

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

XPO PORT SERVICES, INC.

and

Cases 21-CA-150878
21-CA-163614
21-CA-169753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

**ORDER CONSOLIDATING CASES, CONSOLIDATED
COMPLAINT AND NOTICE OF HEARING**

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 21-CA-150878, Case 21-CA-163614 and Case 21-CA-169753, which are based on charges filed by the INTERNATIONAL BROTHERHOOD OF TEAMSTERS (the Union), against XPO PORT SERVICES, INC. (Respondent)¹ are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations, and alleges that Respondent has violated the Act as described below.

1. (a) The original charge in Case 21-CA-150878 was filed by the Union on April 24, 2015, and a copy was served by regular mail on Respondent on April 27, 2015.

¹ Effective April 21, 2015, Respondent's name changed from Harbor Rail Transport to XPO Port Services, Inc.

(b) The first amended charge in Case 21-CA-150878 was filed by the Union on June 29, 2015, and a copy was served by regular mail on Respondent on June 30, 2015.

(c) The second amended charge in Case 21-CA-150878 was filed by the Union on July 30, 2015, and a copy was served by regular mail on Respondent on July 31, 2015.

(d) The third amended charge in Case 21-CA-150878 was filed by the Union on August 6, 2015, and a copy was served by regular mail on Respondent on August 7, 2015.

(e) The original charge in Case 21-CA-163614 was filed by the Union on November 6, 2015, and a copy was served by regular mail on Respondent on November 9, 2015.

(f) The first amended charge in Case 21-CA-163614 was filed by the Union on December 11, 2015, and a copy was served by regular mail on Respondent on December 14, 2015.

(g) The original charge in Case 21-CA-169753 was filed by the Union on February 12, 2016, and a copy was served by regular mail on Respondent on February 17, 2016.

(h) The first amended charge in Case 21-CA-169753 was filed by the Union on March 9, 2016, and a copy was served by regular mail on Respondent on March 9, 2016.

2. (a) At all material times, Respondent, a California corporation, with a facility located at 18726 South Laurel Park Road, Compton, California (herein the Compton facility), has been engaged in the business of drayage and container transport.

(b) During the 12-month period ending February 15, 2016, a representative period, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at its Compton facility goods valued in excess of \$50,000 from other enterprises located within the State of California, each of which other enterprises had received those goods directly from points outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Jose Munguia	Dispatcher Manager
Pedro Gonzalez	Dispatcher
Walter Morales	Regional Safety Manager
Robert Gomez	General Manager

6. Since at least December 30, 2014, Respondent has misclassified its employee-drivers as independent contractors, thereby inhibiting them from engaging in Section 7 activity and depriving them of the protections of the Act.

7. At all material times, and since at least January 31, 2015, Respondent has maintained as a condition of employment for all of its employees at the Compton facility an agreement entitled "Vehicle Lease and Independent Contractor Hauling Agreement" that contains the following provisions requiring employees to resolve employment-related disputes

exclusively through individual arbitration proceedings and to relinquish any rights they have to resolve disputes through collective or class action:

17. DISPUTES-ARBITRATION:

- A. **Disclosure.** By agreeing to this arbitration clause and abiding by its terms, you understand and acknowledge that (1) arbitration is final and binding on both you and us; (2) the parties are waiving their right to seek remedies in court, including the right to a jury trial or to seek class action litigation; (3) pre-arbitration discovery is generally more limited than and different from that permitted in court proceedings; (4) the arbitrators' award is not required to include findings of fact or legal reasoning; and (5) either Party's right to appeal or to seek modification of the rulings or awards of the arbitrators is strictly limited.
- B. **Exceptions to Agreement to Arbitrate.** The Parties agree that the only circumstances in which the Parties may initiate judicial proceedings under this Agreement are to obtain injunctive relief in connection with a breach of the confidentiality obligations or arbitration provision of this Agreement. In any judicial proceeding to enforce this Section 17, the only issues to be determined will be the existence of an agreement to arbitrate and the failure of a Party to comply with such agreement, and those issues will be determined summarily by the court without a jury.
- C. **Agreement to Arbitrate, Venue and Procedure.** Subject to Section 17.B, any dispute arising in connection with this Agreement, including but not limited to any violation of the federal leasing regulations (49 CFR 376) and other applicable Laws, will be exclusively, fully and finally resolved by arbitration in the metropolitan area where the terminal from which you are dispatched is located in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association and the Federal Arbitration Act (ch.1 of title 9 of the U.S. Code), with respect to which the Parties agree that this Agreement is not an exempt "contract of employment." The arbitration will be before a panel of three arbitrators: you will select one arbitrator, we will select a second arbitrator and the two arbitrators will select the third. In the alternative, the Parties may agree on a sole arbitrator. The parties agree that this Agreement involves interstate commerce, including that you will be hauling shipments moving in interstate commerce. The Parties agree that no consolidated or class action arbitration or lawsuits (or participation in private attorney general actions) will be permitted under this Agreement. If a court or arbitrator decides for any reason not to enforce this restriction on consolidated or class action arbitration, then the Parties agree that (1) this Section 17 will be null and void, and any disputes between the Parties will be resolved by court action, not arbitration and (2) you and we waive all right to trial by jury in any such court action.

