

**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

**GENERAL COUNSEL’S MOTION TO  
AMEND ALJ’s July 24, 2020 ORDER REGARDING SUBPOENAS  
B-1-18HZ9LP AND 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 (November subpoena), 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 5, 2020, the GC served on Respondent subpoena duces tecum B-1-18HZ9LP (March subpoena), which requested, in 11 separate paragraphs, Respondent produce various documents prior to the reopening of the hearing in cases 21-CA-150873, et al. On March 12, 2020, Respondent filed a Petition to Revoke the March subpoena (Petition to Revoke). On April 2, 2020, the GC filed its Opposition to Respondent’s Petition to Revoke. On April 13, 2020, Respondent filed its Response to GC’s Opposition to Petition to Revoke.

On July 13, 2020, ALJ Dibble directed the GC and counsel for the International Brotherhood of Teamsters (the Charging Party) to meet and confer about the requests contained in the November subpoena, the March subpoena, and Subpoena Duces Tecum B-1-18EMYPH (Charging Party's subpoena), served on Respondent by the Charging Party on March 9, 2020. ALJ Dibble stated that the GC and Charging Party should review their subpoenas and withdraw requests that are duplicative or otherwise unnecessary; and requested that the GC file a report after engaging in such a review. The GC filed its Report on Status of Subpoenas Duces Tecum B-1-17682W5 and B-1-18HZ9LP (GC's Report) on July 20, 2020.<sup>1</sup> ALJ Dibble issued an Order Denying in Part Petition to Revoke Subpoenas B-1-18HZ9LP and B-1-17682W5 (Order) on July 24, 2020.<sup>2</sup>

## ***II. ALJ Dibble's Findings Concerning the March Subpoena (B-1-18HZ9LP)***

In her July 24, 2020 Order, ALJ Dibble found unpersuasive Respondent's claims that March Subpoena requests 1 and 2 are overbroad and irrelevant; and that requests 3 through 6 are vague, ambiguous, and irrelevant. Directly after making those findings, ALJ Dibble ordered Respondent to produce documents responsive to March Subpoena requests 1, 4, 5, and 6; however, she did not include any conclusion concerning requests 2 and 3. Based on ALJ Dibble's findings concerning requests 2 and 3, the GC believes she intended to order production of documents responsive to those requests, in addition to requests 1, 4, 5, and 6.

After discussing March Subpoena requests 1 through 6 in the Order, ALJ Dibble moved on to March Subpoena requests 8 through 11. While she ultimately revoked subpoena requests 8 through 11, she did not include any findings or conclusions concerning request 7. The GC

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<sup>1</sup> A copy of the GC's Report is attached as Exhibit A.

<sup>2</sup> A copy of the ALJ's Order is attached as Exhibit B.

believes she inadvertently omitted request 7 from the list of requests to which Respondent must respond.

***III. ALJ Dibble's Findings Concerning the November Subpoena (B-1-17682W5)***

In the July 20, 2020 Report, the GC voluntarily withdrew requests 5, 10, 12, and 17 through 20 from the November Subpoena. The GC argued Respondent should be required to respond to the remaining requests (1, 2, 3, 4, 6, 7, 8, 9, 11, 13, 14, 15, 16, 21, 22, 23 and 24) since it had failed to timely file a petition to revoke the November subpoena. In her July 24, 2020 Order, ALJ Dibble agreed with the GC's argument and ordered Respondent to produce documents in response to subpoena requests 1 through 4, 6 through 9, 11, 13 through 16, 21 through 22, and 24. ALJ Dibble did not specifically include request 23 in that list. The GC believes that omission was inadvertent and that she intended to order production of documents responsive to that request.

***IV. Conclusion***

The GC respectfully requests ALJ Dibble amend her July 24, 2020 Order to additionally require Respondent to produce documents responsive to March Subpoena requests 2, 3, and 7 and November Subpoena request 23.

DATED at Los Angeles, California, this 29th day of July, 2020.

Respectfully submitted,

/s/ Mathew Sollett

Mathew Sollett

Molly Kagel

Counsel for the General Counsel

National Labor Relations Board, Region 21

# **EXHIBIT A**

**.UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
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XPO CARTAGE, INC.

