

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS 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 FAILURE TO PRODUCE
DOCUMENTS IN ITS POSSESSION RESPONSIVE TO GENERAL COUNSEL'S
SUBPOENA DUCES TECUM B-1-17682W5**

I. Introduction

On November 12, 2019, Counsel for the General Counsel (GC) served on XPO Cartage Inc. (Respondent) subpoena duces tecum B-1-17682W5 (the November subpoena),¹ which requested, in 24 separate paragraphs, Respondent produce various documents prior to the reopening of the hearing in cases 21-CA-150873, et al. Respondent did not file a petition to revoke the November subpoena within the time prescribed in Section 102.31(b) of the Rules and Regulations of the National Labor Relations Board (the Board), or at any time thereafter.

On March 10, 2020, during a 12:00 p.m. conference call with Respondent's counsel, the GC, and counsel for the International Brotherhood of Teamsters (Charging Party), Respondent's counsel stated that Respondent would produce some documents responsive to the November subpoena later that same day. He also stated that, other than what Respondent would produce that day, he was not

¹ A copy of the subpoena is attached as Exhibit 1.

in possession of any additional responsive documents and was not aware whether Respondent was in possession of additional responsive documents. The GC stated that he would review any documents once they were provided by Respondent and that he believed Respondent should be in possession of documents responsive to all of the requests in the November subpoena.

On March 10, 2020, at about 3:00pm, Respondent electronically sent to the GC documents partially responsive to two of the requests (paragraph numbers 5 and 19) in the November subpoena.²

On March 12, 2020, during a conference call between Administrative Law Judge Christine Dibble (ALJ Dibble), Respondent's counsel, Charging Party's counsel and the General Counsel, the General Counsel informed ALJ Dibble of Respondent counsel's March 10, 2020 statements and of the General Counsel's belief that additional responsive documents existed and Respondent should be required to produce them.

On March 16, 2020, ALJ Dibble issued an Order Setting Discovery Schedule,³ which inter alia, requested the General Counsel to specify the responsive documents he believes to be in existence, the bases for that belief, and the bases for his belief that Respondent has or can obtain access to those documents.

The General Counsel files this submission in response to ALJ Dibble's March 16, 2020 request.

² This partial production is discussed in the General Counsel's Response to ALJ's Order Setting Discovery Schedule Re: Respondent's Non-Compliance with Subpoena Duces Tecum B-1-17682W5, filed concurrently with this response.

³ 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.

II. Argument

The GC's November subpoena requests relevant information based on statements in Respondent's June 10, 2019 Response to ALJ Dibble's Order to Show Cause whether the hearing in the instant cases should be reopened,⁴ and evidence previously introduced by Respondent in trial. Below, each subpoena request is listed⁵ and followed by an explanation of the GC's belief that responsive documents exist and are in Respondent's possession.

November Subpoena Paragraph Requests 1-3

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.

Basis of General Counsel's Belief

In its June 10, 2019 Response to ALJ Dibble's Order to Show Cause (at page 5), Respondent argued the hearing should be reopened to provide it a,

chance to demonstrate that its business is in the nature of a broker and distinct from the transportation services provided by [its] drivers. See *Q.D.-A., Inc. v. Indiana Department of*

⁴ A copy of Respondent's June 10, 2019 Response to ALJ Dibble's Order to Show Cause is attached as Exhibit 2

⁵ Where appropriate subpoena requests are grouped together by subject matter.

Workforce Development, 114 N.E.3d 840, 847-848 (Ind. 2019) (finding that company that connected independent contractor drivers and drive-away customers was a “broker,” and thus not in the same business as the drivers).

While the General Counsel is not fully aware of Respondent’s intended argument concerning the nature of its work, it appears from Respondent’s own statement excerpted above that it claims it is not in the business of short haul trucking and cargo transportation, and instead is in the business of “brokering” between its drivers and its customers. Certainly, if Respondent is engaged in “brokering,” it should be in possession of documents describing that business, the customers it provides “brokering” services to, the equipment it uses to engage in such services, etc. Respondent’s apparent claim that no such documents exist is simply incredible and cannot reasonably be believed.

