

**ORAL ARGUMENT SCHEDULED FOR FEBRUARY 21, 2020**  
**Nos. 19-1097, 19-1125**

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

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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*

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

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**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

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

**(A) PARTIES AND AMICI**

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

**(B) RULINGS UNDER REVIEW**

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

**(C) RELATED CASES**

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

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

s/Joshua L. Ditelberg

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Joshua L. Ditelberg

**CORPORATE DISCLOSURE STATEMENT**

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

**STATEMENT REGARDING JOINT APPENDIX**

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

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**GLOSSARY OF ABBREVIATIONS**

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

## **JURISDICTION**

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

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

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

## **ISSUES PRESENTED**

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

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

### **STATUTES INVOLVED**

Pertinent statutory provisions are set forth in the Statutory Addendum.

### **STATEMENT OF THE CASE**

#### **I. Procedural History**

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

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

#### **Objection No. 1**

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

### Objection No. 2

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

### Objection No. 3

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

### Objection No. 4

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

### Objection No. 5

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

### Objection No. 6

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

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<sup>1</sup> This Objection was withdrawn at the hearing. JA-420.

At hearing, Con-way introduced evidence regarding the following incidents in support of its Objections:

\* Con-way employee organizer and Teamsters agent Placencia threatened labor consultant Camarena with a knife at ULX on October 7, 2014 -- reports of which were widely disseminated among eligible voters, and which reasonably intimidated employees to not oppose the Teamsters;

\* coercive messages -- including referring to specific employees who openly opposed the Teamsters as “rats,” and subjecting them to harassment -- were posted on a “Change Conway [sic] To Win” internet blog ratified by the Teamsters; and

\* an eligible voter in the representation election who openly opposed the Teamsters received intimidating cell phone calls approximately twice a day from about October 9, 2014 through the October 23, 2014 election, and which the employee described as harassing.

After a hearing before ALJ Eleanor Laws sitting as a hearing officer with respect to the Objections, on November 5, 2015, ALJ Laws recommended overruling XPO’s Objections. On December 18, 2015, XPO filed timely exceptions to the ALJ’s recommendations. The NLRB adopted the ALJ’s overruling of XPO’s Objections on August 27, 2018.

Because direct review of an election certification is unavailable under the NLRA, XPO refused to bargain with Local 63, resulting in the Teamsters filing an unfair labor practice charge on September 12, 2018 in Case No. 21-CA-227312. On April 23, 2019, the NLRB issued its Decision and Order, reported at 367 NLRB No. 120, finding that XPO had failed to bargain with the Union in violation of Sections 8(a)(1) and 8(a)(5) of the Act. Thereafter, XPO timely filed the instant appeal.

## **II. Facts**

### **A. The Knife Incident Between Placencia And Camarena**

#### **1. It Is Undisputed A Knife Incident Occurred**

It is undisputed there was a knife incident between driver Placencia and labor consultant Camarena. On October 7, at about 10:10 a.m. or 10:15 a.m., Camarena went to the ULX dispatch office so he could do “ride-alongs” with drivers to answer questions regarding union representation. JA-356-358.

At this time, Steve Roman, a ULX freight operations supervisor whose primary responsibility is to assign the drivers’ daily start times, schedules, routes, and equipment, was in his chair at the dispatch window marked “Will Call,” routing the drivers. JA-552-553, 556-557, 563, 573-574, 739. Camarena was standing to the left of where Roman was seated. JA-366. No one was sitting in the other chair or standing in front of the other computer terminal at the dispatch counter. JA-366-367. Camarena conferred with Roman about possible routes for ride-alongs that day. JA-356-357.



Camarena first saw Placencia at about 10:30 a.m. when Placencia came through the door from the loading dock into the break room.<sup>2</sup> JA-357-358, 743. At about 10:40 a.m., Placencia approached the dispatch window where Roman was sitting. JA-358, 574-575, 742. Roman and Placencia discussed where Placencia would be working and the equipment he would use. JA-574.

This discussion went on for about a minute, at which point Roman saw driver John Cabrera walk past the break room table closest to the dispatch window and exit out the break room door leading to the dock. JA-575-577, 589, 614, 743. After Cabrera exited the break room, Roman and Placencia continued talking briefly about Placencia's day. JA-577.

At about 10:42 a.m. or 10:43 a.m., Placencia was still at the dispatch counter in front of the dispatch window on the break room side of the window, with his backpack on the counter.<sup>3</sup> JA-577-578. Camarena was to Roman's immediate left in front of the same window. JA-577, 581. Camarena and Placencia were about six (6) feet apart looking at each other through the open window. JA-360. Placencia

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<sup>2</sup> Placencia clocked in by 10:30 a.m., as his time card reflects. JA-168, 244, 722, 731. Cabrera similarly testified he arrived at work at about 10:30 a.m. at the same time as Placencia, and clocked in at 10:30 a.m., as his time card reflects. JA-260, 296, 732, 759.

<sup>3</sup> The ALJ, adopted by the Board, erred in finding that Roman testified Placencia's backpack was on a table while he was at the dispatch window. JA-28. Roman testified Placencia's backpack was on the counter at the dispatch window. JA-577-578.

said to Camarena, “What’s up?” and “Good morning.” Camarena responded, “Good morning.” JA-359.

Placencia then asked Camarena what he was doing on the dispatch side. Camarena answered he was going to do some ride-alongs that day to answer any questions the drivers might have. *Id.* Placencia said, in a sarcastic tone of voice: “Well I have a lot of questions. I seem pretty confused.” He asked Camarena, “Why don’t you ride with me?” *Id.* Camarena responded he would let Placencia know when he would ride with him, but that it was not in his plans for that day. JA-359-360. Placencia was persistent — he again said, in a sarcastic and aggressive tone, “Why don’t you ride with me? Come on. I’m confused. You need to ride with me.” JA-360. Camarena said he would let Placencia know in the future when he would ride with him. *Id.*

Placencia reached down to his pocket or the side of his cargo shorts and pulled out a black knife, which was closed, and put his elbow on the counter extending forward away from his body at a 45 degree angle. JA-579-580. Placencia was holding the closed knife in his right hand pointing it towards Camarena. JA-580, 586. While still holding the knife in his right hand, Placencia opened the knife blade by clicking it with his thumb in a jerking motion; the knife made a popping sound as it sprung open. JA-360, 398, 580, 586, 616-617. The blade was pointed towards Camarena, who observed it was about four (4) inches in length. JA-360, 394-398,

411. With the knife continuing to point towards Camarena, Placencia looked straight at him with a smirk on his face and said, “Why don’t you go with me? You don’t have to be afraid. Nothing’s going to happen.”<sup>4</sup> JA-581, 586-587.

There is no job-related reason for a ULX employee to come to the dispatch counter with his work knife and to open it. JA-608. Moreover, almost all of the other ULX drivers carry box cutters at work, not knives. JA-609. Placencia gave no explanation at hearing regarding why he approached the dispatch counter with a knife in his hand. Cabrera likewise testified that Placencia never told him why he did so. JA-290.