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TEAMSTERS

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

**GENERAL COUNSEL'S REPORT ON STATUS  
OF SUBPOENAS DUCES TECUM  
B-1-17682W5 AND B-1-18HZ9LP**

***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),<sup>1</sup> 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 5, 2020, the GC served on Respondent subpoena duces tecum B-1-18HZ9LP (the March subpoena),<sup>2</sup> which requested, in 11 separate paragraphs, Respondent produce various documents prior to the reopening of the hearing in cases 21-CA-150873, et al. On March 12, 2020, Respondent filed a Petition to Revoke the March subpoena (Petition to Revoke). On April 2, 2020, the GC filed its Opposition to Respondent's Petition to Revoke. On April 13, 2020,

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<sup>1</sup> A copy of the November subpoena is attached as Exhibit 1.

<sup>2</sup> A copy of the March subpoena is attached as Exhibit 2.

Respondent filed its Response to GC's Opposition to Petition to Revoke. Administrative Law Judge (ALJ) Dibble has yet to rule on Respondent's Petition to Revoke.

On July 13, 2020, ALJ Dibble directed the GC and counsel for the International Brotherhood of Teamsters (the Charging Party) to meet and confer about the requests contained in the November subpoena, the March subpoena, and Subpoena Duces Tecum B-1-18EMYPH (Charging Party's subpoena), served on Respondent by the Charging Party on March 9, 2020. ALJ Dibble stated that the GC and Charging Party should review their subpoenas and withdraw requests that are duplicative or otherwise unnecessary. ALJ Dibble requested that the GC file this Report after engaging in such a review.

## ***II. The November Subpoena***

Respondent failed to file a petition to revoke the November subpoena and, therefore, should be required to respond to the subpoena in full. Nonetheless, after reviewing the November Subpoena, the GC's position on each request is as follows:

### ***November Subpoena Paragraph Requests 1-3: These Requests Remain Relevant and Respondent Should be Required to Respond***

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.

In its June 10, 2019 Response to ALJ Dibble's Order to Show Cause (at page 5),

Respondent argued the hearing in these matters 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 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. The requested documents are necessary to respond to any arguments Respondent may raise concerning its nature of work as a brokering business. Therefore, these requests remain relevant and Respondent should be required to respond to them.

***November Subpoena Paragraph Request 4: This Request Remains Relevant and Respondent Should be Required to Respond***

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

The record in these matters contains two contracts (alternatively referred to as "carrier agreements") between Respondent and two of its customers. GC 64 and 65.<sup>3</sup> However, both of those exhibits were admitted into the record with redactions obscuring key financial information. This information is directly relevant to an analysis consistent with the Board's controlling

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<sup>3</sup> 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. <sup>4</sup> "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.

precedent, *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019). When looking at the shared-ride and taxicab industries, as the Board did in *SuperShuttle DFW, Inc.*, the Board gives significant weight to, inter alia, evidence concerning “the relationship between the company’s compensation and the amount of fares collected.” *Uber Technologies, Inc.*, NLRB Division of Advice Memorandum (April 16, 2019) [citing to *SuperShuttle DFW, Inc.*, slip op. at 2-3, 12-14]. In the present case, it is unclear what, if any, relationship exists between the amounts Respondent collects directly from its clients and what it pays to its drivers. This relationship can only be revealed if financial information contained in Respondent’s contracts with its customers is made available. Since this information is a significant factor in the Board’s analysis under *SuperShuttle DFW, Inc.*, it is relevant and Respondent should be required to produce it.

***November Subpoena Paragraph Request 5: The GC Withdraws This Request***

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

The GC withdraws this request.

***November Subpoena Paragraph Requests 6-7: These Requests Remain Relevant and Respondent Should be Required to Respond***

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.

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,<sup>4</sup> citing to Tr. 1049, 1930, 1937<sup>5</sup>; GC 72; and ALJD 18:25. Because it appears Respondent intends to claim that it does not have an ownership interest in the chassis, as it suggests in its June 10, 2019 Response to the ALJ's Order to Show Cause (at page 5), the requested documentation is relevant and necessary to determine what entity actually owns an important instrumentality of the drivers' work. Because the chassis are necessary pieces of equipment used daily by drivers, Respondent should have documentation showing who owns the chassis, and it should be required to produce that documentation.

***November Subpoena Paragraph Requests 8-9: These Requests Remain Relevant and Respondent Should be Required to Respond***

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.

