ORAL ARGUMENT SCHEDULED FOR FEBRUARY 21, 2020

Nos. 19-1097, 19-1125

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

XPO LOGISTICS FREIGHT, INC.
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT/CROSS-PETITIONER

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

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

JOSHUA L. DITELBERG
SEYFARTH SHAW LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606-6448
(312) 460-5000

MARSHALL BABSON
SEYFARTH SHAW LLP
620 Eighth Avenue
New York City, NY 10018-1405
(212) 218-5500

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GLOSSARY OF ABBREVIATIONS

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

SUMMARY OF ARGUMENT

Both the Court and the Board recognize that an election cannot stand where it does not reflect the free choice of the voting unit. As the election here was decided by a single vote, the impact of objectionable conduct is amplified.

It is undisputed that there was a knife incident between Placencia and XPO's primary labor consultant, Camarena. Critically, even if the Board is correct that Placencia did not actually threaten Camarena, there is no dispute that the knife incident was widely discussed among the voting unit right up to the election. These discussions centered around drivers conveying to each other that Placencia threatened Camarena.

The widespread understanding among the voting unit of a threat of violence against Camarena -- regardless of its source or veracity -- warrants that the election be set aside. Although the GC argues that XPO should not benefit from rumors which the Board found were prompted by its conduct, the Board has a different means of addressing an employer that prevents election "laboratory conditions." The Board may issue a bargaining order where such an employer causes an election to be set aside, and makes the holding of a fair rerun election unlikely. No such allegation was made here.

While the knife incident constitutes election interference sufficient to require a new election be held, its intimidation was underscored 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.

ARGUMENT

I. The Knife Incident Warrants That The Election Be Set Aside

The GC does not dispute that Placencia displayed a knife with a four (4) inch blade. BB 5-6. The Board concedes that "[w]hat occurred next is the subject of much dispute." JA-028. There *was* a knife incident -- it was not fabricated out of whole cloth. For the reasons set forth in XPO's Principal Brief 5-23, 33-44, the Board's determination that Placencia did not threaten Camarena is unsupported by substantial evidence and contrary to applicable law. Although the Board is afforded broad discretion in representational matters, its determinations that do not satisfy such a standard must be denied enforcement. *Id*. 31-32.

Even if the Court accepts the Board's conclusion that Placencia did not threaten Camarena, the Board fails to recognize that *it is the employees' understanding of the relevant event which governs*. *Id.* 42-44.

The GC asserts that XPO's "embrac[ing]" Camarena's and Roman's "fabricated narrative" was the "genesis of the false rumor that circulated among the drivers" that Placencia threatened Camarena with a knife. BB 33. But even if so, the record establishes that at least a determinative portion of the voting unit

employees understood Placencia -- a prominent member of the Teamsters organizing committee -- to have brandished a knife at XPO's primary labor consultant. They did not understand Placencia to have acted in jest. *See* Principal Brief 22-23, 42-44.

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

As the Board has held, the source of conduct that undermines employee free choice is not the ultimate focus in assessing an election's validity. Rather, "[t]he significant fact is that such conditions existed and that a free election was rendered impossible." *Al Long, Inc.*, 173 NLRB 447, 448 (1969). If a free election did not occur, the cause is irrelevant. Neither of the Board's tests for setting aside an election because employee free choice was thwarted (Principal Brief 34-36) contains an exception for employer involvement.

This is understandable because the Board -- as endorsed by the Supreme Court -- has a different means of addressing an employer that prevents election "laboratory conditions." In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-616 (1969), the Supreme Court affirmed the Board's ability to issue a bargaining order where an

employer causes an election to be set aside, and makes the holding of a fair rerun election unlikely.[1] No such allegation was made here.

The GC's bid (BB 35-36) to distinguish *ManorCare of Kingston, Pa, LLC v. NLRB*, 823 F.3d 81 (D.C. Cir. 2016) misses the mark. The GC claims that the decision turns on employees "actually" making threatening statements, which the Board did not find occurred here. It does not. The Court was clear that "[t]he Board has drawn a firm line that an election cannot stand where the results do not reflect the employees' free choice." *Id*. at 85 (*citing General Shoe Corp.*, 77 NLRB 124, 127 (1948)). The Court goes on to consider whether certain statements or actions objectively can be reasonably interpreted as threats. "'The test is *not* the actual intent of the speaker or the actual effect on the listener[.]'" *Id*. at 87 (*quoting Smithers Tire & Auto. Testing of Texas, Inc.*, 308 NLRB 72, 72 (1992)) (emphasis in original).