Roman saw Camarena move his head and shoulders back, reacting like he did not know what Placencia was doing.<sup>5</sup> JA-583. Roman looked at Camarena; Camarena looked like he was shocked. JA-582. Camarena was scared and “discombobulated” — during his 10 years working as a labor consultant, no employee or anyone else connected with an NLRB election campaign had ever previously pulled a knife or other weapon on him. JA-361, 368-369, 413-414. He

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<sup>4</sup> When Placencia stared at Camarena with the knife pointing towards Camarena, Camarena heard Placencia asking him twice if he was scared. JA-361.

<sup>5</sup> When Camarena informed third party labor consultant Edward Echanique on October 8 or 9 that Placencia had brandished a knife at him, Echanique observed that Camarena, by his gesture of leaning back, was taken aback by the fact that Placencia had brandished a knife at him. JA-343-345.

did not know if Placencia was going to try to jump over the counter and stab him, or if Placencia was going to try to throw the knife at him.<sup>6</sup> JA-361. Roman also was shocked because he has never witnessed any employee, or anyone else, brandish a knife like Placencia did, nor has this ever occurred at ULX or any other place where he worked. JA-587, 610.

After pointing the knife blade at Camarena and making the statements described above, Placencia closed the knife with both hands, then snapped it open with his thumb a second time so that the blade was again pointed at Camarena, and repeated the same statements to Camarena while looking directly at him. JA-581-583. This time, Camarena responded by saying, “That’s not a knife. This is a knife.”<sup>7</sup> JA-361, 404, 583-584. As Camarena said this, he reached behind his back with his right hand and brought an imaginary knife forward to about chest level. JA-362, 404, 584.

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<sup>6</sup> The height of the dispatch counter from the floor is four (4) feet. JA-557, 562, 739, 742. The depth of the counter on each side of the dispatch window is two (2) feet, for a total counter depth of four (4) feet. JA-557-558, 562. The open space in the dispatch will call window in October 2014 was about 36 inches wide and about 19 to 20 inches high. JA-563-564, 742.

<sup>7</sup> In doing so, Camarena was referencing a scene from the movie, “Crocodile Dundee.” JA-362. While Camarena had not seen the movie in years, when Placencia brandished the knife at him, he connected to the scene in the movie in which Crocodile Dundee diffused a situation where he was being assaulted with a knife. Camarena did this because he was scared and, as he told Roman after the incident, change the tone in the room. JA-362-364, 588.

After Camarena instinctively reacted in this manner to Placencia repeating his threatening actions, Camarena and Placencia looked at each other and Placencia said, “oh, that’s from a movie,”<sup>8</sup> after which Placencia closed the knife and put it in his pocket. JA-364, 583-585. Camarena estimates that, during this confrontation, Placencia held the knife out with the blade open pointing at him for about 30 seconds. JA-405, 411.

Placencia then put the knife away, he grabbed his backpack, turned around, and put it on the table closest to him, *i.e.*, the one nearest to the exit door from the break room out to the dock. JA-585. Shortly thereafter, Roman saw Cabrera come into the break room through the door leading from the dock, turn to his right, and get a cup of water at the water dispenser along the wall. JA-589-590, 611, 614, 743. As Roman saw Cabrera do so, he heard the back door directly behind him open and shut.<sup>9</sup> When Roman turned around, he saw driver Sal Navarro walk through the door into the dispatch office and go to the desk in the back of the dispatch office where

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<sup>8</sup> Placencia’s statement to Con-way about the knife incident, his hearing testimony, and Cabrera’s hearing testimony confirm that Placencia commented that Camarena’s statement and gesture in reaction to his knife were *the same* as from the knife assault scene in the movie, “Crocodile Dundee.” JA-169-171, 243, 266, 722.

<sup>9</sup> The door makes a noise when it is opened and shuts. JA-611.

Navarro began matching the delivery receipts or bills to the manifests.<sup>10</sup> JA-591-592, 615, 740-741.

From the time Placencia began speaking with Camarena at the dispatch counter until the time Camarena left the dispatch office and headed into the front office, no one else was in either the break room or the office besides Roman, Camarena, and Placencia. JA-366-368, 588-589. During this time period, neither driver Elvis Martinez nor Cabrera was in the break room, nor was Navarro in the dispatch office.<sup>11</sup> JA-366-368, 590-591, 593. Roman had a clear view of the whole break room except for the back quarter where the men's restroom is located and, even in that back area, he could see part of the third table and the vending machines. JA-613, 618.

The overall mood at the counter during the knife incident was not a joking one. JA-402-403, 587-588. It did not appear that Placencia was joking, and neither Placencia nor Camarena laughed. JA-587. Placencia was not a practical joker at work. JA-601. At no time either before or during the knife incident was anything discussed between Camarena and Placencia or between Camarena and any other

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<sup>10</sup> The distance from the desk chair to the break room side of the glass windows dividing the dispatch counter between the dispatch office and the break room is at least 17 feet. JA-333-336, 560-561, 740.

<sup>11</sup> As Roman testified, he saw Martinez clock in and leave the break room to go to the dock *before* Placencia began speaking with Camarena at the dispatch counter. JA-593.

Con-way employee about, *e.g.*, Camarena driving or going on a ride-along either to Santa Monica, Malibu, or Beverly Hills, or whether Placencia's route would offer Camarena the opportunity to see celebrities, girls, or women, or to be near the beach. JA-393, 606-607. Furthermore, contrary to the testimony of Placencia and Cabrera, at no time did either Roman or Camarena see Placencia's flashlight or see or hear Placencia empty the contents of his backpack onto the table in the break room or repack his backpack. JA-365-366, 600, 606-607.

After the knife incident, Camarena asked Roman if he had seen what occurred; Roman said yes. JA-369, 594. Camarena said he did not know Placencia and repeatedly asked if Roman knew Placencia and whether Placencia was going to come after him and do something. JA-594. Roman saw Camarena was nervous and scared. Camarena kept saying he had a family and kids, and that he did not know whether Placencia was going to do anything. JA-595. Camarena told Roman he was going to prepare a statement and asked Roman if he also was willing to do so. Roman said he would. JA-369-370, 595.

Camarena then went to service center manager Paul Styers' office to tell him what happened. JA-370. Styers asked Camarena what was wrong; Camarena responded Placencia had just threatened him with a knife. JA-370, 621. Camarena told Styers Roman also was present. JA-621-622. Styers observed that Camarena was shaken up, afraid, and upset; Camarena told Styers he could not believe someone

would do that. JA-622. Camarena also told Styers he was not feeling well. JA-370-371. Styers asked Camarena to sit and to calm down, and called supervisor Rick Licon to his office. JA-371, 622.

Licon arrived within a few minutes, and Camarena described what happened. JA-371, 622. Camarena finished describing the incident and said he wanted to call the police. JA-623. Camarena repeated that he was not feeling well, and said he needed to call his wife. JA-371-372. Styers and Licon asked Camarena to calm down, and whether he wanted some water. JA-623. Camarena said no, and indicated he wanted to call the police, his wife, and his boss. *Id.*

As Camarena was about to leave Styers' office, Styers told Camarena that, based upon Con-way's policies, he required a written statement from him. *Id.* Camarena said he was going downstairs and would prepare a statement for to Styers. JA-371, 624, 656. Styers could see Camarena remained very upset. JA-623.