Like the chassis, ALJ Dibble correctly found that Respondent supplies the containers its drivers use to transport cargo and also derives additional revenue from their use. ALJD 4:4, citing to Tr. 1049, 1930, 1937; ALJD 10:2. As with the chassis, it appears Respondent intends to claim that it does not have an ownership interest in the containers used its drivers.<sup>6</sup> Because the containers are necessary pieces of equipment used daily by drivers, Respondent should have documentation showing who owns the containers, and it should be required to produce that documentation.

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<sup>4</sup> "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.

<sup>5</sup> "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.

<sup>6</sup> As it suggests in its June 10, 2019 Response to ALJ Dibble's Order to Show Cause, at page 5.

***November Subpoena Paragraph Request 10: The GC Withdraws 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.

The GC withdraws this request.

***November Subpoena Paragraph Request 11: This Request Remains Relevant and Respondent Should be Required to Respond***

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

Like the unredacted customer contracts sought in November Subpoena Paragraph 4, the requested documents in this paragraph are directly relevant to determining “the relationship between the company’s compensation and the amount of fares collected.” *Uber Technologies, Inc.*, NLRB Division of Advice Memorandum (April 16, 2019) [citing to *SuperShuttle DFW, Inc.*, slip op. at 2-3, 12-14]. This relationship can only be understood if financial information concerning Respondent’s compensation from its customers is made available. Since this information is a significant factor in the Board’s analysis under *SuperShuttle DFW, Inc.*, it is relevant and Respondent should be required to produce it.

***November Subpoena Paragraph Request 12: The GC Withdraws 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.

The GC withdraws this request.

***November Subpoena Paragraph Request 13: This Request Remains Relevant and Respondent Should be Required to Respond***

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.

In its June 10, 2019 Response to ALJ Dibble's Order to Show Cause (at page 6), Respondent claimed that *SuperShuttle DFW, Inc.* "highlighted the significance of an owner-operator's ability to hire additional drivers in order to generate more gross revenue" and that ALJ Dibble "understated both the evidence and the prevalence of this arrangement by the Owner-Operators." Because Respondent will likely pursue this claim when the hearing is re-opened, the requested information in this paragraph is relevant and is necessary for the GC to properly respond. Extensive testimony and various documents admitted into evidence previously in these cases establish that Respondent maintains records identifying its drivers, including the Hauling Agreements each of its drivers has to sign before working for Respondent (for example R1; GC 34; GC 52) and uses dispatching software that contain drivers' truck numbers and contact information for assignment purposes. Tr. 1672-1675. Therefore, Respondent should have documents responsive to this request and it should be required to produce those documents.

***November Subpoena Paragraph Requests 14-16, 23: These Requests Remain Relevant and Respondent Should be Required to Respond***

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.

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.

Both the Board, in *SuperShuttle DFW, Inc.*, and the Division of Advice, in *Uber Technologies, Inc.*, provide detailed factual accountings of employers' dispatch systems. As the Board stressed, the amount of discretion Respondent imparts to the dispatchers when presenting assignments to drivers directly affects a drivers' "scope for entrepreneurial initiative." *SuperShuttle DFW, Inc.*, supra at \*15. While the present record in these cases contains testimony concerning the role Respondent's dispatchers play in the drivers' daily activities, the methods by which Respondent's dispatchers actually perform their duties should be more fully explored in light of *SuperShuttle DFW, Inc.* As such, the requested documents are relevant and Respondent should be required to produce them.

***November Subpoena Paragraph Requests 17-20: The GC Withdraws These Requests***

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.

The GC withdraws these requests.

***November Subpoena Paragraph Requests 21 – 22: These Requests Remain Relevant and Respondent Should be Required to Respond***

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.

As stated in *SuperShuttle DFW, Inc.*, supra at \*15, the ability of a driver to reject assignments and choose an assignment when presented with a selection are factors for evaluating the “scope for entrepreneurial initiative” available to drivers. Conflicting testimony was offered at the previous hearing in these cases about drivers’ ability, or lack thereof, to reject and/or choose certain assignments offered to them by Respondent’s dispatchers. Notably, Respondent witness Miguel Camacho specifically testified that Respondent documented instances in which drivers rejected assignments. Tr. 1206. Since the ability to reject or choose assignments is directly relevant to determining the extent of entrepreneurial opportunity available to Respondent’s drivers, Respondent should be required to produce responsive documents in its possession.

