



REPORT AND ANALYSIS OF THE NLRB CASES AGAINST XPO

THE AUTHOR

Lafe Solomon spent 40 years as a labor law attorney for the National Labor Relations Board (NLRB). His career encompassed positions on the staffs of various Republican and Democrat General Counsels, Chairmen and Board Members, culminating in his appointment by President Obama in June 2010 as acting General Counsel. He served in that position until October 2013.

The International Brotherhood of Teamsters (North American trade union) requested an independent and objective analysis of actions taken by Conway Freight and its successor – XPO Logistics in response to XPO’s employees’ exercise of their rights under the National Labor Relations Act (NLRA) to form a union. Preparation of this report centered on an analysis of the official documents contained in the NLRB representation and unfair labor practice cases involving Conway and XPO. The author’s analysis of these cases is based on his expertise and extensive knowledge of NLRB process and law.

OVERVIEW

The Teamsters began organizing workers in various facilities of Conway Freight in 2014 and 2015, and in 2015 Conway was bought by XPO. The Teamsters began organizing workers at various facilities of XPO in 2016, and the workers are continuing to demonstrate interest in unionizing and choosing the Teamsters as their bargaining representative.

The Teamsters have filed 23 election petitions with the National Labor Relations Board (NLRB) since August 2014. The NLRB has conducted 17 elections. The Teamsters have won 7 elections and to date have been certified as the bargaining representative in 6 facilities (one additional certification is pending before the NLRB).

Since 2014 the Teamsters and/or individual XPO workers have filed a total of 114 unfair labor practice charges with the NLRB against Conway/XPO. NLRB Regional Directors have to date issued 33 complaints, consolidating numerous charges in each complaint. An additional 11 charges resulted in settlement agreements before Regional Directors decided whether to issue complaints.

To date, XPO has paid over \$500,000 in backpay, and no collective bargaining contract has been reached in the units in which the Teamsters are the certified bargaining representative.

EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT (NLRA)

The NLRA, enacted in 1935 and amended in 1947, states in Section 1:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the NLRA provides that employees have the right to form and join unions and to bargain collectively through a union of their own choosing and also to refrain from these activities.

Section 8, in relevant part, makes it an unfair labor practice for an employer to “interfere with, restrain or coerce” employees in the exercise of their Section 7 rights, to discriminate against employees in regard to their hire or tenure of employment or any term and condition of employment to discourage membership in a union, or to refuse to bargain collectively with the union chosen by its employees.

Section 9 provides that unions selected by the majority of employees in an appropriate unit shall be the exclusive bargaining representative of all of the unit employees for the purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment. Section 9 also provides the procedure by which a union becomes the employees’ bargaining representative under the NLRA.

NLRB PROCESS

A. Representation cases

A union, having received interest from employees in having the union represent them, may file a representation petition in one of the NLRB's Regional offices. The Regional office will conduct a secret-ballot election in an appropriate unit and issue a tally of ballots. The Employer or the Union may file objections to the election, alleging conduct that interfered with a free and fair election. The Regional Director will issue a decision on the objections, conducting a hearing where warranted. The Director's decision may be appealed to the 5-Member Board, which will issue a decision, and if it is determined that a majority of employees chose the union in a free and fair election, the Board will issue a certification of representative.

The employer may test the Board's certification in a U.S. Court of Appeals and then the U.S. Supreme Court by refusing to bargain with the union.

B. Unfair labor practice cases

A union, or individual employee(s), may file a charge against an employer, alleging that the employer has committed an unfair labor practice(s) by violating Section 8 of the Act. The Regional office will investigate the charge, and, if the Director finds merit, he/she will issue a complaint. An NLRB administrative law judge will conduct a hearing and issue a decision, which may be appealed to the 5-Member Board. The Board will issue a decision, which may be appealed to a U.S. Court of Appeals and then to the U.S. Supreme Court.

An employer may agree to settle an unfair labor practice charge at any stage of the proceedings, including during the investigation before the Director decides whether to issue complaint. An employer may negotiate and reach a settlement agreement with a union with the approval of the Regional Director (an informal settlement agreement) or without involvement of the Regional Director (a non-Board settlement agreement).