Here, rumors that Placencia indeed threatened Camarena with a knife were widely disseminated within the voting unit right up to the election. See BB 8

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[1] The GC (BB 34) cites *United Builders Supply Co.*, 287 NLRB 1364 (1988) and *Beaird-Poulan Div.*, 247 NLRB 1365 (1980) as providing that an election cannot be set aside as a result of an employer objection to conditions to which it contributed. But in a subsequent case, *Pacific Coast M.S. Industries Co., Ltd.*, 355 NLRB 1422 (2010), the Board held that an employer "correctly invoke[d] the Board's long-held the laboratory conditions requirement, asserting that it does not really matter who is culpable for misconduct, but if the misconduct created an atmosphere which interferes with the employees' free and untrammeled right to choose a bargaining representative, the election should be set aside." *Id.* at 1443 (*citing Al Long, Inc.*, *supra*).

("[R]umors spread among the drivers that Placencia had threatened Camarena, or that he may have done so."). These conveyances "actually" happened. Consistent with ManorCare, neither the intent of the persons conveying the rumors nor their actual effect is relevant. What is determinative is whether it was reasonable for voting unit employees to believe that a prominent Union supporter and member of its organizing committee threatened XPO's primary labor relations consultant with a knife. As ManorCare underscores, here the rumors of serious threatening conduct were "disseminated widely enough to have affected the outcome of the election." *ManorCare*, 823 F.3d at 86.

The bottom line inquiry is not limited to actual threats themselves but encompasses "dissemination" of what is understood to be threatening and communicated by whatever source. *Id.* at 88. Thus, even if -- as the GC portrays (BB 37) -- "where, as here, the [employees'] understanding rests on baseless rumors," the critical point is that as the GC concedes they *did* have such an understanding. Threats of violence are a hallmark basis for setting aside an election. *See* Principal Brief 45. *See also SEIU District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1061 (2003) (finding threats directed at management representatives are contrary to the NLRA where statutory employees reasonably may conclude that they could be subject to similar threats).

The GC groundlessly argues (BB 32-33, *citing* 29 U.S.C. § 160(e)) XPO waived its contention that the election should be set aside because voting unit employees understood a threatening knife incident had occurred.

XPO plainly put before the Board the impact of the knife *incident* on the election regardless of the particular facts. JA-770, Exception No. 280 (objecting to finding that "[b]ecause the evidence shows Placencia never threatened Camarena with a knife, any objection based on this allegation lacks a factual foundation and [sic] recommend overruling it."); JA-772 (describing knife "incident" which was "widely disseminated among all or nearly all unit employees and caused them to reasonably fear for their safety and fear that they would be subjected to retaliation, retribution, and other reprisals if they did not support or vote for the Union"); JA-773-776 (addressing voting unit employee understanding of knife "incident"); JA-782 ("[T]his Reply Brief will address the Juan Placencia knife brandishing *incident, the dissemination of that incident to eligible voters and the effect of this incident and its dissemination on the election*.")(emphasis supplied); JA-784 ("[T]he record evidence clearly establishes that the October 7, 2014 knife brandishing *incident was widely disseminated among the eligible voters* within the two-week period before the October 23, 2014 election.")(emphasis supplied).

In response, the ALJ -- as adopted by the Board -- understood there to be an election objection based upon the *dissemination of the knife incident* apart from its

facts and separately addressed it: "The only other objection potentially related to Placencia is that the knife incident between him and Camarena was widely disseminated among drivers." JA-039. The GC's waiver argument lacks merit and should be rejected.

II. Intimidating Statements On The "Change Conway To Win" Blog And Harassing Calls To Robles Had A Reasonable Tendency To Undermine Employee Free Choice

The intimidating posts and comments from the "Change Conway To Win Blog" and the harassing anonymous telephone calls to Robles both had a reasonable tendency to interfere with employee free choice, and further warrant that the election be set aside.

