

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR REATIONS BOARD
DIVISION OF JUDGES
WASHINGTON D.C.**

XPO CARTAGE, INC.

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

**Cases 21-CA-150873
21-CA-164483
21-CA-175414
21-CA-192602**

**GENERAL COUNSEL'S RESPONSE TO ALJ'S ORDER
SETTING DISCOVERY SCHEDULE RE: RESPONDENT'S
NON-COMPLIANCE WITH SUBPOENA DUCES TECUM B-1-17682W5**

I. Introduction

Pursuant to Judge Dibble's Order Setting Discover Schedule, issued on March 16, 2020,¹ Counsel for the General Counsel (GC) submits this statement describing XPO Cartage, Inc.'s (Respondent) failure to respond to the document requests set forth in Subpoena Duces Tecum B-1-17682W5 (the November subpoena), issued by the GC on November 12, 2019.² The November subpoena requests various documents set forth in 24 separate paragraphs. To date, Respondent has not filed a Petition to Revoke the subpoena and, pursuant to Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board (the Board), any attempt to do so at this time would be untimely.

¹ In response to an inquiry included in that Order, Counsel for the General Counsel is available for the hearing proposed to begin at 9:00 a.m. Pacific Time on June 1, 2020 and continue each consecutive day thereafter until concluded at the U.S. Court House, 312 N. Spring Street, National Labor Relations Board, Suite 10150, Los Angeles, CA 90012.

² A copy of the Order Setting Discover Schedule, issued on March 16, 2020, and the GC's subpoena are attached as Exhibit 1 and 2, respectively.

II. Respondent Has Failed to Fully Respond to all of the Requests Contained in the November subpoena

Respondent has failed to fully respond to the following requests along with the corresponding paragraph numbers in the November subpoena:

1. Documents describing Respondent's brokering business for the period 1/11/15 to 9/1/17, including a description of what products and/or services were/are being brokered.

To date, Respondent has failed to respond to or produce any documents for this request.

2. For each product and service Respondent brokers, documents describing the following for the period 1/1/15 to 9/1/17:

- (a) The amount and source of revenue derived from each product and service being brokered
- (b) Customers to whom Respondent provided brokering services;
- (c) Personnel who service each product and service Respondent brokers, including their names and contact information;
- (d) Equipment used, including computers and software; and
- (e) Location of personnel.

To date, Respondent has failed to respond to or produce any documents for this request.

3. The name(s), address(es), telephone number(s) and email address(es) of (a) person(s) with knowledge of the documents requested in paragraphs 1 and 2.

To date, Respondent has failed to respond to or produce any documents for this request.

4. All contracts with businesses or individuals in which Respondent agreed to deliver goods in effect from 11/1/16 to 12/1/16.

To date, Respondent has failed to respond to or produce any documents for this request.

5. All earnings statements and settlement statements for all drivers working for Respondent from 11/1/16 to 12/1/16.

Respondent has provided documents which are partially responsive, in that they reflect the Microsoft Excel versions of “Vendor Pay Statement Reports” for three employees: Napoleon Gaitan, Jose Herrera, and Jose Lopez. Respondent provided Napoleon Gaitan’s “Vendor Pay Statement Reports” for the period of October 22, 2015, to December 20, 2016, and Jose Herrera’s and Jose Lopez’s “Vendor Pay Statement Reports” for the period of December 29, 2015, to June 21, 2016. This information is contained in three large separate Microsoft Excel files, one for each driver, in which all of their respective “Vendor Pay Statement Reports,” also called settlement statements, for the stated time period are compiled. The Microsoft Excel format in which it was sent also can be freely altered within the program. However, these documents are not fully responsive for this request as the request calls for “all earning statements and settlement for all drivers working for Respondent . . .” not just for a portion of the drivers who testified as witnesses in the previous hearing.

Furthermore, the format of this information produced is incongruent with how this information has been provided in the past by Respondent. Because settlement statements have been previously admitted in the hearing as exhibits, it is known that settlement statements are given to drivers as printed, individual documents. There has been no explanation on Respondent’s part as to why these documents were compiled and presented in the Microsoft Excel format instead of as individual documents.