XPO'S ANTI-UNION PHILOSOPHY

In its Employee Handbook, XPO includes the following section, entitled "Philosophy on Labor Unions":

*XPO was established to provide differentiated transportation and logistics services. The Company's competition comes from unionized as well as union-free transportation and logistics companies. It is the Company's belief that unionized companies will be unable to compete with union-free companies in the transportation and logistics distribution business. Excessive costs are incurred by unionized companies due to restrictive work practices and administrative expenses. Unions have already seen many of their members lost when non-competitive unionized companies have gone out of business. Today, the Company's employees have an absolute legal right **not** (emphasis added) to belong to the union. The Company will take whatever legal means are available to help protect that right. It is the Company's position that it can best achieve a competitive position in the transportation and logistics industries by remaining union free. XPO will do everything legally possible to remain in that position and to convince the Company's employees that they have no need for representation by an outside party....*

Significantly, XPO does not inform its employees of their right to organize and join a union, as is their right under the National Labor Relations Act. Rather, it emphasizes only their right to refrain from such activities and states its intention to remain "union-free." In light of XPO's economic power over its employees as the source of their jobs and their wages, the handbook conveys a clear message to employees that, in choosing a union as their bargaining representative, they act at their peril.

Since 2014, XPO has thwarted its employees' desire to choose the Teamsters as their bargaining representative in an effort to remain "union-free." It has interfered in the NLRB election process by, among other objectionable and unfair labor practice conduct, threatening employees with the futility of choosing the Teamsters, promising them benefits if they did not choose the Teamsters, discharging or suspending union activists, and withholding raises and bonuses to employees for choosing the Teamsters. In addition, XPO has taken advantage of the delays afforded it under the legal process to circumvent its bargaining obligation with the Teamsters.

XPO'S UNLAWFUL RESPONSE TO THE TEAMSTER'S ORGANIZING CAMPAIGNS

A. Pre-election conduct

During organizing campaigns in 7 facilities (King of Prussia, Trenton, Baltimore, Des Plaines, Los Angeles, Commerce and Compton), XPO engaged in serious and extensive objectionable conduct and unfair labor practices in blatant attempts to interfere with employee free choice in the elections. As enumerated in complaints issued by NLRB Regional Directors, high-level managers and supervisors, including terminal managers, told employees that it would be futile for them to select a union, that the employer would never agree to a contract, and that the employer would remain non-union.

In addition, managers and supervisors threatened employees that they would not receive annual wage increases, solicited grievances from employees and impliedly promised to remedy them, interrogated employees, and created the impression of surveillance of their union activities. And to intensify the effect of its message to employees, in three facilities the threats and promises were also delivered by the labor consultant hired by XPO to thwart the union campaign.

Further, in four additional facilities (El Paso, Elgin, Rockford and Erie), XPO agreed, without the NLRB Regional Directors deciding whether to issue complaint, to settle the unfair labor practice charges filed by the Teamsters, alleging that XPO threatened employees and engaged in surveillance during the organizing campaigns.

B. Post-election conduct

In the six facilities in which the Teamsters were certified as the employees' bargaining representative, XPO followed through on its threats and unlawfully withheld annual wage increases while giving them to non-union employees in other facilities and made additional unilateral changes in terms and conditions of employment. In addition, in four facilities, XPO suspended and/or discharged employees because of their union activities—"hallmark" unfair labor practices designed to "nip-in-the-bud" organizing campaigns.

C. Delaying tactics

1. XPO objections to elections in which the employees chose the Teamsters as their bargaining representative

XPO has taken full advantage of the legal delays afforded it under the National Labor Relations Act, clearly designed to postpone its bargaining obligation. XPO filed objections to the elections in four facilities (Laredo, Aurora, Trenton and Gary). The Regional Directors and the Board overruled the objections in all four cases.

In the Laredo case, XPO, after issuance by the Board of a certification of representative, refused to bargain with the Teamsters in order to appeal the certification to the 5th Circuit Court of Appeals. The 5th Circuit enforced the Board's order, XPO filed a petition for rehearing, and when the 5th Circuit denied the petition, XPO petitioned for certiorari to the United States Supreme Court, which was denied on October 2, 2017. As the election was conducted on September 12, 2014, XPO's appeals resulted in a 3-year delay of the employees' choice of the Teamsters as their bargaining representative.