***November Subpoena Paragraph Request 24: This Request Remains Relevant and Respondent Should be Required to Respond***

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.

The GC 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 and 68. The GC believes depositions, which include relevant testimony, were conducted in connection to that litigation. For example, the transcript for California state

court cases, *Herrera, et al v. XPO Logistics Cartage, LLC*, California Superior Court Cases NS033715, NS033716, NS033717, and NS033718, Hon. Michael P. Vicencia, presiding (hearing: December 10 to 12, 2018, and September 9, 2019), which the GC has reviewed, contains multiple references to depositions of various witnesses. Many of these witnesses, such as Safety Manager Enrique Flores, also testified at the previous hearing in these cases. This deposition testimony is relevant to evaluating the credibility of various witnesses who may be called to testify once the hearing in these matters is reopened. Further, as Respondent is a party to litigation in various forums concerning the employment status of its drivers, it should have documents responsive to this request and it should be required to produce those documents.

### **III. The March Subpoena**

#### ***March Subpoena Request 1: This Request Remains Relevant and Respondent Should be Required to Respond***

1. Documents defining the “Yard Rules” governing driver conduct at the Respondent’s facility.

Documents explaining the “Yard Rules” governing driver conduct at its facility are related to Respondent’s control over the drivers while they are working. Because those rules may indicate the degree to which Respondent exercises control over its drivers, those rules are directly tied to drivers’ lack of entrepreneurial opportunity [“...employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa.” *SuperShuttle DFW, Inc.*, at \*15]. The GC became aware of Respondent’s “Yard Rules” only after the previous hearing in these cases closed, and as such, they were not previously explored during the hearing. Since the extent to which Respondent maintained and enforced its “Yard Rules” is directly relevant to determining

the extent of entrepreneurial opportunity available to Respondent's drivers, Respondent should be required to produce responsive documents in its possession.

***March Subpoena Requests 2 -4: These Requests Remain Relevant and Respondent Should be Required to Respond***

2. "Compliance Safety Accountability" (CSA) documents reporting driver conduct.
3. "Motor Vehicle Reports" (MVR) reporting driver conduct.
4. "Violation Summary Letters" issued to drivers.

While XPO's compliance with applicable safety laws and regulations was explored in the first phase of the hearing, the GC has only recently become aware that Respondent subjects its drivers to additional levels of supervision, including mandatory training, performance reviews, and the issuance of "Violation Summary Reports," for drivers who receive unsatisfactory CSA scores and Motor Vehicle Reports. The GC learned this, in part, from testimony by Respondent's own supervisors and managers in a California state court case, *Herrera, et al v. XPO Logistics Cartage, LLC*, supra.

The GC has also recently learned that if Respondent's drivers failed to comply with these requirements, Respondent could and would take them out of service. This is significant for the GC's case as it contradicts testimony in the existing record as well as ALJ Dibble's finding that, "...there is also no substantive evidence of an agreement between the Respondent and the drivers for close supervision" and "the record is also devoid of evidence that the drivers receive evaluations, audits, or training." ALJD 17:7-8; 17:31-32.

Due to this new information, it appears that Respondent did exert supervisory control, including mandatory training and audits, over drivers during the relevant time period. As discussed above, the level of control exercised by Respondent over its drivers is directly relevant

to determining the extent of entrepreneurial opportunity, if any, the drivers enjoyed. Given the relevance of the requested documents, Respondent should be required to produce them.

***March Subpoena Request 5: This Request Remains Relevant and Respondent Should be Required to Respond***

5. “Roadside Spec Driver Remedial” forms issued to drivers.

As stated above, the GC has only recently learned that Respondent exerts control through additional levels of supervision, including the requirement that drivers fill out a form entitled “Roadside Specs Remedial” if they receive a poor inspection.<sup>7</sup> This document includes a section in which drivers write down what actions they plan to undergo to avoid poor inspections in the future. If drivers failed to complete this document, Respondent could and would take them out of service. This is significant for the GC’s case as it contradicts testimony in the existing record as well as ALJ Dibble’s finding that Respondent did not evaluate or audit drivers’ performance. Based on this, Respondent clearly did exert supervisory control over drivers during the relevant time period, which, in turn, limited drivers’ entrepreneurial opportunity. Given the relevance of the requested documents, Respondent should be required to produce them.

