42-45) that even if the threat did not occur, the workplace gossip suggesting that it did had such an impact on the employees that, whether applying the union-agent standard or the third-party standard, the election results should be set aside. The Court does not have jurisdiction to consider this contention.

Section 10(e) of the Act provides in relevant part: “No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Courts thus “lack[] jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); accord *Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015); *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008).

Here, the Company never contended before the Board that—even if Placencia’s alleged threatening conduct did not occur—the election should still be set aside based on the false rumors regarding the supposed threat, or based on some employees’ consequent misimpression that such a threat actually did occur. To the contrary, the Company consistently premised its objections on the assertion that Placencia had, in fact, committed the purported threatening acts—even while noting, as further support for its position, that the occurrence of those threatening actions also was widely disseminated among the employees. (*See* A. 44, 87-103, 760-70, 781-84.) Thus, because the Company failed to urge before the Board the alternative argument it now raises—and because the Company has not claimed, let alone shown, “extraordinary circumstances” that would excuse its failure—the Court lacks jurisdiction to consider the argument. 29 U.S.C. § 160(e).

In any event, the argument is meritless. As the Board found, the so-called “incident” was “only fodder for employee gossip because the Company distorted it and used it to justify terminating Placencia.” (A. 39.) Thus, the genesis of the false rumor that circulated among the drivers was Camarena and Roman’s wholly fabricated narrative—embraced by the Company as the sole grounds for Placencia’s suspension and discharge—that Placencia had opened his knife, brandished or pointed it at Camarena, and made a threatening statement. Indeed, driver Lopez testified that Service Center Manager Styers himself, the facility’s

highest-ranking manager, contributed to the rumor's dissemination—telling Lopez directly that “Placencia . . . was arrested because he threatened a consultant with a knife.” (A. 433-36.) The Company—having generated the completely phony claim that Placencia engaged in threatening conduct, and having created the conditions, through Placencia's suspension and discharge, that would all but ensure that claim's proliferation as rumor—cannot now avoid an unwanted election result in reliance on the false rumor that it originated. *See United Builders Supply Co.*, 287 NLRB 1364, 1375 n.34 (1988) (“If the [employer] . . . contribute[d] to the perpetuation of . . . a rumor [of union-caused violence], it cannot benefit from the rumor” in its election objections); *cf. Beaird-Poulan*, 247 NLRB at 1370 (where anti-union employees “spread a false rumor that [coworker] had brandished a gun,” union's election victory could not be set aside “because of a false rumor which was circulated by adherent[s] of the losing side”).

The Board also reasonably found that there was “no evidence . . . that anyone from the Union circulated information about the knife incident,” and that the false “scuttlebutt” about the incident was “not of [Placencia's] making.” (A. 39.) Additionally, the Company is wrong that driver Cabrera “was a notable source of dissemination regarding the incident.” (Br. 22-23, 29.) Only two witnesses, Lopez and Cruz, testified that Cabrera told them anything about the events of October 7—and, although their testimony is largely vague as to what

Cabrera said, both witnesses made clear that Cabrera conveyed that the accusations against Placencia were false, and that no genuine threat had occurred. (A. 433-37, 533-38.)¹¹ Accordingly, given the credited evidence demonstrating that it was the Company, not the Union, Placencia, or Cabrera, who fabricated and spread the false rumor, the Company's claim that the rumor warrants a new election under either the union-agent or third-party standard turns a blind eye toward the Company's role in creating and perpetuating the rumor.

The Company fails in its effort (Br. 42-44) to liken this case to *ManorCare of Kingston PA, LLC v. NLRB*, 823 F.3d 81 (D.C. Cir. 2016). There, two employees actually “made statements” to coworkers “that, on their face, threatened physical harm and property damage to non-supporters of unionization.” *Id.* at 83-86. Those statements were then disseminated by and among the employees—beginning with the coworkers who had heard them. *Id.* at 83-84, 86. In that context, the Court held that it was irrelevant whether the employees who initially made the threatening statements “may have intended their remarks in jest,”

¹¹ Moreover, to the extent that the Company's repeated references (Br. 19, 22, 29) to Cabrera's membership in the union-organizing committee are meant to portray him as a union agent, settled law refutes any such argument (*see Downtown Bid*, 682 F.3d at 115 n.4 (employee membership in union-organizing committee insufficient to establish agency); *Overnite Transp.*, 140 F.3d at 265-66) (same)), which, in any event, the Company never urged before the Board. *See* 29 U.S.C. § 160(e). (*See* generally p. 32.)

because “some employees interpreted the remarks as threats, and it was reasonable for them to do so.” *Id.* at 87-88.

