

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

XPO LOGISTICS FREIGHT, INC.)	
Petitioner/Cross-Respondent)	Nos. 19-1097, 19-1125
)	
v.)	Board Case No.
)	21-CA-227312
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	

**UNOPPOSED JOINT MOTION TO VOLUNTARILY DISMISS,
WITH PREJUDICE, THE PETITION FOR REVIEW
AND TO DISMISS, WITHOUT PREJUDICE,
THE CROSS-APPLICATION FOR ENFORCEMENT**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

Pursuant to Federal Rule of Appellate Procedure 42(b), XPO Logistics Freight, Inc. (“the Company”), by its counsel, and the National Labor Relations Board (“the Board”), by its Assistant General Counsel, respectfully move the Court for leave to voluntarily dismiss, with prejudice, the Company’s petition for review and to dismiss, without prejudice, the Board’s cross-application for enforcement in the above-captioned case, and show:

1. The Company filed with the Court a petition for review of the Board’s Order in *XPO Logistics Freight, Inc.*, 367 NLRB No. 120 (2019) (see Attachment 1). The Board cross-applied for enforcement of its Order, and the Court consolidated the appeals. The case was fully briefed to the Court, and oral argument was held on February 21, 2020.

2. On February 27, 2020, the Board notified the Court by letter that serious settlement discussions were in progress regarding this case.

3. On March 10, the Board and the Company filed a joint motion to hold this case in abeyance. The parties informed the Court that they had entered into a settlement agreement to resolve this case without further litigation, and they requested that the Court hold the case in abeyance pending the parties' compliance with the agreement's terms.

4. On March 12, the Court granted the parties' joint motion, ordered that the case be held in abeyance, and directed the parties to file status reports at 90-day intervals beginning June 10.

5. On June 10, the parties filed a joint status report updating the Court as to their efforts to achieve compliance with the terms of their settlement agreement.

6. The parties have now achieved substantial compliance with the settlement agreement's terms.

7. The parties, therefore, request that this Court dismiss, with prejudice, the Company's petition for review. The parties also ask that the Court dismiss the Board's cross-application without prejudice to the Board's right to file a future application for enforcement, if necessary, to enforce the "continuing obligation" imposed on the Company by the Board's Order. *See NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567 (1950) (Because "[a] Board order imposes a continuing

obligation” and because “the Board is entitled to have [any] resumption of the unfair practice barred by an enforcement decree,” an employer’s compliance does not deprive the Board of the right to secure enforcement of the order from an appropriate court). *Accord NLRB v. Raytheon Co.*, 398 U.S. 25, 27-28 (1970).

8. Each side is to bear its own costs.

9. Joshua L. Ditelberg, counsel for the Company, has given the Board permission to sign this motion on his behalf.

WHEREFORE, the parties respectfully request that their joint motion be granted, and that the petition for review be dismissed with prejudice and the cross-application for enforcement be dismissed without prejudice.

Respectfully submitted,

For the Board:

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2960

Dated: September 2, 2020

For the Company:

/s/ Joshua L. Ditelberg
Joshua L. Ditelberg
Seyfarth Shaw LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606-6448
(312) 460-5000

Dated: September 2, 2020

Dated at Washington, DC
this 2nd day of September 2020

Attachment 1: Decision of the National Labor Relations Board

As required by Circuit Rule 27(g)(2)

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

XPO Logistics Freight, Inc. and International Brotherhood of Teamsters, Local 63. Case 21–CA–227312

April 23, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on September 12, 2018,¹ by International Brotherhood of Teamsters, Local 63 (the Union), the General Counsel issued the complaint on October 19, 2018, alleging that XPO Logistics Freight, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union’s request to recognize and bargain with it following the Union’s certification in Case 21–RC–136546.² (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On November 21, 2018, the General Counsel filed with the National Labor Relations Board a Motion for Summary Judgment. On November 30, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the Union filed a reply to the Respondent’s response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.³

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union’s certification of representative based on its objections to the election in the underlying representation proceeding.

¹ The General Counsel, in his motion for summary judgment at par. 14, inadvertently stated that the charge was filed on September 14, 2018.

² 366 NLRB No. 183 (2018). The underlying representation decision was captioned under the name of the predecessor employer, Con-Way Freight, Inc. About October 31, 2015, the Respondent purchased the business of, and became a successor to, Con-Way Freight, Inc.

In the underlying proceeding, Case 21–RC–136546 was consolidated for hearing with Cases 21–CA–135683 and 21–CA–140545. The administrative law judge in the underlying proceeding was sitting as a

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, with a place of business in Los Angeles, California, has been engaged in the business of interstate freight transportation.

During the 12-month period ending on September 30, 2018, a representative period, the Respondent, in conducting its operations described above, purchased and received at its Los Angeles, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

About October 31, 2015, the Respondent purchased the business of Con-Way Freight, Inc. (Con-Way). Since then, it has continued to operate the business of Con-Way in basically unchanged form and has employed as a majority of its employees, individuals who were previously employees of Con-Way. Based on these operations, the Respondent has continued the employing entity and is a successor to Con-Way.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

hearing officer with respect to the representation issues. See Sec. 102.1(f) of the Board’s Rules and Regulations; see also NLRB Casehandling Manual (Part 2) Representation Proceedings, Sec. 11424.1.

³ Member Emanuel is recused and took no part in the consideration of this case.

⁴ Member Kaplan did not participate in the underlying representation proceeding, but he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

On August 27, 2018, the Board certified the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time driver sales representatives and driver sales representative students employed by the Employer at its service center located at 1955 E. Washington Boulevard, Los Angeles, California; but excluding all other employees, office clerical employees, plant clerical employees, confidential employees, customer service representatives, freight class specialist employees, temporary employees, temporary agency employees, staffing agency employees, sales employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

At all material times, Paul Frayer has held the position of Director of Human Resources for the Respondent and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About September 10, 2018, the Union, by letter and email, requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. Since about September 12, 2018, the Respondent has failed and refused to recognize and bargain with the Union.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since September 12, 2018, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, XPO Logistics Freight, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local 63 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time driver sales representatives and driver sales representative students employed by the Employer at its service center located at 1955 E. Washington Boulevard, Los Angeles, California; but excluding all other employees, office clerical employees, plant clerical employees, confidential employees, customer service representatives, freight class specialist employees, temporary employees, temporary agency employees, staffing agency employees, sales employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

(b) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the

attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 23, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Local 63 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time driver sales representatives and driver sales representative students employed by us at our service center located at 1955 E. Washington Boulevard, Los Angeles, California; but excluding all other employees, office clerical employees, plant clerical employees, confidential employees, customer service representatives, freight class specialist employees, temporary employees, temporary agency employees, staffing agency employees, sales employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

XPO LOGISTICS FREIGHT, INC.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Board's decision can be found at www.nlr.gov/case/21-CA-227312 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that the foregoing document contains 601 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 2nd day of September 2020

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify further that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit _____
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 2nd day of September 2020