***March Subpoena Request 6: This Request Remains Relevant and Respondent Should be Required to Respond***

6. “Annual Reports” issued to drivers.

In addition to the documents discussed above, Respondent exerts control over its drivers through the issuance of “Annual Reports,” essentially a form of an annual review. This document includes a section for drivers to sign after a meeting with Respondent’s

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<sup>7</sup> As noted above, the GC learned of this, in part, from testimony by Respondent’s own supervisors and managers in *Herrera, et al v. XPO Logistics Cartage, LLC*.

representatives, and the document also can contain a list of violations which, if committed, would result in the driver being put out of service.

This is significant in that it contradicts ALJ Dibble's previous findings that, "...there is also no substantive evidence of an agreement between the Respondent and the drivers for close supervision" ALJD 17:7-8; 17:31-32. As such, the GC is seeking these annual reports to demonstrate Respondent's exertion of supervisory control over the drivers during the relevant time period, which bears directly on entrepreneurial opportunity. Given the relevance of the requested documents, Respondent should be required to produce them.

***March Subpoena Request 7: This Request Remains Relevant and Respondent Should be Required to Respond***

7. Documents showing fines, levies, and/or other penalties, including deductions from drivers' settlement statements, issued to drivers as a result of an unsatisfactory roadside inspection and/or any other failure to comply with rules governing their conduct, including but not limited to, documents identifying (1) who decided to issue the fine, levy, and/or other penalty; (2) the amount of the fine, levy, and/or other penalty; (3) the driver who received the fine, levy, and/or other penalty; and (4) the reason(s) the fine, levy, and/or other penalty was issued.

As with the previous requests in the March subpoena, this request seeks documents relevant to the issue of control and is directly tied to the issue of entrepreneurial opportunity, and thus is clearly relevant to the re-opening of the record. This is significant for the GC's case in light of ALJ Dibble's previous finding that the record lacked evidence of driver supervision and evaluation. A monetary penalty for poor performance, especially one not required by any government regulation, is a clear indication that Respondent has taken it upon itself to supervise how its drivers do their jobs, and that drivers face clear consequences for violations of Respondent's rules. Thus, it appears that Respondent did exert supervisory control over drivers during the relevant time period through the drivers' earnings, which, in turn, limited drivers'

entrepreneurial opportunity. Given the relevance of the requested documents, Respondent should be required to produce them.

***March Subpoena Requests 8-9: These Requests Remain Relevant and Respondent Should be Required to Respond***

8. Documents reporting counselings and/or remedial trainings given to drivers, including but not limited to, documents identifying (1) who conducted the counseling and/or training; (2) the driver counseled and/or trained; (3) the reason(s) Respondent counseled and/or trained the driver; and (4) the subject(s) of the counseling and/or training.
9. Documents reporting the identity of drivers taken out of service for failing to attend counselings and/or complete remedial trainings.

The requests in these two paragraphs focus on the subject of “counselings,” mandatory one-on-one meetings between drivers and representatives of Respondent, the nature of these counselings, and the repercussions drivers faced if they did not attend counselings. Contrary to Respondent’s claims based on the existing record, these documents will provide further evidence that Respondent did exert supervisory control over drivers during the relevant time period, which, in turn, limited drivers’ entrepreneurial opportunity. Given the relevance of the requested documents, Respondent should be required to produce them.

***March Subpoena Request 10: This Request Remains Relevant and Respondent Should be Required to Respond***

10. Documents showing any bonuses, incentives, and/or discounts that Respondent provided to, promised to, or offered to drivers who incorporated or registered a business or limited liability company.

The request focuses on actions taken by Respondent to incentivize its drivers to incorporate or register a business or limited liability company. The GC recently became aware that Respondent has offered drivers incentives to incorporate or register a business or limited liability company. The information requested in paragraph 10 is necessary to respond to a claim

Respondent previously made regarding its drivers' supposed entrepreneurial opportunity: that its drivers, in an effort to increase their entrepreneurial opportunity, incorporate or register as a business or limited liability company in order to separate themselves from Respondent. Evidence of Respondent's efforts to incentivize this veneer of independence is crucial when analyzing whether actual entrepreneurial opportunity exists. Given the relevance of the requested documents, Respondent should be required to produce them.