ManorCare is inapposite because Placencia’s alleged threatening conduct and statements simply did not occur. Thus, contrary to the Company’s mischaracterizations (Br. 42-44), this case does not involve circumstances in which Placencia menacingly pointed or brandished his knife, or uttered any threatening statement, but did so “in jest” (Br. 42)—and where the intended “humor [in his conduct was] diluted over the course of dissemination.” (Br. 42-43). Rather, the workplace gossip suggesting that Placencia made a threat was categorically false. *See Beaird-Poulan*, 247 NLRB at 1370 (overruling election objection based on false rumor that employee had brandished gun at anti-union coworkers); *Reed Seismic Co.*, 182 NLRB 158, 158 & n.2, 163-67 (1970) (overruling objection based on numerous rumors of threats of violence because the purported threats did not actually occur), *enforced*, 440 F.2d 598, 600-01 (5th Cir. 1971). Moreover, the false rumors here originated not with the good-faith reports of coworkers who had witnessed the events, but with the distorted claims of the Company. (*See* pp. 5-9, 23-31, 33-35.)

Q. B. Rebuilders, also cited by the Company (Br. 42-43), is similarly inapposite. 312 NLRB 1141 (1993). As in *ManorCare*, the relevant employee in

that case in fact made the threatening statements that subsequently were disseminated throughout the workforce. *Id.* at 1141-42.

Accordingly, none of the authority cited by the Company supports its meritless and overbroad contention (Br. 29-31, 42-44) that “it is the employees’ understanding of the relevant event which governs” in all circumstances (Br. 42)—even where, as here, their understanding rests on baseless rumors, born of a bogus narrative fabricated and fostered by their employer. Furthermore, to embrace the Company’s sweeping contention would perversely encourage employers in future representation elections to manufacture false rumors, or to facilitate the spread of such rumors, as a form of insurance against a union’s electoral victory.

C. The Board Did Not Abuse Its Discretion in Overruling the Company’s Objections Concerning the Anonymous Online Messages and Anonymous Silent Phone Calls

The Board reasonably found (A. 39-40) that the anonymous messages posted on the “Change Conway To Win” website and the anonymous phone calls received by driver Robles did not warrant setting aside the election. The Board appropriately determined (A. 39-40) that such conduct should be evaluated under the standard applicable to third-party misconduct, which, as the Board expressly recognized (A. 40), is an objective standard. *See PruittHealth-Virginia Park*, 888 F.3d at 1295; *AOTOP, LLC v. NLRB*, 331 F.3d 100, 104 (D.C. Cir. 2003). (*See also* p. 20.) Applying that “demanding” standard to the credited evidence, the

Board acted well within its “broad discretion” in determining that the online messages and silent phone calls were not “so aggravated as to create a general atmosphere of fear or reprisal rendering a free election impossible.” *Downtown Bid*, 682 F.3d at 112, 116-17 (quotation marks omitted). “Given the high level of deference [the Court] owe[s] to the Board’s assessment of the facts and of an election atmosphere,” *id.* at 117, and in light of the Court’s recognition that third-party conduct is accorded even less significance when, as here, it is anonymous, *id.*, *Amalgamated*, 736 F.2d 1559, 1568, the Board’s determination is entitled to the Court’s acceptance.

1. The anonymous website posts did not render a free election impossible

Regarding the anonymous online messages, which appeared on a website that employees “voluntarily chose to view” (A. 40), the Board first reasonably determined that they should be assessed under the third-party standard. As the Board explained, because the Union did not “create . . . or manage” the website or “control[]” its contents, the Company “failed to establish” that any union agent “published” the messages/website. (A. 39-40.)