Thereafter, Styers interviewed Roman, who confirmed that Placencia had pulled a knife, stared at Camarena, and asked if he was scared. Styers called Kimball Hinds, a Con-way human resources generalist. JA-625-626. Hinds told Styers to get statements from Camarena and Roman, which he did. JA-625-626, 745, 749.

Camarena went to the safety training room downstairs and called his wife and Lupe Cruz, the CEO of Cruz & Associates. JA-372-373. Camarena described the incident to Cruz and said he felt very uncomfortable and scared. JA-373. Camarena



also told Cruz he was going to prepare a statement, and that he intended to file a police report. *Id.* Camarena prepared his statement on his laptop and emailed it to Cruz about noon. JA-374-378, 733. Camarena then again called his wife and had lunch, which he finished by about 2:30 p.m. JA-377-378.

Because Styers could see Camarena was still upset, Styers asked him if he could drive himself to the police station. JA-632. Camarena said no. *Id.* Styers offered to have Licon drive Camarena to the station if he was concerned about his safety. *Id.* Camarena answered he would like to have Licon give him a ride, that he was not feeling well and did not feel comfortable to drive. JA-377-379, 633. Camarena and Licon then left Styers' office. JA-633.

Licon drove Camarena to the Newton Division of the Los Angeles Police Department.<sup>12</sup> An officer filled out an investigative report, including an entry that Camarena made the report at about 3:45 p.m. JA-381, 387, 734.<sup>13</sup>

## **2. The Board's Findings Regarding The Knife Incident Are Unsupported By Substantial Evidence**

The ALJ's findings and conclusion -- adopted by the Board -- that Placencia's, Cabrera's, and Navarro's contradictory versions of the knife incident were more plausible and credible than Roman's and Camarena's, and her decision to credit Placencia's version of what occurred, are clearly erroneous and unsupported by substantial evidence.

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<sup>12</sup> The ALJ, as adopted by the Board, found that Camarena's "waiting" before he went to the police station "leads to the conclusion that Camarena was not in fear for his life because the incident did not occur as he alleged." JA-037. This finding ignores that: (1) Camarena reasonably wanted to first speak with his wife and his boss about what had occurred and how to proceed; (2) at Styers' insistence, Camarena had agreed to provide a statement to Con-way, which Camarena initially needed to have reviewed by Cruz. As to his fear, Camarena emphasized in his statement: "I am a family man with three wonderful kids at home, at this time I have great concern over my well being and getting home safely to my family. I cannot and will not tolerate being threatened with my life while on the job." JA-733. Camarena returned to work the next day after learning Placencia would not be at the ULX facility. JA-401.

<sup>13</sup> Placencia was arrested and terminated from employment for workplace violence. The criminal case against him later was dismissed. As noted by the Board, it granted the parties' motion to sever and ultimately dismiss pursuant to a settlement agreement claims that Con-way unlawfully discharged Placencia and filed criminal charges against him. By its terms, the dismissal does not affect Con-way's election objections. JA-011, 029-030, 786-791.

According to Placencia, during his entire interaction with Camarena, he was standing at a table in the break room 10 to 15 feet from, and sideways to, the dispatch counter, holding his knife and flashlight in his left hand.<sup>14</sup> JA-179, 182, 238-241. For this entire interaction, he also placed Cabrera sitting at the table in front of him rather than standing at the counter. JA-183-184, 238, 242, and he placed Navarro at his work station at the window in the dispatch office on the other side of the dispatch counter.<sup>15</sup> JA-184.

Cabrera testified that he and Placencia walked up to the dispatch counter around the same time and went to different windows -- Placencia to the window where Roman was and Cabrera to the window where Navarro was located. JA-263-264, 288-290. Cabrera further testified, contrary to Placencia's version, that the first time he saw Camarena was when he approached the dispatch window, after Cabrera and Placencia joked about all of Placencia's personal belongings in his backpack; and that Cabrera did not sit down at any of the tables in the break room from the time he entered the break room to the time he went to the dispatch counter, but that

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<sup>14</sup> At first Placencia testified his knife and flashlight were in his right hand, closer to the dispatch office, but then changed his testimony to state they were in his left hand, furthest away from the dispatch office. JA-240-243.

<sup>15</sup> Although Placencia testified that Martinez was sitting at the table to his left, and another driver -- Hector Sanchez -- was at the water dispenser, his written statement prepared nearer in time to the incident mentions neither Martinez nor Sanchez. JA-184, 241-242, 247-248, 722.

he stood the whole time. JA-261-263, 287, 293-294. Cabrera also confirmed, further contrary to Placencia's testimony, that Placencia -- while he was at the dispatch window -- faced the open window with his face, chest and front part of his body towards the dispatch window and held his knife in his right hand and his flashlight in his left hand.<sup>16</sup> JA-265, 290-291.

According to Navarro, when he returned to his work station in the dispatch office after a 9:30 a.m. employee meeting, Camarena already was talking to Placencia and Cabrera who both were standing at the dispatch counter at the window in front of Navarro's work station, with Cabrera one (1) to two (2) feet behind Placencia.<sup>17</sup> JA-311, 328-329, 757.

Further contrary to Placencia's and Cabrera's version of events, Navarro testified that, about a minute later, he went to the rear of the dispatch office to match up the manifests with their delivery receipts and was still sitting at the desk facing the cubbies when he heard Camarena say, "That's not a knife, this is a knife" and someone mention the "Crocodile Dundee" movie. JA-313-315, 330-332, 335.

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<sup>16</sup> Additionally, Cabrera makes no mention in his statement (JA-759) of seeing Martinez, and testified that he did not recall seeing Martinez between when Cabrera went to the dispatch window and when Placencia went to the dispatch window and when Camarena made his "Crocodile Dundee" reference. JA-294-295.

<sup>17</sup> Cabrera testified that he did not recall Placencia walking up to the window on the right side of the counter where Navarro's work station is located at any time while Cabrera was at the counter. JA-292.

Navarro also contradicted Cabrera by testifying he saw Placencia at the dispatch window with his knife in his left hand.<sup>18</sup> Navarro's statement makes no mention of either Martinez or Sanchez being present in the break room during Placencia's interaction with Camarena. JA-757-758.

Moreover, ULX drivers Gerardo Lopez and Victor Cruz testified that shortly after the October 7 knife incident, Cabrera told them that Placencia exposed and showed his knife to Camarena with the blade open.<sup>19</sup> JA-435-437, 534-535. Teamsters representative Diaz testified that Cabrera and Navarro are members of the employee Union organizing committee. JA-689-690. As such, they clearly have an interest in purporting to corroborate the testimony of their fellow organizing committee member, Placencia.<sup>20</sup>

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<sup>18</sup> At first, Navarro testified that he could not recall if he could see Placencia at the window because Camarena and Roman were blocking his view. JA-315-316, 334-336. However, when further questioned by the GC, he testified he saw Placencia with his knife in his left hand, although he could not see Placencia's chest, only his right shoulder, and he could not see what Placencia did with his knife. JA-320, 336-337.