The GC does not dispute that a message entitled "Outing The Rats at ULX" which labeled employees opposed to the Teamsters as "rats" was posted during most of the critical period leading up to the election on the "Change Conway To Win" website, and was widely viewed by ULX employees. BB 38. Specific employees targeted in the intimidating post and subsequent comments -- including being called "sorry ass punk" -- were identified by full name, thereby ensuring their "outing" to all readers. Principal Brief 24-28.

Likewise, it is undisputed that Robles -- the only employee in the voting unit called out in the "Outing The Rats at ULX" post -- began receiving daily anonymous telephone calls shortly after his name appeared. BB 44.

In holding that these events did not constitute election interference, the Board ignored its precedent and erroneously focused upon alleged subjective employee reactions rather than whether objectively the conduct would have a reasonable tendency to interfere with employee free choice. Principal Brief 46-47.[2]

The GC's claim (BB 39, 45) that the Board did not rely on alleged subjective employee reactions is belied by its actual findings:

- "Viewing the 'Change Con-Way' blog *did not cause any witness to change his mind* about how he voted in the election."
- "No witness heard of any other employee *changing his or her mind* about the election based on the blog."
- "While the comments were certainly derogatory and unkind, *I find they did not instill fear in employees* so as to render a free election impossible."
- Robles "did not feel scared or threatened by the calls."
- The ALJ, as adopted by the Board, characterized the targeted employees' "reactions" to the post and comments.

JA-039-040 (emphasis supplied). As the Board's conclusions regarding the impact of these events are grounded in improper analysis, they cannot stand. The issue should be remanded for an assessment consistent with Board law. Being "outed"

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[2] *See also 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).

as a "rat" is a classic threat in labor relations parlance, as is being termed a "punk." *See, e.g.*, *Fetzer Television, Inc.*, 129 NLRB 660, 669 (1960) (rats); *Frederick's Foodland Inc.*, 247 NLRB 284, 292 (1980) (punks). *See also United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257, 268 (7th Cir. 2009) (finding pilots who did not comply with union directives "found themselves the subjects of harassment that included 'rat lists[]'").

Further, the Court either should conclude *de novo* that Diaz -- an indisputable Union agent -- ratified the intimidating posts and comments on the "Change Conway To Win" blog, or remand the issue to the Board for determination. *See* Principal Brief 24-25, 40.

If the Union ratified the blog, the Board's party interference test applies and the election should be set aside because the posts and comments "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). *See also* Principal Brief 34-35. The GC (BB 10) does not dispute that "[m]any ULX drivers voluntarily chose to visit the [blog] and viewed the post and/or comments highlighted above during the timeframe between their publication and the representation election."

Contrary to the GC (BB 40-41), the relevant portions of the Board's Decision and Order (JA-039-040) nowhere address ratification under applicable standards of agency. The ALJ, as adopted by the Board, made stray findings that "the Teamsters

logo appeared on [the blog] and visited it on a few occasions." JA-039. The ALJ's agency determinations based on those and other facts was limited to that XPO "has failed to establish that a union agent *published*" the "Change Conway To Win" blog. JA-040 (emphasis supplied). Neither she nor the Board evaluated whether the Union *ratified* the blog.

Moreover, contrary to the GC (BB 43-44), in *Browning-Ferris Indus. v. California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), the Court was clear that it owes the Board's common law agency formulations no deference. *Id.* at 1206 ("The content and meaning of the common law is a pure question of law that we review *de novo* without deference to the Board."). As the Court explained, "[t]he 'two fairly conflicting views' standard applies to the Board's application of the common law to the facts of a particular case—which is a mixed question of law and fact. It does not extend to the Board's articulation of the common law, which is a pure question of law." *Id.* at 1208 (citations omitted). Here, as the Board *articulated no common law ratification formulation* and then purported to apply it to particular facts, the "two fairly conflicting views" standard is irrelevant.

Rather, the Court should hold that the Board erroneously failed to find that Diaz ratified the "Change Conway To Win" blog as a Union agent. There is no dispute that Diaz was a Union employee and its lead organizer at ULX. JA-687. He admits that he visited the blog and "could have" done so as many as five (5) times

prior to the harassing posts at issue, otherwise was "informed" about the blog, saw the prominent Teamsters logo and identification on the front page, and took no action to have it removed. JA-691, 696-698. *See also* JA-735-738.