6. Documents describing the cost to Respondent for the acquisition of the chassis used by all drivers to transport containers from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

7. Documents showing the names and contact information of the owners and/or lessors of the chassis used by drivers to transport containers described in paragraph 6.

To date, Respondent has failed to respond to or produce any documents for this request.

8. Documents describing the cost to Respondent for the acquisition of the containers that drivers transported with their tractors from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

9. Documents showing the names and contact information of the owners and/or lessors of the containers that drivers transported with their tractors described in paragraph 8.

To date, Respondent has failed to respond to or produce any documents for this request.

10. For every container transported from 11/1/16 to 12/1/16, documents showing the value of the contents inside the containers the drivers transported.

To date, Respondent has failed to respond to or produce any documents for this request.

11. Documents showing how much Respondent charged its customers for each container transported by drivers from 11/1/16 to 12/1/16.

To date, Respondent has failed to respond to or produce any documents for this request.

12. Documents describing the method(s) Respondent uses to calculate mileage rates Respondent pays drivers for delivery of loads, including but not limited to, the use of "PC*Miler" and other computer software.

To date, Respondent has failed to respond to or produce any documents for this request.

13. Names and contact information for all drivers who leased and/or owned tractors driven by more than one person in a 24-hour period from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

14. Documents describing the dispatch system(s) Respondent used from 1/1/15 to 9/1/17 to dispatch drivers, including, but not limited to, computer software.

To date, Respondent has failed to respond to or produce any documents for this request.

15. Documents describing the method(s) Respondent's dispatchers use, including but not limited to seniority, to determine drivers' job assignments from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

16. Copies of all rules and instructions given to drivers regarding dispatching from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

17. The names and contact information for all individuals who have dispatched drivers from Respondent's facility from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

18. Documents describing the method(s) Respondent used from 1/1/15 to 9/1/17 to track the trucks used to transport loads for Respondent, including, but not limited to, "Pegasus," "TracPlus," and other computer software.

To date, Respondent has failed to respond to or produce any documents for this request.

19. For each driver transporting loads for Respondent from 11/1/16 to 12/1/16, documents, organized by driver name, showing the hours each driver worked for Respondent each day.

Respondent has provided documents which are partially responsive, in that they reflect the daily log reports between February 1, 2016, to September 1, 2017, for four drivers: Domingo Avalos, Napoleon Gaitan, Jose Herrera, and Jose Lopez. However, these documents do not constitute a full response to this request because the request calls for “. . . documents, organized by driver name, showing the hours each driver worked for Respondent each day,” not the daily log reports for four drivers who testified in the previous hearing for a period of more than a year.

To completely comply with this request, Respondent will need to furnish the daily logs and other responsive documents for all of the drivers who worked for Respondent from November 1, 2016, to December 1, 2016.

20. Documents showing the maximum number of hours, per day, drivers were allowed to drive for Respondent 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

The daily log reports described above that were produced in response to Paragraph 19 do not reflect the maximum number of hours, per day, drivers were allowed to drive for Respondent for the time period requested.

21. Documents showing drivers' rejections of assignments during the period from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

22. For every driver, documents showing that drivers were given a choice of assignments during the period from 11/1/16 to 12/1/16.

To date, Respondent has failed to respond to or produce any documents for this request.

23. Instructions, procedures, policies, rules, and regulations distributed by Respondent to its dispatchers concerning their performance of work during the period from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

24. Transcripts of depositions of Respondent's drivers, supervisors, managers and agents conducted from 1/1/16 to the present as a result of claims, lawsuits, and/or litigation concerning the employment status of Respondent's drivers who transported loads form Respondent from 1/1/15 to 9/1/17.

To date, Respondent has failed to respond to or produce any documents for this request.

III. Conclusion

In light of the above, it is clear that Respondent has failed to produce the majority of documents in response to the November subpoena. General Counsel requests that the Administrative Law Judge order Respondent to fully comply with the requests contained in Subpoena Duces Tecum B-1-17682W5 issued on November 12, 2019.³

DATED at Los Angeles, California, this 20th day of March, 2020.