November Subpoena Paragraph Request 4

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

Basis of General Counsel’s Belief

The current record in this matter already contains contracts (alternatively referred to as “carrier agreements”) between Respondent and two of its customers. See GC 64 and GC 65.⁶ Both of those contracts were produced by Respondent and given to the GC in response to an earlier subpoena duces tecum served on Respondent by the GC (B-1 -WXEZ11, issued June 6, 2017). One of them (GC 65), by its own terms, was in effect from February 24, 2016 through May 31, 2017. Given how many drivers work for Respondent on any given day, it is apparent that Respondent does

⁶ The letters “GC” and “R,” followed by a number, refer to General Counsel and Respondent exhibits previously introduced into the hearing record in these cases.

business with more than these two customers and, therefore, Respondent should have more contracts to present to General Counsel. Respondent cannot credibly state no documents responsive to this request exist since GC 65 is itself responsive to the request.⁷

November Subpoena Paragraph Request 5

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

Basis of General Counsel's Belief

Like the contracts discussed above for paragraph 4, the record in these cases already contains earnings statements for some of Respondent's drivers that were submitted by Respondent during the hearing. For example, Humberto Canales (R 8, R 10-12) and Lawrence Decoud (R 30). Further, in response to the present subpoena, Respondent produced *some* additional driver earning statements, but those statements do not cover all of Respondent's drivers for the period 11/1/16 to 12/1/16. Given this partial production, Respondent should also have these documents available for the rest of the drivers. Respondent has yet to offer an explanation as to why it has failed to respond to this request in full.

November Subpoena Paragraph Requests 6 - 7

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.

⁷ If GC 65 is the only document in existence that is responsive to the request, Respondent should so state.

Basis of General Counsel's Belief

In her previous decision and order in this matter, ALJ Dibble correctly found that Respondent supplies the chassis its drivers use to transport cargo and also derives additional revenue from the use of its chassis. ALJD 4:4,⁸ citing to Tr. 1049, 1930, 1937⁹; GC 72; and ALJD 18:25. As such, there should be documentation of Respondent's ownership interest in the chassis. Conversely, if Respondent claims it does not have an ownership interest in the chassis, as it hints at in its June 10, 2019 Response to ALJ Dibble's Order to Show Cause (at page 5), it should have documentation of who does own the chassis, as they are important pieces of equipment that its drivers use daily.

November Subpoena Paragraph Requests 8 - 11

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 for 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.

Basis of General Counsel's Belief

Like Respondent's chassis, ALJ Dibble correctly found that Respondent supplies the containers its drivers use to transport cargo and also derives additional revenue from the use of its

⁸ "ALJD" refers to ALJ Dibble's September 12, 2018 Decision. The numbers following "ALJD" refer to the relevant page and line number(s) of the Decision.

⁹ "Tr." refers to the transcript of the previous hearing in these cases. The numbers following "Tr." refer to the relevant page numbers of the transcript.

containers. ALJD 4:4, citing to Tr. 1049, 1930, 1937; ALJD 10:2. As such, there should be documentation of Respondent's ownership interest in the containers. Conversely, if Respondent claims it does not have an ownership interest in the containers,¹⁰ it should have documentation of who does own them, as they are important pieces of equipment that its drivers use daily.

November Subpoena Paragraph Request 12

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.

Basis of General Counsel's Belief

Testimony from Respondent's witnesses during the initial hearing in this matter (including Miguel Camacho) established that Respondent calculates the rates it pays to its drivers and that it does so using computer software including a program called "PC*Miler." Tr. 1139-1140. As such, Respondent must be in possession of documentation describing how it calculates these rates and how it uses PC*Miler to do so.

November Subpoena Paragraph Request 13

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.

Basis of General Counsel's Belief

Extensive testimony and various documents admitted into evidence previously in these cases establish that Respondent maintains records identifying its drivers, including the Hauling

¹⁰ As it hints at in its Response to ALJ Dibble's Order to Show Cause at page 5.

Agreements each of its drivers has to sign before working for Respondent (for example R1; GC 34; GC 52) and maintains dispatching software that contain drivers' truck numbers and contact information for assignment purposes. Tr. 1672-1675. As a result of this previously provided evidence, Respondent is clearly in possession of this information.

November Subpoena Paragraph Requests 14-17, and 23

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.
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.

Basis of General Counsel's Belief

Extensive testimony offered previously at the hearing in these cases, and ALJ Dibble's findings based on that testimony reveal that Respondent's dispatchers play a critical role in Respondent's operations by assigning cargo loads to its drivers and that they exercise discretion in making those assignments. Tr. 1543, 1652; ALJD 17:25-30, 27:33. Additionally, testimony was elicited at the hearing about the specific methods dispatchers use to complete their job duties. Tr. 1672-1675. Based on this testimony presented at the hearing by Respondent's own witnesses, Respondent must have documentation concerning dispatch, which is an important part of their business.