<sup>19</sup> The Board further erred in failing to draw an adverse inference from the GC's and the Teamsters' failure to recall Cabrera as a witness to rebut Lopez's and Cruz's testimony.

<sup>20</sup> Thus, the ALJ's conclusion, adopted by the Board, that "[t]estimony from current employees tends to be particularly reliable because it goes to their pecuniary interests," JA-030, is erroneous.

These substantial contradictions in the testimony of key witnesses undermine the ALJ's findings -- adopted by the Board -- that during the knife incident, Cabrera was in the break room and Navarro was in the dispatch office; that Placencia's knife was closed; and that he did not brandish his knife at Camarena in a threatening manner.

The ALJ, as adopted by the Board, also found that Roman's account of what occurred on October 7 is flawed. JA-036. When Roman prepared his written statement shortly after the knife incident, the initial version prepared on October 7 only mentioned what actually happened among Camarena, Placencia, and Roman. JA-745. On October 8, early in the morning, Cabrera informed Styers that he had witnessed what happened and that Placencia did not threaten Camarena. JA-650-651. Later that same day, Hinds interviewed Roman and conveyed by email to human resources director Kevin Huner that night:

Steve [Roman] told me that employee Johnny Cabrera was also in the break room when Juan first came in, but left right away. From his position in dispatch he could not be certain that Johnny was not still in the room down by Rick Licon's office or by the bathrooms. He just knows he did not see him during the incident.

JA-751-752. As a result, it appears Roman subsequently was asked to address in his written statement whether Cabrera or anyone else was present. On October 9, at about 5:16 p.m., Roman added to this statement, in relevant part, that:

When all this began only myself and Luis [Camarena] and Juan [Placencia] had been present, John Cabrera was in the break room

shortly before but had left the break room heading to the dock. No other employees or office staff were present in the dispatch area or break room.

JA-746. Thus, while the need for Roman to address in his statement who was present appears to have been prompted by Cabrera's communication on October 8, the substance of what Roman added was based merely upon what he saw. As Roman testified, his speaking with Styers did not help him create his statement of what actually happened. JA-610.

The Board then erroneously found that Roman's original statement (JA-745) was written to dispel the notion that the knife incident was done in a friendly manner. JA-036. But Roman's and all other statements were requested by Conway to document what happened, consistent with what typically occurs in a workplace investigation. To the extent Roman wrote that he did not think Placencia snapped the knife out in a friendly manner -- but that it was more so an intimidation or threat -- Roman had written that he was surprised by what Placencia had just done and did not understand why Placencia acted in such a manner. From there, the ALJ inexplicably made the leap of concluding that Roman would only have written his statement in this fashion if the knife incident was actually committed in jest. *Id.*

The Board further erroneously failed to find that Camarena's quoting the "That's not a knife, this is a knife" line from "Crocodile Dundee" and mimicking part of the scene by pretending to pull out an imaginary knife from behind his back

only makes sense if Placencia's knife blade was open and exposed, *i.e.*, that there was a knife brandished. Camarena reacted in the manner he did to defuse the situation. If Placencia's knife was closed, there would have been no reason whatsoever for Camarena to react in this manner.

### **3. The Board Found That Reports Of The Knife Incident Were Widely Disseminated Among Voters In The Union Election**

The ALJ, as adopted by the Board, found that “[i]t is undisputed that after Placencia's arrest, the knife incident was widely discussed among drivers at the ULX facility. The record is replete with testimony that this was a common topic among drivers at the time.” JA-039.

Employee discussions regarding the October 7, 2014 event -- which occurred up to the October 23 election -- centered around drivers conveying to other eligible voters that Placencia threatened Camarena (understood to be Con-way's labor “consultant” or “advisor”) with a knife. Every or virtually every ULX driver was aware of the incident. JA-435-437, 444, 458-462, 479-481, 497-498, 515-519, 521, 533-536, 539-542.

Cabrera -- like Placencia, a member of the Union organizing committee (JA-689-690) -- was a notable source of disseminating that Placencia had pulled out a knife and displayed it to Camarena. JA-433, 534-535, 537-538. Although Cabrera claimed Placencia was just playing, in discussing the event, other drivers did not understand the incident to be humorous. JA-499, 503, 521, 534-535, 539, 542.



#### **4. Placencia Is A Teamsters Agent**

Because the ALJ, as adopted by the Board, concluded that Placencia never threatened Camarena with a knife, there is no Board finding of whether Placencia was a Teamsters agent. JA-039. Substantial evidence establishes that Placencia was a Union agent.

Placencia began organizing drivers at ULX and other Con-way locations to support the Teamsters in the beginning of 2013. JA-143-147, 208-209. In addition to directly soliciting other drivers, Placencia routinely participated in Teamsters-sponsored organizing strategy calls with drivers from other Con-way facilities, including outside California. JA-148. Placencia played a significant role in establishing the Teamsters employee organizing committee at ULX, and then at Con-way's San Fernando Valley, Santa Fe Springs, Fontana, Santa Maria, and Ventura facilities. JA-147, 689.

In the beginning of 2014, Placencia started obtaining Union authorization cards from other ULX employees. When Diaz -- the Teamsters' lead staff organizer for the ULX election -- distributed cards to Placencia and the other employee organizers, he instructed them what he needed entered on the cards for them to be valid, and told them to meet privately with ULX employees to solicit signed cards. JA-130-131, 150-151, 215, 695, 698-699.

Placencia was one of the primary conduits through which the Diaz and the Teamsters communicated back and forth with ULX employees eligible to vote in the representation election. JA-132-135, 212, 215-216. *See also* JA-023.

**B. Intimidating Statements Were Posted On The “Change Conway To Win” Blog**

Between the filing of the Teamsters election petition on September 11, 2014 and the election on October 23, intimidating statements were posted on a “Change Conway [sic] To Win” internet blog. JA-735-738.

On the website, immediately below the title of “Change Conway To Win,” the following description appears: “This is a forum for Conway employees to communicate and educate each other on the importance of becoming a Union company. This forum is open to any Conway employee who is interested in working towards a secure future and for our Unionized brothers and sisters to help us learn the importance of a Union in the workplace.” JA-488-489, 528-530, 735.

Although the ALJ, as adopted by the Board, concluded that the Teamsters did not create and/or manage blog, she found that Diaz -- the Teamsters’ lead outside organizer for the ULX election -- had visited the “Change Conway To Win” blog “on a few occasions.” JA-039. *See also* JA-692, 696. In doing so, Diaz indisputably observed on the first page of the website the Teamsters logo with the words “INTERNATIONAL BROTHERHOOD OF TEAMSTERS” inscribed around the logo wheel. JA-697. *See also* JA-039. The Teamsters logo on the “Change Conway

To Win” website was viewed every day by ULX employees between September 11 and October 23, 2014. JA-424-425, 491-494, 506, 528. It is undisputed that Diaz never took any action to remove the Teamsters logo from the blog, nor otherwise disavowed it. JA-697-698.

An entry entitled “Outing The Rats at ULX” was posted on the website on September 19, 2014 at 2:43 p.m. The post reads:

Paul Styers and his henchmen have done it again. They are out spreading lies about the union. Steyers’ [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. Stating that with a union in place, we would be paying for ABF and YRC pensions, that ABF and YRC drivers can come to Conway and dovetail into the roster with their company seniority. They need to be a little more original, these are old, tired, and frankly just lazy lies. We don’t expect any less of Paul Styers, he is a known liar and bigot. He’s 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. As we continue to push forward with our efforts we 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!