***March Subpoena Request 11: This Request Remains Relevant and Respondent Should be Required to Respond***

11. Documents showing any bonuses, incentives, and/or discounts that Respondent provided to, promised to, or offered to drivers to sign-on, refer, or recommend additional drivers either as truck owners or truck lessors or as second-seat drivers.

Like the documents revealing incentives given to drivers to incorporate, the information requested in paragraph 11 is necessary to respond to a claim Respondent has made based on the existing record: that its drivers, in an effort to increase their own entrepreneurial opportunity, make an independent business decision to employ additional drivers to drive their trucks. A full consideration of Respondent's role in this supposed "independent business decision" is crucial when analyzing whether its drivers enjoy any actual entrepreneurial opportunity in their work for Respondent. Given the relevance of the requested documents, Respondent should be required to produce them.

#### **IV. Conclusion**

The GC respectfully requests ALJ Dibble order Respondent to comply with the outstanding document requests made in the November and March subpoenas, as discussed above.

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

Respectfully submitted,

Mathew Sollett /s/

Mathew Sollett

Molly Kagel

Counsel for the General Counsel

National Labor Relations Board, Region 21

# **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, 10<sup>th</sup> 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**

**SUBPOENA DUCES TECUM****UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**Custodian of Records  
XPO Cartage, Inc.To 5800 Sheila StreetCommerce, CA 90040-2300As requested by Mathew Sollett, Counsel for General Counselwhose 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 Boardat 312 N. Springs Street, 10th Floorin the City of Los Angeles, CAon Tuesday, March 17, 2020 at 9:30 AM or any adjournedor 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-1-18HZ9LP**

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

Issued at Los Angeles, CADated: March 05, 2020

 A handwritten signature in black ink that reads "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.

# 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 recordings 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. **“Period covered by this subpoena”** means the period from **January 1, 2015 through September 1, 2017** and the subpoena seeks only documents from that period unless another period is specified. 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. This subpoena does not supersede, revoke or cancel any other subpoena(s) previously issued in this proceeding.

## DOCUMENTS TO BE PRODUCED

1. Documents defining the “Yard Rules” governing driver conduct at the Respondent’s facility;
2. “Compliance Safety Accountability” (CSA) documents reporting driver conduct;
3. “Motor Vehicle Reports” (MVR) reporting driver conduct;
4. “Violation Summary Letters” issued to drivers;
5. “Roadside Spec Driver Remedial” forms issued to drivers;
6. “Annual Reports” issued to drivers;
7. Documents showing fines, levies, and/or other penalties, including deductions from drivers’ settlement statements, issued to drivers as a result of an unsatisfactory roadside inspection and/or any other failure to comply with rules governing their conduct, including but not limited to, documents identifying (1) who decided to issue the fine, levy, and/or other penalty; (2) the amount of the fine, levy, and/or other penalty; (3) the driver who received the fine, levy, and/or other penalty; and (4) the reason(s) the fine, levy, and/or other penalty was issued;
8. Documents reporting counselings and/or remedial trainings given to drivers, including but not limited to, documents identifying (1) who conducted the counseling and/or training; (2) the driver counseled and/or trained; (3) the reason(s) Respondent counseled and/or trained the driver; and (4) the subject(s) of the counseling and/or training;
9. Documents reporting the identity of drivers taken out of service for failing to attend counselings and/or complete remedial trainings;
10. Documents showing any bonuses, incentives, and/or discounts that Respondent provided to, promised to, or offered to drivers who incorporated or registered a business or limited liability company;
11. Documents showing any bonuses, incentives, and/or discounts that Respondent provided to, promised to, or offered to drivers to sign-on, refer, or recommend additional drivers either as truck owners or truck lessors or as second-seat drivers.

**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 REPORT ON STATUS OF SUBPOENAS DUCES TECUM B-1-17682W5 AND B-1-18HZ9LP** was submitted by E-filing to the National Labor Relations Board, Division of Judges, San Francisco Branch Division, on July 20, 2020, and that each of the following parties was served with a copy of the same document by e-mail on July 20, 2020.