Respectfully submitted

/s/ Mathew Sollett

Mathew Sollett
Molly Kagel
Counsels for the General Counsel
National Labor Relations Board, Region 21

³ To date, the GC has met and conferred with Respondent's attorneys on multiple occasions to try to resolve the present subpoena issues. The GC is happy to continue this meet and confer process and will advise the ALJ if any resolutions are reached between the parties.

EXHIBIT 1

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC**

XPO CARTAGE, INC.

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Cases 21-CA-150873
21-CA-164483
21-CA-175414
21-CA-192602

ORDER SETTING DISCOVERY SCHEDULE

THIS MATTER has come before the National Labor Relations Board (NLRB/Board) upon XPO Cartage, Inc. (Respondent) filing petitions to revoke. On March 2, 2020, the International Brotherhood of Teamsters (Charging Union) served the Respondent with subpoena duces tecum B-1-18EMYPH requesting the production of 59 categories of documents. On March 9, 2020, the Respondent filed a petition to revoke the subpoena. On March 10, 2020, the Board's Region 21 referred the petition to revoke to me for a ruling. On March 5, 2020, the General Counsel served the Respondent with subpoena duces tecum B-1-18HZ9LP with 11 requests for production of documents.¹ On March 12, 2020, the Respondent filed a petition to revoke, which Region 21 referred to me for a ruling on March 13, 2020. On March 12, 2020, a conference call was held with the parties to discuss subpoena issues and the feasibility of proceeding with the hearing scheduled for March 17, 2020.²

Based on a careful consideration of the unresolved matters between the parties involving discovery, I am setting forth the following discovery schedule:³

The General Counsel has **five (5) calendar days** from the date of this order to identify which of the document requests set forth in its November 2019 subpoena duces tecum the Respondent failed to respond to or produce. Second, the General Counsel and the Charging Union alleged that in response to several of their subpoena requests, the Respondent denied that the documents exist despite evidence to the contrary. Consequently, the General Counsel and the Charging Union have **five (5) calendar days** from the date of this order to specify the documents and the bases for their beliefs that the

¹ During the conference call, counsel for the General Counsel noted that in November 2019, he served the Respondent with a subpoena but felt the Respondent had failed to fully comply.

² Since this matter is before me on remand and has been extensively litigated, the parties are cautioned against requesting documents that are redundant of evidence already in the record. I will reject requests for documents (and testimony) that I determine are duplicative or outside the scope of the parameters I have previously set for this hearing. Conciseness is valued. Therefore, plan your case accordingly.

³ If I have omitted an item that was discussed during the conference call, submit a recommended correction to me at Christine.dibble@nrlb.gov with a copy to all parties.

documents exist and the Respondent has or can obtain access to those documents. Third, the General Counsel and the Charging Union have **fourteen (14) business days** from the date of this order to file responses to the Respondent's petition to revoke. The Respondent has **seven (7) business days from receipt** of the General Counsel's and the Charging Union's responses to file a reply.

Last, include your availability to start the hearing at **9:00 a.m. Pacific Time on June 1, 2020 and each consecutive day thereafter until concluded** at the U.S. Court House, 312 N. Spring Street, National Labor Relations Board, Suite 10150, Los Angeles, CA 90012. Since the parties have about seventy-five (75) calendar days before the hearing to conclude discovery and resolve all other matters, the hearing date will not be extended for any reason.⁴

Dated: March 16, 2020

Christine E. Dibble
Administrative Law Judge

⁴ The only exception being the death or illness of a necessary party to this matter or travel restrictions as a result of the coronavirus pandemic.

EXHIBIT 2

SUBPOENA DUCES TECUM

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

Custodian of Records
XPO Cartage, Inc.