Further, XPO's objections clearly did not merit Supreme Court review. XPO claimed that employee in-house organizers were agents of the Teamsters, but the Board and the 5th Circuit found, as a factual matter, that they were not

and, moreover, that they did not engage in any objectionable conduct. XPO also objected to the Board Agent's use of a table-top voting booth rather than a booth that stood on the floor. XPO argued that by seeing a voter's upper arms and shoulders, observers might be able to read body language and determine how an employee voted. However, as the hearing officer noted, the Board has repeatedly upheld the use of tabletop voting booths, and XPO identified no decision of any court of appeals that has found that the use of such booths conflicts with the NLRB's rules or manuals.

In the Aurora case, XPO made an offer of proof that was found by the Regional Director and the Board lacking in specificity to warrant a hearing. Again, XPO refused to bargain to test the Teamster's certification as bargaining representative in the D.C. Circuit. The Court denied XPO's petition for review, finding that XPO's objections were "general and conclusory... devoid of factual specifics about who said or did what to whom...." The Court issued its decision on May 25, 2018, 18 months after the election in which the employees chose the Teamsters as their bargaining representative.

XPO's objections to the April 14, 2017 election at the Trenton facility were the subject of an NLRB hearing before an administrative law judge, which commenced on June 26, 2018. On July 9, 2018, XPO and the Teamsters signed an informal settlement agreement, in which XPO agreed, in relevant part, to withdraw its objections and commence bargaining with the Teamsters—15 months after the election.

In the Gary case, pursuant to a representation petition filed by the International Association of Machinists (IAM), an election was conducted by the NLRB on June 29, 2016, and IAM was certified on July 20, 2016. XPO refused to bargain to test the certification and filed a petition for review in the D.C. Circuit. The Court denied XPO's petition on April 3, 2018, almost 2 years after the election.

2. XPO's bargaining tactics

Despite Teamster certifications as the employees' bargaining representative in 6 facilities, no contract has been reached. The Teamsters were certified as the employees bargaining representative in Miami on 12/22/14; in Laredo on 7/8/15; in Aurora on 11/2/16; in King of Prussia and North Haven on 11/22/16; and in Trenton on 7/12/18. Significantly, there have been over 55 bargaining sessions

in Miami without the finalization of a collective bargaining agreement and bargaining in Laredo and Aurora began over 2 years after Teamster certification.

CONCLUSION

XPO has demonstrated extreme hostility to its employees' right to choose a bargaining representative. It has engaged in an extensive, well-orchestrated campaign by high-level managers and its hired labor consultants to interfere with the NLRB election process, and when, despite its efforts, the employees chose the Teamsters, XPO continued its unlawful conduct, designed to reduce support among the employees for the Teamsters and to frustrate the bargaining process. Further, XPO has demonstrated its desire to delay the bargaining process "for delay's sake," by choosing to litigate the Teamsters' certifications at multiple levels rather than to begin to bargain with the Teamsters in accordance with its employees' wishes.

Although XPO has had to pay over \$500,000 in backpay to make its employees whole for the unfair labor practices it committed, this is clearly, for XPO, a "cost of doing business," to keep it "union-free" and a calculation that backpay payments are preferable and less costly to the business than reaching collective bargaining agreements.

In my experience, the sheer number of unfair labor practice charges filed and complaints issued by NLRB Regional Directors against XPO, resulting in numerous Board decisions and settlements, are extraordinary and outside the norm of employer opposition to its employees' organizing efforts, and evidence XPO's intent to flaunt its obligations under the NLRA to deny its employees their right and ability to form and join a union.

XPO has recently shown a willingness to settle its long-standing unfair labor practices, but it remains to be seen whether XPO will bargain in good faith with the intent to reach collective bargaining agreements with the Teamsters in the certified units and whether any organizing campaigns in additional facilities will meet with the same unlawful response as XPO has demonstrated in the past.

Respectfully Submitted,



Lafe E. Solomon

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