The Board then evaluated the allegedly objectionable messages and properly found “insufficient evidence to prove” that they “had a reasonable tendency to influence the outcome of the election.” (A. 39-40.) As the Board observed, much of the messages’ contents “lacked specificity regarding the election,” or amounted

to mere “unkind,” “derogatory,” or “critical” comments regarding two drivers and a manager, or, more generally, regarding union opponents who allegedly spread lies about the Union. (A. 39-40.) (*See* pp. 9-10.) It is well established that such “[n]ame-calling” by third parties does “not warrant setting aside [an] election under either the Board’s precedents or [those of this Court].” *Downtown Bid*, 682 F.3d at 117; *accord Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 186 (2d Cir. 1989) (“rude [or] impolite talk, without more, is insufficient to justify setting aside an election”); *Beaird-Poulan*, 247 NLRB at 1373-74, 1376 n.22 (“abusive namecalling” or “verbal invective” directed at one anti-union employee and her husband, and anonymous graffiti containing “vulgar, insulting, and vicious” comments about others and their family members, “cannot be deemed as objectionable conduct”). Moreover, as the Board additionally found, the only “‘threat’ implicated by the [website] is that employees who made false statements about the Union would be named, or ‘outed.’” (A. 40.) Accordingly, the Board appropriately determined that those messages did not reasonably tend to “instill fear in employees so as to render a free election impossible.” (A. 40.)

There is no merit to the Company’s attempts to undercut the Board’s reasonable exercise of its wide discretion. The Board did not rely on the employees’ subjective reactions to the website to support its finding that the online posts were not objectionable conduct. (Br. 46-47, n.30.) As discussed, it relied on

the website's anonymous nature and the fact that its statements lacked any specificity regarding the election and constituted impolite criticisms at worst. Thus, the Board determined that, viewed objectively, mere rude comments from unnamed sources with no specific ties to the election did not warrant overturning the results.

The Company also contends (Br. 25, 31, 40, 46) that the Board erred in evaluating the anonymous website messages under the third-party standard because—although the Union undisputedly did not create, manage, or control the website—the Union purportedly “ratified” the relevant messages. Specifically, the Company claims that the Union’s lead staff organizer, Louie Diaz, “ratified the intimidating posts . . . through his silence,” merely because Diaz “accessed the website on multiple occasions, the first page of which prominently displayed the Teamsters’ logo,” and Diaz thereafter “took no action” to “remove the . . . logo from the [website]” or otherwise to “repudiate the [website’s] contents.” (Br. 25, 40.) The Company further claims that the Board “made no determination whether the [Union] through Diaz ratified” the pertinent online statements. (Br. 40.)

The Company’s ratification claims are wrong on every count. To begin, contrary to the Company, the Board considered and rejected the contention that the Union ratified the online messages based on Diaz’s inaction after having seen the Teamsters logo on the website. (A. 11, 39-40.) The judge, as adopted by the

Board, expressly acknowledged the factual linchpin of the Company's ratification argument—specifically highlighting that “the Teamsters logo appeared on [the website] and Diaz was aware of it and visited it on a few occasions.” (A. 39.)

Notwithstanding that express acknowledgment, the judge and the Board concluded that the Company “failed to establish that a union agent published the [website],” and that therefore, “the standards for evaluating conduct by a third party are applicable to objections based on the [website]” (A. 40)—thus rejecting the Company's ratification contention.

Further, the Company has presented no authority to support the notion that the mere presence of the Teamsters logo on the website would suffice to establish Diaz's ratification of the purportedly objectionable messages purely by virtue of his subsequent inaction. Indeed, relevant precedent consistently suggests the opposite. *See Amalgamated*, 736 F.2d 1559, 1564-65 (union not responsible for remark of organizing-committee member, although such members, inter alia, “wore pro-union insignia,” in part because “no evidence that the union had knowledge of *or in any way affirmed* [the] remark”) (emphasis added); *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 260-63 (8th Cir. 1993) (reporter did not act with apparent union authority in videotaping employees, although reporter “wore a union hat while filming,” and stood in close proximity to union banner and organizers, who “did not affirmatively disavow [reporter's] actions” to all

employees who witnessed them), *enforcing* 304 NLRB 770, 770-71 (1991); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 120 (6th Cir. 1992) (affirming Board’s position that “wearing union hats or other insignias does not establish union agency nor does it cloak the wearer with apparent union authority”).