To 5800 Sheila Street
Commerce, CA 90040-2300

As requested by Jean Libby and Mathew Sollett, Counsel for General Counsel

whose address is US Court House, 312 N Spring Street, 10th Floor, Los Angeles, CA 90012
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge
of the National Labor Relations Board

at Los Angeles, CA, US Courthouse, 312 N. Spring Street, 10th Floor.

in the City of Los Angeles, CA 90012

on Monday, December 2, 2019 at 9:30 am or any adjourned

or rescheduled date to testify in XPO Cartage, Inc., 21-CA-150873, et al.
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-17682W5

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Los Angeles, CA

Dated: November 12, 2019



John F. Ring
John Ring, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

XPO CARTAGE, INC., Cases 21-CA-150873, 21-CA-164483, 21-CA-175414,
and 21-CA-192602

Subpoena Duces Tecum Attachment

DEFINITIONS AND INSTRUCTIONS

- a. **“Document”** means any existing printed, typewritten or otherwise recorded material of whatever character, records stored on computer or electronically, records kept on microfiche or written by hand or produced by hand and graphic material, including without limitation, checks, cancelled checks, computer hard drives, discs and/or files and all data contained therein, computer printouts, E-mail communications and records, any marginal or “post-it” or “sticky pad” comments appearing on or with documents, licenses, files, letters, facsimile transmissions, memoranda, telegrams, minutes, notes, contracts, agreements, transcripts, diaries, appointment books, reports, records, payroll records, books, lists, logs, worksheets, ledgers, summaries of records of telephone conversations, summaries of records of personal conversations, interviews, meetings, accountants’ or bookkeepers’ work papers, records of meetings or conference reports, drafts, work papers, calendars, interoffice communications, financial statements, inventories, news reports, periodicals, press releases, graphs, charts, advertisements, statements, affidavits, photographs, negatives, slides, disks, reels, microfilm, audio or video tapes and any duplicate copies of any such material in the possession of, control of, or available to the subpoenaed party, or any agent, representative or other person acting in cooperation with, in concert with or on behalf of the subpoenaed party.
- b. **“Respondent”** means XPO Cartage, Inc.
- c. **“Respondent’s facility”** means the facility located at 5800 Sheila Street, Commerce, California.
- d. The term **"drivers"** as used in this subpoena shall refer to all drivers working out of Respondent's facility, including those Respondent considers to be lease drivers, owner-operators, independent contractors, and temporary drivers obtained from an employment agency.
- e. **“Person”** or **“persons”** means natural persons, corporations, limited liability companies, partnerships, sole proprietorships, associations, organizations, trusts, joint ventures, groups of natural persons or other organizations, or any other kind of entity.
- f. This subpoena request is continuing in character and if additional responsive documents come to your attention after the date of production, such documents must be promptly produced.
- g. Any copies of documents that are different in any way from the original, such as by interlineation, receipt stamp, notation, or indication of copies sent or received, are considered original documents and must be produced separately from the originals.

- h. If any document covered by this subpoena contains codes or classifications, all documents explaining or defining the codes or classifications used in the document must also be produced.
- i. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
- j. All documents produced pursuant to this subpoena should be presented as they are kept in the usual course of business or organized by the subpoena paragraph to which the document or set of documents is responsive.
- k. This subpoena applies to documents in your possession, custody, or control.
- l. If a claim of privilege is made as to any document which is the subject of this subpoena, a claim of privilege must be expressly made and you must describe the nature of the withheld document, communication, or tangible thing in a manner that, without revealing information itself privileged or protected, will enable an assessment of the claim to be made.
- m. Unless otherwise stated, this subpoena does not supersede, revoke or cancel any other subpoena(s) previously issued in this proceeding.