November Subpoena Paragraph Request 18

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.

Basis of General Counsel’s Belief

Based on the testimony of various witnesses, ALJ Dibble made several findings related to Respondent’s method(s) of tracking the cargo its drivers transport, including the use of “TracPlus” and “Pegasus” computer software. ALJD 5:5-22, 5:fn. 8, 29:26. Given the testimony regarding Respondent’s tracking of cargo, – the goods actually being transported by its drivers – it is logical that some responsive documents must exist.

November Subpoena Paragraph Request 19

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.

Basis of General Counsel’s Belief

Like the contracts and earning statements discussed above in response to November subpoena paragraphs 4 and 5, the record in these cases already contains documents showing the work hours of some of Respondent’s drivers, for example, Humberto Canales. R 9. Further, in response to the November subpoena, Respondent produced *some* additional driver earning statements and daily log reports, but those statements clearly do not cover all of Respondent’s drivers for the period 11/1/16 to 12/1/16. Respondent has yet to explain why it has failed to respond to this request in full.

November Subpoena Paragraph Request 20

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

Basis of General Counsel's Belief

Testimony offered previously from Respondent's witnesses in these cases established that federal regulations limit the number of hours Respondent's drivers can physically drive per day, and that Respondent is responsible for tracking the number of hours each of its drivers is engaged in driving in order to maintain compliance with these regulations. Tr. 1855-1856. As such, clearly Respondent should have documents responsive to this request.

November Subpoena Paragraph Requests 21 - 22

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.

Basis of General Counsel's Belief

Various witnesses offered testimony about drivers' ability, or lack thereof, to reject and/or choose certain assignments offered to them by Respondent's dispatchers. Further, Respondent witness Miguel Camacho specifically testified that Respondent documented instances in which drivers rejected assignments. Tr. 1206. As such, the General Counsel believes responsive documents exist.

November Subpoena Paragraph Request 24

24. Transcripts of depositions 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 1/1/15 to 9/1/17.

Basis of General Counsel's Belief

The General Counsel is aware of several civil and/or administrative claims against Respondent which have resulted in litigation, including two California state administrative decisions already raised in the record (GC 67-68). The General Counsel believes depositions, which would include relevant testimony, were conducted in connection to that litigation.¹¹

III. Conclusion

In light of the above, the General Counsel believes documents responsive to the November subpoena exist and are in Respondent's possession. The General Counsel requests Respondent be ordered to produce all responsive documents as soon as possible. If responsive documents do not exist for any of the subpoena requests, Respondent should so state in writing.

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

Respectfully submitted,

/s/ Mathew Sollett

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

¹¹ The transcript for a California state court case, *Herrera et al v. XPO Cartage Inc.*, Case NS033715, which the GC has reviewed, contains multiple references to depositions of various witnesses.

EXHIBIT 1

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.

EXHIBIT 2

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

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Charging Party,

**Case Nos. 21-CA-150873
 21-CA-164483
 21-CA-175414
 21-CA-192602**

and

XPO CARTAGE, INC.,

Respondent.

**RESPONDENT XPO CARTAGE, INC.'S RESPONSE TO
ORDER TO SHOW CAUSE**

Respondent XPO Cartage, Inc. (XPO) hereby responds to Administrative Law Judge (ALJ) Christine E. Dibble's May 24, 2019 Order to Show Cause.

As demonstrated below, a reopening of the record is necessary and appropriate to submit additional evidence regarding independent contractor status in light of the National Labor Relations Board's (Board's) holding in *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019) (*SuperShuttle*). *SuperShuttle* refocused the independent contractor analysis generally on the traditional common-law test, and specifically on the nature of the "entrepreneurial opportunity" analysis. A reopening of the record is needed to permit the development of evidence which has taken on greater significance or is made relevant by *SuperShuttle*.

A complete record requires development of a number of such issues. For example, *SuperShuttle* considered the drivers' ability to meet or exceed their weekly overhead, a fact that is underdeveloped in the existing record in this case. *SuperShuttle* at 12. Similarly, the issue of

control now must be developed further to consider the extent to which the minimal incidents of control impact entrepreneurial opportunity. *Id.* at 13. Other factors also must be placed in the proper context of entrepreneurial ability, such as ownership of the tools of the trade other than tractors, of which there is scant evidence. These and other issues discussed below require the reopening of the record.