Notably, moreover, the Company—who bore the burden of substantiating its objections (see pp. 19-20, 24)—failed to demonstrate that the allegedly objectionable messages had even been published during the times that Diaz visited the website. “[C]learly,” Diaz could not ratify “an event which had not yet occurred.” *Villanueva v. Brown*, 103 F.3d 1128, 1139 (3d Cir. 1997) (only a prior act may be ratified). If anything, the evidence suggests that the relevant messages had not yet been posted, since Diaz testified, without contradiction, that he accessed the website only in August 2014, and the messages are dated as having been posted between mid-September and October 2014. (A. 691-92, 696-97, 735-38.) Furthermore, even if the pertinent posts had been made, the Company failed to show that Diaz was aware of them. Diaz testified only that he visited the website on a few occasions and saw the logo on it (A. 39)—he was never asked whether, and did not testify that, he saw or otherwise knew about any of the allegedly objectionable statements. Because the Company “produced no evidence that [Diaz] was aware of [the] allegedly objectionable conduct . . . there is no support for the [Company’s] claim that the [Union] ratified [that conduct] by

failing to repudiate [it].” *Cornell Forge Co.*, 339 NLRB 733, 734 (2003); *accord Villanueva*, 103 F.3d at 1139 (party “cannot ratify an action that [it] is not aware of”); *Pierce Corp.*, 288 NLRB 97, 101 (1988) (rejecting as “ludicrous” suggestion that union “ratified” employee’s misstatements, “and thus conferred agency [on him],” by “fail[ing] to correct [those] misstatements of which [the union] had no knowledge”).

The sole case that the Company cites (Br. 40) on the topic of ratification—*Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988), where the Board found a union responsible for the unlawful secondary activities of picketers—does not support the Company’s position. Unlike here, the union in *West Bay* had knowledge of the picketers’ prior and ongoing unlawful picketing. *Id.* at 82-84. And in further contrast, the picket signs in *West Bay*—which bore the union’s name, and which the picketers used with the union’s specific knowledge—were the union’s property and “within [its] exclusive control.” *Id.* The Company here has not claimed, let alone shown, that the digital image of the Teamsters logo that appeared on the website was within the Union’s exclusive control.

The Company is mistaken in suggesting (Br. 32, 40) that the Board’s rejection of the Company’s ratification argument is subject to “de novo” review. Indeed, the very case that the Company cites as support for that suggestion, *Browning-Ferris Indus. of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir.

2018), itself makes clear that, although the Board’s interpretation of the common law of agency is subject to de novo review, “the Board’s application of the common law to the facts of a particular case”—for example, as here, determining whether the factual record establishes that a union agent ratified the conduct of others—is entitled to the Court’s acceptance so long as it reflects a choice between “two fairly conflicting views.” *Id.* at 1206-08; *accord Overnite Transp.*, 140 F.3d at 265.

2. The anonymous silent phone calls did not render a free election impossible

The Board also did not abuse its discretion in finding that the anonymous silent phone calls to Robles would not objectively evoke “a reasonable perception of a threat.” (A. 40.) *See Coca-Cola Bottling Co.*, 273 NLRB 444, 449 (1984) (“telephone calls . . . where no one said anything at all” would not evidence a threat). As the Board aptly found, “there is nothing to establish who initiated the calls,” and “[n]o evidence, aside from timing, ties the . . . calls to the election.” (A. 40.) *See Equinox*, 883 F.3d at 939-40 (Board properly overruled objection “[i]n the absence of . . . evidence” that would establish any “connection . . . between [the purported misconduct] and the election”); *Amalgamated*, 736 F.2d 1559, 1568 (anonymous conduct that “may not even be related to the union, the plant, or the election at all” deserves the littlest weight); *Beaird-Poulan*, 247 NLRB at 1371, 1373 (“anonymous telephone calls in which nothing was said,” placed to “one of

the principal employee opponents of the [union],” if credited, would not establish objectionable threats attributable to union or its supporters, or other objectionable conduct).

In addition to the lack of evidence tying the calls to the election, the Board also found that the evidence that the Company did muster about these calls was “inconsistent.” (A. 40.) As the Board observed, Styers testified that “it was Victor Cruz who received the calls,” and driver Leonard Loya testified that “the calls to Robles were [supposed to have contained] obscenities.” (A. 40; A. 499-500, 657.) The Board also noted that “[h]ad there been a reasonable perception of a threat,” it was “hard to believe” that Robles and Styers “thought the best course was to take no steps to identify who was making that threat.” (A. 40.) In making that observation, the Board was not, contrary to the Company’s claim (Br. 46-47, n.30), “ground[ing]” its findings on Robles and Styers’ subjective reaction, but was instead explaining how a reasonable person, when faced with a threat, would react. The Board’s overruling of an objection premised on vague and inconsistent testimony was entirely proper.