DOCUMENTS TO BE PRODUCED

1. Documents describing Respondent's brokering business for the period 1/1/15 to 9/1/17, including a description of what products and/or services were/are being brokered.
2. For each product and service Respondent brokers, documents describing the following for the period 1/1/15 to 9/1/17:
 - (a) the amount and source of revenue derived from each product and service being brokered;
 - (b) Customers to whom Respondent provided brokering services;
 - (c) Personnel who service each product and service Respondent brokers, including their names and contact information;
 - (d) Equipment used, including computers and software; and
 - (e) Location of personnel.
3. The name(s), address(es), telephone number(s) and email address(es) of (a) person(s) with knowledge of the documents requested in paragraphs 1 and 2.
4. All contracts with businesses or individuals in which Respondent agreed to deliver goods in effect from 11/1/16 to 12/1/16.
5. All earnings statements and settlement statements for all drivers working for Respondent from 11/1/16 to 12/1/16.
6. Documents describing the cost to Respondent for the acquisition of the chassis used by all drivers to transport containers from 1/1/15 to 9/1/17.
7. Documents showing the names and contact information of the owners and/or lessors of the chassis used by drivers to transport containers described in paragraph 6.
8. Documents describing the cost to Respondent for the acquisition of the containers that drivers transported with their tractors from 1/1/15 to 9/1/17.
9. Documents showing the names and contact information of the owners and/or lessors of the containers that drivers transported with their tractors described in paragraph 8.
10. For every container transported from 11/1/16 to 12/1/16, documents showing the value of the contents inside the containers the drivers transported.
11. Documents showing how much Respondent charged its customers for each container transported by drivers from 11/1/16 to 12/1/16.

12. Documents describing the method(s) Respondent uses to calculate mileage rates Respondent pays drivers for delivery of loads, including but not limited to, the use of "PC*Miler" and other computer software.
13. Names and contact information for all drivers who leased and/or owned tractors driven by more than one person in a 24-hour period from 1/1/15 to 9/1/17.
14. Documents describing the dispatch system(s) Respondent used from 1/1/15 to 9/1/17 to dispatch drivers, including, but not limited to, computer software.
15. Documents describing the method(s) Respondent's dispatchers use, including but not limited to seniority, to determine drivers' job assignments from 1/1/15 to 9/1/17.
16. Copies of all rules and instructions given to drivers regarding dispatching from 1/1/15 to 9/1/17.
17. The names and contact information for all individuals who have dispatched drivers from Respondent's facility from 1/1/15 to 9/1/17.
18. Documents describing the method(s) Respondent used from 1/1/15 to 9/1/17 to track the trucks used to transport loads for Respondent, including, but not limited to, "Pegasus," "TracPlus," and other computer software.
19. For each driver transporting loads for Respondent from 11/1/16 to 12/1/16, documents, organized by driver name, showing the hours each driver worked for Respondent each day.
20. Documents showing the maximum number of hours, per day, drivers were allowed to drive for Respondent 1/1/15 to 9/1/17.
21. Documents showing drivers' rejections of assignments during the period from 1/1/15 to 9/1/17.
22. For every driver, documents showing that drivers were given a choice of assignments during the period from 11/1/16 to 12/1/16.

23. Instructions, procedures, policies, rules, and regulations distributed by Respondent to its dispatchers concerning their performance of work during the period from 1/1/15 to 9/1/17.
24. Transcripts of depositions of Respondent's drivers, supervisors, managers and agents conducted from 1/1/16 to the present as a result of claims, lawsuits, and/or litigation concerning the employment status of Respondent's drivers who transported loads for Respondent from 1/1/15 to 9/1/17.

With regard to the documents subpoenaed, Counsel for the General Counsel is willing to meet with the Respondent's designated or legal representatives, at a mutually agreed-upon time and place, prior to the return date of the subpoena, for the purpose of examining and/or copying the documents subpoenaed, and/or to enter into stipulations concerning the contents of subpoenaed documents, for the purpose of reducing trial time and expense.

STATEMENT OF SERVICE

I hereby certify that a copy of the GENERAL COUNSEL'S RESPONSE TO ALJ'S ORDER SETTING DISCOVERY SCHEDULE RE: RESPONDENT'S NON-COMPLIANCE WITH SUBPOENA DUCES TECUM B-1-17682W5 was submitted by E-filing to the National Labor Relations Board, Division of Judges, San Francisco Branch Division, on March 20, 2020, and that each of the following parties was served with a copy of the same document by e-mail on March 20, 2020.

Holger Besch, Attorney at Law
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/s/ Mara Estudillo

Mara Estudillo, Designated Agent
National Labor Relations Board, Region 21