Accordingly, Diaz ratified the blog by failing to repudiate its being held out to employees as a Union communication while reaping its benefits. Knowing full well that Union supporters were conveying the impression that the blog was affiliated with the Teamsters, and having ample time to put a stop to it, the Union cannot purport to bury its head in the sand and avoid responsibility for harassing conduct carried out in its name.

The GC's attempt (BB 43) to distinguish *West Bay Building Maintenance*, 291 NLRB 82 (1988) is unavailing. Rather, relying upon the Restatement of Agency (Second), the Board in *West Bay* was clear that a union becomes responsible for the conduct of non-employee supporters where it "was done or professedly was done on his account" and an "affirmance of an authorized transaction can be inferred from a failure to repudiate it." *Id.* at 83 (*citing* Restatement (Second) of Agency, §§ 82, 94). *See also One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237, 1240 (2010). Such was the case here.

While the GC argues (BB 42) that ratification is not possible because the specific harassing posts and comments occurred after Diaz admitted to viewing the blog, the Teamsters knew that the blog was being associated with the Union and did

nothing to repudiate it. The NLRA expressly provides that "[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." 29 U.S.C. § 152(13). The blog itself is a "transaction" under the Restatement of Agency, the Union ratified its existence, and is answerable for its contents.

With regard to the undisputed two (2) to three (3) anonymous telephone calls per day that Robles received for a couple weeks during the period leading up to the election (Principal Brief 28, 45; JA-040), the Board likewise improperly fails to find they would have a reasonable tendency to intimidate. *See, e.g.*, *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976) (finding anonymous telephone calls, even though not attributable to union, were "threats").

Further, the GC's assertion (BB 45-46) that the only evidence the telephone calls were related to the election was their timing -- itself significant -- is unfounded. The GC suggests that "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." BB 46. Of course it does. It is axiomatic that the Board is to act upon the evidence *in the record*[3], and the record evidence is that the *only* recipient

[3] "[T]he court can only consider the evidence contained in the record." *Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1175 n. 1 (D.C. Cir. 1998) (*citing* 29 U.S.C. § 160(e), (f)).

of harassing calls in the voting unit is the one person who recently had been referenced in an election-related blog post encouraging: "Out with the rats!" JA-039.[4]

III. The Impact Of Interference Is Amplified In A Close Election

The GC downplays that the election was decided by a single vote. BB 46-47. Contrary to the GC, XPO does not suggest that a close election -- in and of itself -- creates a "presumption" that the election was invalid. BB 46. Rather, it is self-evident that where an election turns on a single vote, the impact of interference is amplified. The Court and the Board hold that objections in close elections are to be carefully scrutinized, and interference considered especially serious. Principal Brief 36. Given the interference here, a valid election was not held and a new election should be conducted.

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[4] The GC (BB 47) cites *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559 (D.C. Cir. 1984) in which the Court declined to overturn an election where "if the challenges to ballots were all decided against the union, a one-vote sing out of 200 votes cast could have changed the results." *Id*. at 1569. However, the Court acknowledged that "the election at issue here was flawed when viewed against the 'laboratory conditions' ideal." *Id.* In *Amalgamated*, the alleged interference only was aimed at a small portion of the voting unit. *Id.* Here, in contrast, in addition to harassing conduct directed at particular employees who then told others about it, it is undisputed that "the knife incident was widely discussed among drivers at the ULX facility" as a whole. JA-039. The *entire* voting unit was affected.

CONCLUSION

For the foregoing reasons and the reasons set forth in XPO's Principal Brief, its 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,

s/Joshua L. Ditelberg

JOSHUA L. DITELBERG
SEYFARTH SHAW LLP
233 South Wacker Drive, Suite 8000
Chicago, IL 60606-6448
(312) 460-5000

MARSHALL BABSON
SEYFARTH SHAW LLP
620 Eighth Avenue
New York City, NY 10018-1405
(212) 218-5500

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 Reply Brief of XPO Logistics Freight Inc. is proportionately spaced, has a typeface of 14 points or more, and contains 3,282 words.

s/Joshua L. Ditelberg

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 Reply 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

JOSHUA L. DITELBERG