Holger Besch, Esq.  
Seyfarth Shaw, LLP  
Email: Hbesch@seyfarth.com

Michael F. Marino, Esq.  
Seyfarth Shaw LLP  
Email: MMarino@seyfarth.com

Marshall Babson, Esq.  
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Hector De Haro, Esq.  
Bush Gottlieb, A Law Corporation  
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Julie Gutman Dickinson, Esq.  
Bush Gottlieb, A Law Corporation  
Email: jgutmandickinson@bushgottlieb.com

/s/ Mara Estudillo

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

# **EXHIBIT B**

**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 DENYING IN PART PETITION TO REVOKE SUBPOENAS B-1-18HZ9LP and  
B-1-17682W5**

I. Procedural Background

Following the issuance of the initial Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and the Second Consolidated Complaint, on March 22, 2017, the General Counsel issued an Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing. XPO Cartage, Inc. (the Respondent) filed timely answers.

The consolidated complaint alleges that the Respondent violated the National Labor Relations Act (NLRA/the Act) when (1) on or about February 26, 2015, the Respondent, by Hector Banuelos (Banuelos), at the dispatch window at the Commerce facility, told an employee that the employee was not receiving work assignments because he was wearing union insignia clothing; (2) on or about March 4, 2015, the Respondent, by dispatcher Armando Rodriguez (Rodriguez), at the Commerce facility, prohibited employees from talking about the Union during working hours while permitting employees to talk about other nonwork subjects; (3) on or about March 6, 2015, the Respondent, by Ezequiel Chevez (Chevez), at the Commerce facility, prohibited employees from wearing union insignia at work while permitting employees to wear other insignia; (4) on or about April 22, 2015, the Respondent, by Enrique Flores (Flores), at the Commerce facility, interrogated an employee about the employee's union membership, activities, and sympathies, and the union membership, activities, and sympathies of other employees; and implicitly threatened an employee with job loss and/or unspecified reprisals if the Union won or came into the Commerce facility; (5) on or about April 27 and September 30, 2015, the Respondent, by Chevez and/or Miguel Camacho (Camacho) engaged in surveillance or created the impression of surveillance of employees engaged in union activities; (6) on or about May 5, 2015, the Respondent, Flores, in Flores' office at the Commerce facility, interrogated an employee about the employee's union membership, activities, and that of other employees; solicited employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment; and threatened an employee with less desirable work all because of his union support and activity, or if the Union came into the Commerce facility; (7) at all material times since at least about February 11, 2015, the Respondent has maintained as a condition of employment for its employees and has required its employees to

sign and be bound by Equipment Lease Agreements and the Independent Contractor Hauling Agreement, with both containing provisions that require employees to resolve disputes through individual arbitration proceedings and relinquish any right they have to resolve disputes through collective or class action; (8) on or around March 10, 2016, the Respondent, through Rodriguez, conditioned work assignments on the removal of union insignia; (9) since at least December 30, 2014, the Respondent has misclassified its employee-drivers as independent contractors; (10) on or around February 26, 2015, the Respondent refused to assign work to its employee Humberto Canales (Canales); (11) on or about January 5, 2017, the Respondent refused to consider for hire or hire Canales; (12) in or about the months of March through June 2015, the Respondent denied a truck-repair loan to its employee Domingo Avalos (Avalos), and then required him to make a large cash payment to have the truck repaired; and (13) on or around June 18, 2015, the Respondent prohibited its employee Avalos from working.

This case was tried in Los Angeles, California, on July 24 – August 3, 2017 and September 11 – 13, 2017; and a recommended decision was issued September 12, 2018. The parties subsequently filed exceptions to the decision with the National Labor Relations Board (NLRB/the Board). On May 10, 2019, the NLRB issued an Order Remanding this case to the me for further consideration under *SuperShuttle DFW, Inc.*, 387 NLRB No. 75 (2019). The Board remanded this case to me "for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing the complaint allegations affected by *SuperShuttle* and setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order." The parties were notified in subsequent orders and conference calls with me that in reopening the record, the only issue for consideration is whether the drivers are employees or independent contractors under the new standard established in *SuperShuttle*.

On March 5, 2020,<sup>1</sup> counsel for the General Counsel served the Respondent with subpoena duces tecum B-1-18HZ9LP (subpoena HZ9LP) requesting 11 categories of documents. On March 12, the Respondent filed a petition to revoke subpoena HZ9LP. In its petition, the Respondent claims generally that subpoena HZ9LP should be revoked because it (1) seeks irrelevant information; (2) overly broad or unduly burdensome; (3) seeks privileged materials or attorney work product; (4) untimely; and (5) seeks confidential financial and business information. Throughout the petition to revoke, the Respondent makes specific objections to individual requests for documents. The General Counsel filed a response in opposition on April 2, addressing the Respondent's general and specific objections to the subpoenas. The Respondent's response to the General Counsel's opposition is dated April 13.