In requesting a more complete record, XPO is not suggesting that the existing record does not support an independent contractor finding. To the contrary, as XPO has maintained, the existing record even under prior Board law made clear that the XPO-contracted Owner-Operators were independent contractors. But the issue here is not whether XPO believes that there is enough in the record but rather whether the record is complete in light of *SuperShuttle*. It is not.

I. ARGUMENT

A. Background

1. Summary of Proceedings

This case involves several unfair labor practice allegations against XPO which turn, in the first instance, on whether XPO properly classified as independent contractors the Owner-Operator drivers that haul freight for XPO's customers in Southern California.

On September 12, 2018, this ALJ issued her decision finding that XPO violated the National Labor Relations Act on two of thirteen allegations in the complaint; severing and deferring consideration of one of the allegations; and dismissing the remaining ten allegations. As a threshold matter in the case, the decision found that the XPO Owner-Operators were employees rather than independent contractors. This ALJ explicitly grounded her analysis of the independent contractor issue, both generally and on the subject of entrepreneurial opportunity, on

the Board's decision in *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014) (*FedEx*). See ALJ Decision (ALJD) at 13, 22-23.

On May 10, 2019, after the matter was fully briefed on exceptions to the Board, the Board remanded the matter back to this ALJ “for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the complaint allegations affected by [the Board's decision in] *SuperShuttle*.”

2. *SuperShuttle*

On January 25, 2019, the Board issued its decision in *SuperShuttle*. While retaining the Board's traditional ten-factor test for determining independent contractor status, *SuperShuttle* overruled how the Board in *FedEx* required those factors to be evaluated and weighed.¹ Specifically, *SuperShuttle* found “[e]ntrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain.” *SuperShuttle* at 9.

The Board's application of this analysis focused heavily on the drivers' discretion to act unilaterally in the “day-to-day performance of their work.” *SuperShuttle* at 12. In so doing, the Board found significant the level of control exerted over the drivers “while they are actually

¹ The ten common law factors traditionally used in the analysis are taken from the Restatement (Second) of Agency: (a) The extent of control which, by the agreement, the master may exercise over the details of the work.; (b) Whether or not the one employed is engaged in a distinct occupation or business; (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) The skill required in the particular occupation; (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) The length of time for which the person is employed; (g) The method of payment, whether by the time or by the job; (h) Whether or not the work is part of the regular business of the employer; i) Whether or not the parties believe they are creating the relation of master and servant; and (j) Whether the principal is or is not in business. *SuperShuttle* at 1-2 (citing the Restatement (Second) of Agency § 220 (1958)).

driving” *Id.* at 14. The Board also gave great weight to the ownership of the tools of the trade, finding that the ownership of the vans used by the drivers weighed in favor of independent contractor status. *Id.* at 13. Other factors discussed by the Board were the relationship of fares to the drivers’ compensation and whether driving is a distinct occupation. *Id.* at 13-14.

B. A Limited Reopening of the Record will Make Clear that the Owner-Operators are Independent Contractors Under *SuperShuttle*

The issue of whether to reopen the record is based on the practical consideration of whether the existing record is sufficient to decide the matter under the changed law. *See, e.g., Harmony Corp.*, No. 15-CA-14102, 2000 WL 33664358, at *1 (N.L.R.B. Div. of Judges Aug. 28, 2000); *Oil Capitol Sheet Metal, Inc.*, No. E 17-CA-19714, 2000 WL 33664334, at *1 (N.L.R.B. Div. of Judges July 31, 2000). Reopening the record generally is not appropriate for the purpose of relitigating the entire matter. *Am. Directional Boring, Inc.*, No. JD-35-07, 2007 WL 2430006, at *1 (N.L.R.B. Div. of Judges Aug. 23, 2007).

XPO is not seeking to open the record to relitigate this case, but rather for the limited purpose of addressing issues that have increased relevance in light of *SuperShuttle*. The issue of whether there is “enough” in the record is inextricably intertwined with the outcome of the case. In other words, any evaluation of the sufficiency of the record must include a consideration of how the outcome of the case might be changed by such additional evidence.

The General Counsel’s failure to withdraw the Complaint in this case demonstrates his belief that the existing record is insufficient to establish that the Owner-Operators are independent contractors. That fact alone makes relevant additional evidence that might be determinative under *SuperShuttle*. Such evidence would include:

- **Whether XPO and the Drivers are in the Same Business.** While the Board in *SuperShuttle* found that in that case driving was not a distinct occupation, *SuperShuttle* at 14, the nature of the intermodal business is substantially different in a way that makes

clear the entrepreneurial independence of the Owner-Operator drivers. XPO should be provided the chance to demonstrate that its business is in the nature of a broker and distinct from the transportation services provided by the drivers. See *Q.D.-A., Inc. v. Indiana Department of Workforce Development*, 114 N.E.3d 840, 847-848 (Ind. 2019) (finding that company that connected independent contractor drivers and drive-away customers was a “broker,” and thus not in the same business as the drivers).