The Company erroneously suggests (Br. 46) that the record compelled the Board to conclude that the anonymous silent phone calls to Robles were related to the election since—in addition to the timing of the calls as noted by the Board (A. 40)—Robles was “the sole recipient” of such calls and “the only statutory

employee . . . addressed in the ‘Outing the Rats’ [website] post.” (Br. 46 n.29.) To begin, as a matter of logic, the fact that the record evidence regarding silent phone calls solely concerns Robles does not establish that Robles was the “sole” employee to receive such calls. And given the calls’ total lack of content and unknown origin, any employee might receive them for any number of reasons completely unrelated to one’s job or to any union-organizing activity. Moreover, the Board acknowledged (A. 39) the undisputed fact that Robles was named in the online post, but that fact, in conjunction with or as an express component of the consideration of timing, does not compel the inference that the calls were connected to the election—to suggest otherwise is, in effect, to presuppose such a connection.

D. The Company’s Insubstantial Objections Come No Closer to Warranting a New Election Simply Because the Vote Was Close

The Company repeatedly invokes (Br. 28-30, 36, 44) the closeness of the vote, but a close vote may be “simply an indication of divided views among the employees,” and is “insufficient to require the rerun of an election.” *PruittHealth-Virginia Park*, 888 F.3d at 1289, 1296-97 (upholding certification where one-vote swing could have changed result); accord *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 261, 268 (4th Cir. 2000) (same, holding “there is . . . no presumption against the validity of a closely contested election”). Moreover, the closeness of the tally does not relieve the Company of its heavy burden of satisfying the

heightened third-party-conduct standard here. *See Lamar Co., LLC*, 340 NLRB 979, 980 (2003) (third-party standard applies “even where . . . there [is] a one-vote electoral margin”). And even if electoral misconduct may merit “particular consideration” (Br. 28-29) in the context of a close election, insubstantial objections, as here, remain insubstantial. *See PruittHealth-Virginia Park*, 888 F.3d at 1296-97 (“[z]ero plus zero equals nothing,” and “[i]f there has been no misconduct,” then closeness of the vote is irrelevant). Indeed, even when reviewing objections far more substantial than those in the instant case, this Court has upheld an election in which “a one-vote swing out of 200 votes cast could have changed the results,” notwithstanding that the election surely was “flawed when viewed against the ‘laboratory conditions’ ideal.” *Amalgamated*, 736 F.2d 1559, 1564-69.

In short, the Union “garnered a majority of the votes in the election,” and the Board reasonably “found that the allegations of objectionable conduct were meritless.” *PruittHealth-Virginia Park*, 888 F.3d at 1297. “That is the end of the matter.” *Id.* The Court should therefore affirm the Board’s decision to certify the Union as the employees’ bargaining representative.

CONCLUSION

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

Respectfully submitted,

/s/ Elizabeth Heaney

ELIZABETH HEANEY

Supervisory Attorney

/s/ Michael R. Hickson

MICHAEL R. HICKSON

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-1743

(202) 273-2985

PETER B. ROBB

General Counsel

ALICE B. STOCK

Associate General Counsel

DAVID HABENSTREIT

Acting Deputy Associate General Counsel

National Labor Relations Board

December 2019

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

XPO LOGISTICS FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 19-1097 &
)	19-1125
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its proof brief contains 11,020 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

 /s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 19th day of December, 2019

STATUTORY ADDENDUM

STATUTORY ADDENDUM

TABLE OF CONTENTS

National Labor Relations Act, 29 U.S.C. § 151, et seq.

Section 7.....	ii
Section 8(a)(1).....	ii
Section 8(a)(5).....	ii
Section 9(a)	ii
Section 9(c)	iii
Section 9(d)	iii
Section 10(a)	iv
Section 10(e)	iv
Section 10(f).....	iv

THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides:

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 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees

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

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

* * *

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

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . .

(B) . . . 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.

* * *

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

* * *

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

* * *

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

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

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding 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 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. . . . 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 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 court a written petition praying that the order of the Board be modified or set aside. . . . 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 . . . 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.

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

XPO LOGISTICS FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 19-1097 &
)	19-1125
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2019, 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 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.

/s/David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 19th day of December, 2019