Based on my review of case law, Board rules and regulations, and the parties' filings, I make the following rulings:

## II. Subpoena Duces Tecum B-1-18HZ9LP

The Respondent's argues that requests in paragraphs nos. 1 and 2 are overbroad and have no relevance to the question of how the new legal standard, with its focus on entrepreneurial opportunity, affects my ruling in the prior recommended decision. Moreover, the Respondent

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<sup>1</sup> All dates are in 2020 unless otherwise stated.

contends that requests in paragraphs 3 – 6 are vague and ambiguous and irrelevant to the entrepreneurial opportunity factor under the new legal standard. I find those arguments unpersuasive. The requests nos. 1, 4, 5 and 6 must be produced because they are relevant to the Respondent’s control over the drivers; and they were not explored during the first trial because the General Counsel did not become aware of their existence until after the first trial closed.

The Respondent is not required to produce subpoena requests nos. 8 – 11. The purpose of reopening the record is not to allow the parties to relitigate the case with new and novel arguments. Rather, the Board’s remand order only allows the parties to supplement the record with new evidence about changes in entrepreneurial control that was unavailable during the first trial. I find that the General Counsel’s subpoena duces tecum requests nos. 8 – 11 do not meet this requirement.

Based on the above, I find that Respondent’s request that subpoena 18HZ9LP be revoked is DENIED IN PART AND GRANTED IN PART.

### III. Subpoenas duces tecum B-1-17682W5

Pursuant to a filing dated July 20, 2020, the General Counsel withdrew subpoena requests nos. 5, 10, 12, and 17 – 20. The General Counsel argues that the Respondent should be ordered to produce the remaining documents requested in subpoena duces tecum B-1-17682W5 (17682W5) because the Respondent did not timely file a petition to revoke. I agree.

Therefore, the Respondent is ordered to produce documents in response to subpoena 17682W5 requests nos. 1 – 4, 6 – 9, 11, 13 – 16, 21 – 22, and 24.<sup>2</sup> The Respondent must make a diligent effort to search for the documents or inquire of its supervisors/managers/agents/employees or contracted third parties to ascertain if it or they are in possession of such documents. If after engaging in an exhaustive search the Respondent finds some of the requested documents do not exist, the Respondent should respond as such to the General Counsel’s request and detail the efforts it took to locate the documents.

It is so ORDERED.

Dated: July 24, 2020



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Christine E. Dibble  
Administrative Law Judge

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<sup>2</sup> The parties should note that the rulings in this order do not guarantee the documents produced pursuant to the above-referenced subpoenas will be admitted into evidence at trial. I will not allow into evidence documents that were discoverable during the first trial.

**STATEMENT OF SERVICE**

I hereby certify that a copy of General Counsel's Motion to Amend ALJ's July 24, 2020 Order Regarding Subpoenas B-1-18HZ9LP and B-1-17682W5 was submitted by e-filing to the Administrative Law Judge of the National Labor Relations Board on July 29, 2020.

The following parties were served with a copy of said document by electronic mail on July 29, 2020:

Holger Besch, Attorney at Law  
Michael F. Marino, Attorney at Law  
Marshall Babson, Attorney at Law  
Seyfarth Shaw, LLP  
[hbesch@seyfarth.com](mailto:hbesch@seyfarth.com)  
[mmarino@seyfarth.com](mailto:mmarino@seyfarth.com)  
[mbabson@seyfarth.com](mailto:mbabson@seyfarth.com)

Hector De Haro, Attorney at Law  
Julie Gutman Dickinson, Attorney at Law  
Bush Gottlieb, A Law Corporation  
[hdeharo@bushgottlieb.com](mailto:hdeharo@bushgottlieb.com)  
[jgutmandickinson@bushgottlieb.com](mailto:jgutmandickinson@bushgottlieb.com)

Respectfully submitted,

/s/ Aide Carretero\_\_\_\_\_

Aide Carretero  
Secretary to the Regional Director  
National Labor Relations Board  
Region 21