JA-735. Six (6) driver witnesses at hearing read the post between September 11 and the October 23, 2014 election. JA-425-426, 448-452, 471-472, 492-493, 511, 526-527. Driver Clemente Fuentes was aware that other ULX drivers accessed the blog

because they discussed it with him. JA-478-479. Driver Mario Cruz similarly testified that he many other eligible voters accessed the website. JA-519-520.

The “Outing The Rats at ULX” entry indicated there were 82 comments regarding the post. JA-735-736. *See also* JA-039. Two (2) of those comments referred to Fuentes as follows:

Richard said...

Clemente Fuentes from ulx, I thought you were a man you sorry ass punk.

October 10, 2014 at 3:07 PM

Jaime said. . .

Clemente pay your child support that you’re complaining about and don’t be ignorant saying you will pay someone else’s pension, you stupid fool.

October 12, 2014 at 5:52 PM

JA-537. Other ULX eligible voters saw these comments, and understood them to refer to Fuentes -- who is the only “Clemente Fuentes” and “Clemente” at ULX. JA-427-428, 433-434, 494-495, 529-532.

A number of witnesses felt threatened by communications on or related to the “Change Conway To Win” website. Driver Lopez initially learned of the “Outing The Rats at ULX” post when he received a hyperlink to it on his cell phone. JA-430-431. He understood the hyperlink to be directed at him and outing him as a “rat.” JA-430. As a result, Lopez’ reaction when he first read the hyperlink was that it was

a personal threat. JA-432. He also felt it was not right that an employee's full name, such as driver Ramsey Robles', was included in the post. *Id.*

When driver Mario Cruz saw Robles' full name in the "Outing The Rats at ULX" post, he was concerned about whether his own name similarly was referenced, and felt relieved when it was not. JA-511-512.

Driver Victor Cruz's reaction to seeing Robles' full name in the "Outing The Rats at ULX" post was that he was frightened about expressing opposition to the Teamsters in any way because he was scared his own name would appear on the website, and that someone might hurt him or his family. JA-527-528, 543. He also was concerned that the name of his brother, who works for Con-way, would be included on the website. JA-540. Victor Cruz testified that other employees were afraid to speak out as well because they feared their names were going to appear on the blog. JA-543. *See also* JA-040.

**C. Robles Received Harassing Calls After Being Named In The "Change Conway To Win" Blog**

Shortly after the "Outing The Rats at ULX" post appeared on the website on September 19, 2014, driver Robles began to receive silent calls on his personal cell phone. JA-454-455. The caller would not say anything when Robles answered. JA-454-455, 500. Robles received such calls two (2) to three (3) times per day, every day, for about two (2) to three (3) weeks. JA-455. The calls ceased occurring prior to the October 23 election, and Robles has not received any similar calls since then.

JA-457. Robles testified that he may have received the calls because of the election. *Id.* He told another driver, Leonard Loya, that he was scared of the calls because he did not know who was calling him. JA-504-505.

### **SUMMARY OF ARGUMENT**

As the Court recognizes, “[t]he Board has drawn a firm line that an election cannot stand where the results do not reflect the employees’ free choice.” *ManorCare of Kingston PA, LLC v. NLRB*, 823 F.3d 81, 85 (D.C. Cir. 2015) (citation omitted). Objections that election conditions fell short of that standard are to be given particular consideration where -- as here -- the outcome turned on a single vote.

It is undisputed that on October 7, 2014, there was a knife incident between driver Juan Placencia -- a Teamsters agent -- and Con-way’s third party labor consultant, Luis Camarena. The Board adopted the ALJ’s findings that “[i]t is undisputed that after Placencia’s arrest, the knife incident was widely discussed among drivers at the ULX facility. The record is replete with testimony that this was a common topic among drivers at the time.” JA-039.

Employee discussions of the knife incident -- which occurred right up to the October 23 election -- centered around drivers conveying to each other that Placencia threatened Camarena. Every or virtually every ULX driver was aware of the event. Indeed, driver John Cabrera -- like Placencia, a member of the Union organizing

committee -- was a notable source of dissemination regarding the incident. It was widely understood by drivers to not have been an expression of humor by Placencia.

The Board repeatedly has held that threats of violence constitute grounds for setting aside an election -- regardless of whether the source is a party to the election (*e.g.*, the Teamsters or a Union agent) or a non-party (*e.g.*, a non-agent employee).<sup>21</sup>

Here, the Board's conclusion that Placencia did not threaten Camarena with a knife is unsupported by substantial evidence. Importantly, even if the Court were to defer to the Board's findings regarding the incident, a determinative portion of the eligible voters understood Placencia -- a prominent Union supporter -- to have brandished a knife at Con-way's labor "consultant" or "advisor." Whether election-related conduct is coercive is assessed under an objective standard, and it was reasonable for ULX employees to have comprehended that Teamsters opponents would be subject to threats of violence.

The widespread understanding of such a threat is more than enough to set aside an election -- much less one with a razor-thin vote margin. As the Board has held, the source of fear and disorder is not the ultimate focus of whether employee free choice was exercised. Rather, "[t]he significant fact is that such conditions

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<sup>21</sup> In evaluating whether election conditions fostered employee free choice, interference emanating from a party is given greater weight.

existed and that a free election was thereby rendered impossible.” *Al Long, Inc.*, 173 NLRB 447, 448 (1969).

The Board’s treatment of the knife incident fails to grapple with the understanding of the event that the voters were communicating among themselves.<sup>22</sup> *See* JA-039. The Board found that the knife incident was discussed extensively among voters in the run-up to the election. Moreover, substantial record evidence establishes that a determinative number of ULX employees understood the event to have been serious and threatening. The Board erred by failing to find that -- at a minimum -- the incident “create[d] a general atmosphere of fear and reprisal rendering a free election impossible.” *NLRB v. Downtown BID Services Corp.*, 682 F.3d 109, 116 (D.C. Cir. 2012).

While the knife incident constitutes election interference sufficient to require the result be set aside, its intimidation was augmented by: (1) an employee blog whose coercive content was ratified by the Teamsters; and (2) repeated anonymous cell phone calls to an employee known to oppose the Teamsters, who communicated his fear of reprisals to another driver.

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<sup>22</sup> “Between the idea  
And the reality  
Between the motion  
And the act  
Falls the Shadow.” T.S. Eliot, “The Hollow Men.”



## STANDING

XPO has standing to petition for review under 29 U.S.C. § 160(f) because it was respondent in the NLRB proceedings and is aggrieved by the DO under review.

## STANDARD OF REVIEW

If the NLRB's decision to certify a union "is consistent with its precedent and supported by substantial evidence," the Court will enforce the Board's order. *Downtown BID Servs.*, 682 F.3d at 112.