- **Ownership of the Instrumentalities of the Trade.** *SuperShuttle* placed substantial weight on the fact that drivers owned or leased their vans. *SuperShuttle* at 13. Here, the instrumentalities go far beyond the tractor owned or leased by the owner operators. The tractors are used to pull a chassis on which is loaded a container. How these chassis and containers are owned, used, stored, compensated for, and repaired are only some of the facts that need to be developed on this critical factor.
- **Limited Incidents of Company Control.** *SuperShuttle* found that the extensive control retained by the drivers far outweighed the limited incidents of control exercised by the company, such as that the company mandated the fares to be charged to the customers. *SuperShuttle* at 13. The decision in this case found similar facts to be determinative evidence of employer control. AJLD at 14-15. The record here should be further developed to demonstrate the limited impact of these facts on the drivers’ entrepreneurial opportunity and ability to control the means and manner of their work.
- **Control of Drivers while Actually Driving.** The *SuperShuttle* Board found significant the level of control exerted over the drivers “while they are actually driving” *SuperShuttle* at 14. While this ALJ found that the drivers were not subject to supervision by XPO while they were behind the wheel, AJLD at 17, the GC has contested that finding, contending that XPO maintained control and supervision of the drivers while they were delivering cargo. GC Brief in Support of Exceptions at 3-4. To the extent that the GC still maintains that XPO retained this control over the drivers, the record on that factor should be further developed.
- **Opportunity to Meet or Exceed Weekly Overhead.** The Board in *SuperShuttle* viewed this factor as an important determinative of entrepreneurial activity. *SuperShuttle* at 12. While the record in this case contains evidence regarding income, that evidence focused largely on the truism that more work produces more revenue. The *SuperShuttle* determination is more nuanced, requiring a more careful focus on types of activities within the control of the drivers that can produce either profit or loss. That requires a much more detailed inquiry into the drivers’ business and the many differences in that business between drivers, such as overhead costs and the manner in which owner operators can recover or reduce those costs. Issues such as why any specific driver selected a certain model truck, the reasons for purchasing as opposed to leasing, whether the truck was acquired new or used, whether repairs are made with new or used parts, and a host of other details would be relevant to this analysis.
- **Availability of Other Opportunities.** The record in this case focused on whether an owner operator’s contractual obligations prohibited, as a practical matter, the pursuit of

business with other companies. What is missing in the record is specific evidence relating to the marketplace, *e.g.*, the number of competitors for driver services, the shortage of drivers in the geographic market, and the frequency at which drivers are approached to change contractors. These and other related facts are needed to enable a proper evaluation of the *opportunity* of drivers to move, as opposed to whether any drivers had in fact moved.

- **Hiring Drivers.** *SuperShuttle* highlighted the significance of an owner-operator's ability to hire additional drivers in order to generate more gross revenue. *SuperShuttle* at 7. The ALJ understated both the evidence of the prevalence of this arrangement by the Owner-Operators, concluding that "two drivers hired other drivers to work for them," and the significance of this as an entrepreneurial opportunity. AJLD at 5, 23. *SuperShuttle* requires that the issue of the opportunity to hire drivers be taken into account, not merely whether owner operators took the opportunity. The record requires development on this factor.

Arguing that the record should be reopened does not mean XPO believes the current record does not support the independent contractor status of the drivers. To the contrary, XPO's view is that the application of *SuperShuttle* to the existing record makes inevitable the conclusion that the owner operators are independent contractors. Virtually every factor that led the Board to conclude the SuperShuttle drivers to be independent contractors is present here. *SuperShuttle* at 12-14; AJLD at 16-20. But to the extent the issue remains in dispute, fundamental due process requires that XPO be permitted to present all arguments in support of its position, and that in turn requires a complete record consistent with *SuperShuttle*.

II. CONCLUSION

For the foregoing reasons, the hearing record should be reopened for additional evidence to better allow for a supplemental decision consistent with *SuperShuttle*.

Respectfully Submitted,

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Dated: June 10, 2019

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 FAILURE TO PRODUCE DOCUMENTS IN ITS POSSESSION RESPONSIVE TO GENERAL COUNSEL'S 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.

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