However, the Court does not "merely rubber-stamp NLRB decisions." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991). It has vacated the NLRB's order when the Board's decision has "no reasonable basis in law or when the Board has failed to apply the proper legal standard." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-446 (D.C. Cir. 2004). Similarly, an NLRB order is unenforceable when its application of law to facts is arbitrary or otherwise erroneous. *See Sutter E. Bay Hospitals v. NLRB*, 687 F.3d 424, 437 (D.C. Cir. 2012).

The NLRB's factual determinations are afforded deference only if supported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-488 (1951). "Substantial evidence" is more than "a mere scintilla" of evidence. *Pacific Micronesia Corp. v. NLRB*, 219 F.3d 661, 665 (D.C. Cir. 2000). The Board "must present on the record 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted). Moreover, the

Board “is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.” *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 378 (1998).

With regard to agency relationships, *e.g.*, as to Placencia and Diaz here, “[t]he content and meaning of the common law is a pure question of law that [the Court] review[s] *de novo* without deference to the Board.” *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1206 (D.C. Cir. 2018).

## ARGUMENT

### **I. The Election Should Be Set Aside Because It Was Held In An Atmosphere Preventing Employee Free Choice**

#### **A. Under The Board’s Alternative Legal Standards, Employee Free Choice Was Prevented**

The NLRB “has drawn a firm line that an election cannot stand where the results do not reflect the employees’ free choice.” *ManorCare*, 823 F.3d at 85 (citation omitted). It long has espoused that:

in election proceedings it seeks ‘to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.’ *Where for any reason the standard falls too low the Board will set aside a union election and direct a new one.* Unsatisfactory conditions for holding elections may be created by ... a general atmosphere of fear and confusion caused by a participant or by members of the general public. Our function, as we see it, is to conduct elections in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.

*Sewell Manufacturing Company*, 138 NLRB 66, 69-70 (1962), *supp. by* 140 NLRB 220 (1962) (footnotes omitted) (emphasis supplied). *See also NLRB v. Schwartz Bros., Inc.*, 475 F.2d 926, 930 (D.C. Cir. 1973).

Thus, regardless of the source of inhibiting conduct, if “laboratory conditions” fostering employee free choice have been undermined, the results of a Board election cannot be given effect. *See, e.g., Pacific Coast M.S. Industries Co., Ltd.*, 355 NLRB 1422, 1443 (2010) (noting “it does not really matter who is culpable for misconduct ... if the misconduct created an atmosphere which interferes with the employees’ free and untrammled right to choose a bargaining representative, the election should be set aside.”) (citation omitted). *See also NLRB v. L & J Equip. Co.*, 745 F.2d 224, 239 (3d Cir. 1984) (“[T]he Board must consider the impact of all the events ... regardless of the source of those acts.”).

The Board has developed different tests for whether an election should be overturned -- described below -- depending on whether a party’s or a non-party’s conduct is at issue.

### **1. The Board’s Party Interference Test**

The NLRB will set an election aside if conduct attributable to a *party* (*e.g.*, here, the Teamsters or its agents, Placencia and Diaz) “affected the employees in the voting unit and had a reasonable tendency to affect the outcome of the election.” *Delta Brands, Inc.*, 344 NLRB 252, 252 (2005).

In its assessment of election interference, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *See, e.g., Taylor Wharton Division*, 336 NLRB 157, 158 (2001) (citation omitted).

## **2. The Board's Third Party Interference Test**

Where election interference is attributable to *third parties*, *e.g.*, employees who neither are agents of the employer or union, the NLRB will overturn an election if conduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (citations omitted). *See also Downtown BID Services*, 682 F.3d at 116.

The ultimate inquiry is whether there is sufficiently coercive conduct, regardless of its source. *See also Al Long*, 173 NLRB at 448 (“The significant fact is that such conditions existed and that a free election was thereby rendered impossible.”).

In evaluating third-party conduct, the Board considers: (1) the nature of the threat; (2) whether the threat was directed at an entire unit; (3) the extent of the dissemination of the threat; (4) whether the person making the threat was capable of carrying it out (and whether employees likely acted on that fear); and (5) whether the threat was made or “rejuvenated” near the time of the election. *See ManorCare*, 823 F.3d at 85 (citations omitted); *Westwood Horizons*, 270 NLRB at 803 (citations omitted).

### **3. The Impact Of Interference In A Close Election**

As the vote in the election here was 22-20, JA-011, the switch of a single vote would have changed the result.<sup>23</sup> The Board routinely has set elections aside where interference could have affected a small, determinative number of voters. *See, e.g., Robert-Orr Sysco Food Services*, 338 NLRB 614, 615 (2002) (“Objections must be carefully scrutinized in close elections”); *Smithers Tire*, 308 NLRB 72, 73 (1992); *Buedel Food Products Co.*, 300 NLRB 638, 638 (1990); *Bristol Textile Co.*, 277 NLRB 1637,1638 (1986); *RJR Archer, Inc.*, 274 NLRB 335, 336 (1985); *Sonoco of Puerto Rico*, 210 NLRB 493, 493-494 (1974); *Steak House Meat Co.*, 206 NLRB 28, 29 (1973).<sup>24</sup>

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<sup>23</sup> In a tie vote scenario, the union is not certified. *See* NLRB Casehandling Manual, Part 2 (Representation Proceedings), Section 11340.4.

<sup>24</sup> *See also Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 578 (D.C. Cir. 2015) (“The objections were serious, not only because of their content,

#### 4. Placencia and Diaz Were Teamsters Agents

##### (i) *Placencia*

The NLRB expressly declined to find whether Placencia was a Teamsters agent. JA-039. The Court either should determine *de novo* that he was a Union agent as a matter of common law, or remand the issue to the Board with appropriate instructions to determine Placencia's agency status.

The Board applies common law agency principles to determine whether an individual is a union or employer agent for election purposes. Under those principles:

an agency relationship may be found based on either actual authority (the employer's express or implied manifestation of authority to the individual), or apparent authority (the employer's manifestation of the individual's authority to a third party). *See, e.g., Toering Electric Co.*, 351 NLRB 225, 236 (2007); and *Wal-Mart Stores*, 350 NLRB 879, 884 (2007). Moreover, even in the absence of actual or apparent authority, a principal may be bound by the actions of an agent as if originally authorized where the principal has subsequently 'ratified' those actions by its silence and/or affirmative conduct. *See Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988).

*One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237, 1240 (2010).

In the union election context, "[c]ourts have concluded that under the NLRA, agency principles must be expansively construed, including when questions of *union* responsibility are presented." *Local 1814, International Longshoremen's Assoc. v.*

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but also because the election was so close."); *North of Mkt. Senior Servs. v. NLRB*, 204 F.3d 1163, 1170 (D.C. Cir. 2000); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 884 (D.C. Cir. 1988).

*NLRB*, 735 F.2d 1384, 1394 (D.C. Cir. 1984) (citations omitted) (emphasis in original).<sup>25</sup> The Board’s agency determinations only are entitled to deference if “reasonable, consistent with its prior decisions, supported by substantial evidence, and consistent with common law determinations on similar facts.” *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1998) (citations and internal quotations omitted).

The Board is guided by the *Restatement (Second) of Agency* in assessing apparent authority:

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988), citing *Restatement (Second) of Agency* § 27 (Comment a), 1958.

*Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003). See also *IBEW, Local 557, AFL-CIO (Newton Heat Trace, Inc.)*, 343 NLRB 1486, 1498

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<sup>25</sup> See also *NLRB v. Katz*, 701 F.2d 703, 708 (7th Cir. 1983) (finding that under NLRA “the rules of agency are liberally construed”); 29 U.S.C. § 152(13), (“[I]n determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”)

(2004); *Great American Products*, 312 NLRB 962, 963 (1993); *Ozark Auto. Distribs v. NLRB*, 779 F.3d 576, 580 (D.C. Cir. 2015).

Where -- as here -- an employee is held out by a party as “a conduit for transmitting information to the other employees,” NLRB has found an actual or apparent agency relationship. *Cooper Hand Tools*, 328 NLRB 145, 145 (1999) (citation omitted). *See also Bristol Textile Co.*, 277 NLRB 1637, 1637 (1986) (holding that although union “did not designate [employee]” as its representative, a “well-known pro-union employee” used “as a conduit between the Union and employees, who perceived him as the Union’s representative” was agent); *Pastoor Bros. Co.*, 223 NLRB 451, 453 (1976) (finding employee organizing committee members to be union agents where used them to solicit authorization cards, employees viewed them as union’s in-plant representatives, and committee drafted handout approved by union’s legal counsel before distribution to employees).<sup>26</sup>

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<sup>26</sup> *See also Local 1814*, 735 F.2d at 1397 (citing *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244-1245 (4th Cir. 1976) (“[T]he acts of a voluntary in-plant committee that tainted the election atmosphere were held attributable to the union, notwithstanding the absence of authority for those acts;” Fourth Circuit found agency relationship because “in the eyes of the other employees were the representatives of the union on the scene and the union authorized them to occupy that position.”); *PPG Industries, Inc. v. NLRB*, 671 F.2d 817, 819 (4th Cir. 1982) (finding agency relationship where union organizer requested in-plant committee members to solicit support, distribute union literature, transport membership cards to the union’s office, and generally to serve as the union’s “eyes and ears” in the plant).



At a minimum, the Teamsters invested Placencia with apparent authority regarding election-related conduct. He was held out by the Union to ULX employees as a primary conduit regarding organizing and election matters, and reasonably was understood to be one of the key Teamsters “eyes and ears” at the facility.<sup>27</sup> Placencia was one of only six (6) employees on the ULX employee Teamsters organizing committee, and began organizing at the facility well over a year before the election. He solicited authorization cards from employees, and was a central channel between Diaz, the Union’s staff organizer, and ULX employees regarding transmission of election-related information. He routinely participated in Teamsters telephone organizing strategy conferences. He acknowledged that it was he and other employees -- not the Teamsters staff -- who were communicating with employees about unionization in California and other parts of the country. *Supra*, pp. 22-23.

(ii) *Diaz*

The intimidating posts on the “Change Conway To Win” blog were ratified by Diaz, the Teamsters’ staff organizer. It is undisputed that Diaz accessed the website on multiple occasions, the first page of which prominently displayed the Teamsters’ logo. Diaz took no action to repudiate the blog’s contents. *Supra*, pp.

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<sup>27</sup> In contrast, the Board made no findings that, *e.g.*, Diaz ever organized on-site at ULX or directly communicated with ULX employees who were not part of the Union organizing committee. *See, e.g.*, JA-38-40.

23-24. *See also* JA-039. Although the ALJ, as adopted by the Board, found that “[t]he Union did not create and or manage the blog,” *id.*, the NLRB made no determination whether the Teamsters through Diaz ratified it. JA-39-40. *But see West Bay Maintenance*, 291 NLRB at 83 (finding “failure to take sufficient steps to repudiate” conduct establishes ratification).

As to Diaz as well, the Court either should conclude *de novo* as a matter of common law that he ratified the intimidating posts on behalf of the Teamsters through his silence -- or remand the issue to the Board for determination.

#### **5. The Election Should Be Set Aside Under Either Board Test Of Interference**

The election should be set aside under either the NLRB’s party or third party interference tests. Indeed, the same result is warranted even if the Court were to accept the Board’s conclusion that Placencia did not threaten Camarena with a knife.

(i) *The Board’s determination that Placencia did not threaten Camarena is unsupported by substantial evidence*

The NLRB’s findings that Placencia did not threaten Camarena during the knife incident are unsupported by substantial evidence. *Supra*, pp. 15-21.

There are numerous material, substantial, and fundamental contradictions in the testimony of Placencia, fellow Teamsters organizing committee members Cabrera and Navarro. Among other things, their version of the events vary significantly as to their respective locations in the break room and dispatch office

during the October 7, 2014 incident; what they each were doing at the time; in which hand was Placencia holding his knife; and which other employees were present in the break room during the incident. These contradictions show that Placencia, Cabrera, and Navarro fabricated their testimony. Indeed, drivers Gerardo Lopez and Victor Cruz testified that Cabrera told them Placencia had displayed his knife to Camarena with the blade open, not closed. As members of the employee Union organizing committee, Cabrera and Navarro were not disinterested witnesses as the Board would have it. JA-036.

For Camarena's undisputed statement, "That's not a knife, this is knife," and accompanying gesture mimicking the knife-brandishing scene in "Crocodile Dundee" to make any sense at all, the knife in Placencia's hand had to be open with the blade exposed just like in the scene from the movie. As the Board's findings regarding how the knife incident transpired are patently unreasonable, they are unsupported by substantial evidence.

- (ii) *Even if the Court accepts the Board's conclusion that Placencia did not threaten Camarena, the knife incident was understood by ULX employees as a threat*

Importantly, even if the Court accepts the NLRB's conclusion that Placencia did not threaten Camarena, the Board's failure to set aside the election as a result of the knife incident errs as a matter of law.

The ALJ -- as adopted by the Board -- concluded that the incident was in jest, and because there was no threat, “any objection based on this allegation lacks a factual foundation.” JA-039. But the Board’s determination fails to recognize that under its own precedent, *it is the employees’ understanding of the relevant event which governs*.

In *ManorCare*, the Court emphasizes that the Board does not follow its own precedent where it “insists that any comment relayed with less than stenographic accuracy does not count as dissemination.” 823 F.3d at 86. Indeed, even if humor were to be initially attached to an event, *if such humor is diluted over the course of dissemination, what counts is the employees’ comprehension of the incident. Id.* (citing *Q.B. Rebuilders, Inc.*, 312 NLRB 1141, 1142 (1993)).

Thus, whether election interference occurred:

‘is not the actual intent of the speaker or the actual effect on the listener,’ but ‘whether a remark can reasonably be interpreted by an employee as a threat.’ *Smithers Tire*, 308 NLRB 72. A threatening statement, ‘even one uttered in jest,’ can nonetheless convey a risk to another of serious harm. ... [A]lthough [the speakers] may have intended their remarks in jest, *some employees interpreted the remarks as threats*, and it was reasonable for them to do so.

*Id.* at 87-88 (emphasis supplied).

As the Court observed in *ManorCare*, “the Board has not hesitated to ‘set aside elections where, as here, threats have been made *or disseminated to voters whose ballots might have been determinative.*’” *Id.* at 88 (citation omitted)

(emphasis supplied). When, in *ManorCare*, the Board “did not even acknowledge this precedent, let alone distinguish it,” the Court overturned the election.

Here, the ALJ -- as adopted by the Board -- found that the knife incident was widely discussed among all or virtually all ULX drivers. JA-039. The record establishes that at least a determinative portion of eligible voters understood Placencia -- a prominent member of the Teamsters employee organizing committee -- to have brandished a knife at Con-way’s labor “consultant” or “advisor.” They did not understand Placencia to have acted in jest. *Supra*, p. 21.

Because the Board’s analysis of the knife incident is not premised upon how a determinative segment of ULX employees understood the event (*i.e.*, as a threat of violence directed at a key source of Teamsters opposition, such that employees reasonably would have comprehended that opposing the Union could result in a similar threat), it fails as a matter of law.

(iii) *As Placencia was a Teamsters agent, the party election interference test should apply*

As noted *supra*, p. 22, the NLRB made no finding regarding whether Placencia was a Teamsters agent. Because substantial evidence establishes that he was a Union agent, *supra*, pp. 22-23, the party election interference test should be applied to the knife incident. Under the party test, as understood by ULX employees the knife incident was serious, it was widely disseminated, it was not disavowed by the Union, and it was continually discussed among voters up until the election.

Further, the election margin was a single vote. Consistent with the Board's own threat-of-violence decisions, *infra*, the event patently "affected the employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands*, 344 NLRB at 252.

- (iv) *Even under the third-party election interference test, employee understanding of the knife incident as a threat warrants setting aside the election*

Even when applying the third party election interference test, the Board regularly finds threats of violence create a general atmosphere of fear and reprisal sufficient to overturn an election. *See, e.g., Robert Orr-Sysco Food Services, LLC, supra*, and cases cited therein; *Stannah Stairlifts, Inc.*, 325 NLRB 572, 572-573 (1998); *Westwood Horizon Hotel, supra*; *Smithers Tire, supra*. *Electra Food Machinery, Inc.*, 279 NLRB 279, 279-280 (1986); *RJR Archer, supra*; *Steak House Meat Company, supra*.

The Board's third party interference test for overturning election is easily met here: (1) the knife incident was comprehended by ULX employees to be a threat of violence; (2) it was directed at a labor consultant understood by ULX employees to have been brought in by Con-way to inform them of facts and arguments opposing the Teamsters<sup>28</sup>; (3) the threat was disseminated widely; (4) employees understood

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<sup>28</sup> Threats directed at management representatives are contrary to the NLRA where, as here, statutory employees reasonably may conclude that they could be

Placencia to have brandished a weapon; and (5) the threat was discussed right up to the election. *Supra*, p. 21.

- (v) *The Board erroneously failed to find that intimidating statements on the “Change Conway To Win” blog and harassing calls to Robles contributed to an atmosphere preventing employee free choice*

While the knife incident alone warrants setting the election aside, an intimidating message entitled “Outing The Rats at ULX” which labeled employees opposed to the Teamsters as “rats” was posted during most of the critical period prior to the election on the “Change Conway To Win” website. The blog was widely viewed by ULX employees, and ratified by the Union. Employees reasonably would fear retaliation if they spoke out against or otherwise demonstrated opposition to the Teamsters. Moreover, specific employees targeted in the intimidating post and comments were identified by full name, thereby ensuring their “outing” to all readers. *Supra*, pp. 23-26.

Further, it appears the message of intimidation adopted by the Teamsters achieved its likely result based upon daily disturbing anonymous telephone calls directed at Ramsey Robles, one of the individuals named in the blog, which began

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subject to similar threats. *See, e.g., SEIU District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1061 (2003).

shortly after his name appeared in the “Outing The Rats at ULX” post.<sup>29</sup> Robles shared his concern about the harassing calls with another driver. *Id.*

The NLRB failed to follow its own precedent regarding election interference resulting from these events -- which are undisputed to have occurred. The Board erroneously focused its findings upon the alleged subjective reactions of employees -- not whether objectively the type of conduct implicated would have a reasonable tendency to interfere with employee free choice.<sup>30</sup> *See, e.g., Picoma Industries*, 296 NLRB 498, 499 (1989) (“The hearing officer’s analysis ignores well-established Board precedent that ‘the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.’ Rather, the test is based on an objective standard.”) (citation omitted).

Under an objective legal standard, the intimidation wrought by the “Change Conway To Win” website and the anonymous calls to Robles reasonably contributed to interfering with employees’ uncoerced choice in the election, as well as to the

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<sup>29</sup> The ALJ’s finding (JA-040) -- adopted by the Board -- that no evidence aside from timing ties the calls to the election overlooks the fact that Robles, the sole recipient, was the only statutory employee in the voting unit addressed in the “Outing the Rats” post. *Supra*, pp. 23-27.

<sup>30</sup> Thus, the ALJ’s findings -- adopted by the Board -- inextricably are grounded in findings that the “Change Conway To Win” blog did not cause any particular witness to change his mind about how he voted; that no witness heard of any other employee changing his or her mind based on the blog; that the statements and comments in the blog did not instill fear in employee witnesses; and that Robles supposedly did not feel scared or threatened by the anonymous calls. JA-038-040.



creation of a general atmosphere of fear and reprisal rendering a free election impossible. The Court either should so conclude or should remand the issue to the Board to conduct an assessment based upon the appropriate test.

### **CONCLUSION**

For the foregoing reasons, XPO's Petition for Review should be granted; the NLRB's Cross-Application for Enforcement denied; the Board's DO in Case No. 21-CA-227312 vacated; and the Board's certification of Local 63 as bargaining representative in Case No. 21-RC-136546 set aside.

Respectfully submitted,

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December 20, 2019

**CERTIFICATE OF COMPLIANCE  
WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Joshua L. Ditelberg, counsel for Petitioner and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that the foregoing Final Principal Brief of XPO Logistics Freight Inc. is proportionately spaced, has a typeface of 14 points or more, and contains 11,164 words.

s/Joshua L. Ditelberg

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JOSHUA L. DITELBERG

December 20, 2019

**CERTIFICATE OF SERVICE**

I, Joshua L. Ditelberg, counsel for Petitioner and a member of the Bar of this Court, certify that on December 20, 2019, I caused a copy of the foregoing Final Principal Brief of XPO Logistics Freight Inc. to be filed with the Clerk through the Court's CM/ECF system. I further certify that all participants in the case who are registered CM/ECF users will have service accomplished through that method.

s/Joshua L. Ditelberg

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JOSHUA L. DITELBERG

**STATUTORY ADDENDUM**

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## **5 U.S.C. § 706 – Scope of Review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## **29 U.S.C. § 158 – Unfair labor practices**

(a) UNFAIR LABOR PRACTICE BY EMPLOYER 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 157 of this title; ....
- (5) to refuse to bargain collectively with the representatives of its employees, subject to the provisions of section 159(a) of this title.

**29 U.S.C. § 160 – Prevention of unfair labor practices****(e) Petition to court for enforcement of order; proceedings; review of judgment**

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) Review of final order of Board on petition to court**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court

of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), 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.