- D. Award. The arbitrator(s) will make their award in writing, will include the rationale for the decision and will specifically determine whether you have prevailed for purposes of reimbursement of your expenses in Section 17.E below.
- E. Expenses. If you prevail in the arbitration, we will pay the full fees and expenses of the arbitrator(s) as well as the arbitration filing fee. Furthermore, we will pay (1) the full arbitration filing fee, if we are the claimant, or (2) the portion of the arbitration filing fee that exceeds the filing fee then in effect for civil actions in the United States federal court sitting in the metropolitan area where the arbitration is held under Section 17.C. Otherwise, the parties are responsible for their own arbitration expenses, including but not limited to attorneys fees.
- F. Effect. Any award entered by the arbitrators will be final, binding and non-appealable, and the Parties consent to the entry of judgment by any court of competent jurisdiction with respect to the arbitration award. This arbitration provision will be specifically enforceable.

8. On about October 27, 2015, 2015, Respondent, by Pedro Gonzalez, in the dispatcher's office at the Compton facility:

- (a) interrogated an employee about the employee's union and other protected concerted activity;
- (b) implicitly threatened an employee with termination in retaliation for engaging in union and other protected concerted activity; and
- (c) told an employee that it would be futile for employees to support the Union.

9. On about January 13, 2016, Respondent, by Jose Munguia, in the front parking lot at the Compton facility:

- (a) engaged in surveillance of employees' union and other protected concerted activity by photographing and/or recording them; and
- (b) created the impression that employees' union and other protected concerted activity was under surveillance by waving a cell phone pointed at employees.

10. (a) About January 14, 2016, Respondent took out of service/suspended its employee Fidel Gonzalez.

(b) Respondent engaged in the conduct described above in paragraph 10(a) because employee Fidel Gonzalez assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

11. By the conduct described above in paragraphs 6 through 9, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

12. By the conduct described above in paragraph 10, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Wherefore, as part of the remedy for the unfair labor practices alleged in above in paragraph 10, the General Counsel seeks an order requiring that the Respondent reimburse the discriminatee for all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

Further, as part of the remedy for the unfair labor practices alleged above in paragraphs 6 through 10, the General Counsel seeks an Order requiring that at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent's representative read the Notice to the employees in English and in Spanish on worktime in the presence of a Board agent.

Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees during worktime in the presence of Respondent's supervisors and agents identified above in paragraph 5.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before August 9, 2016, or postmarked on or before August 8, 2016.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be

transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **October 24, 2016**, at 1:00 p.m. PDT in Hearing Room 902, 888 South Figueroa Street, 9th Floor, Los Angeles, California, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Los Angeles, California, this 26th day of July, 2016.



Olivia Garcia, Regional Director, Region 21
National Labor Relations Board
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 21-CA-150878

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

XPO Port Services, Inc.
18726 South Laurel Park Road
Compton, CA 90220-6003

Isaac Ramirez, Organizer
International Brotherhood of Teamsters
25 Louisiana Avenue, NW
Washington, DC 20001

Robert G. Hulteng, Attorney at Law
Littler Mendelson, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104

Michael T. Manley, Attorney at Law
International Brotherhood of Teamsters
25 Louisiana Avenue, NW
Washington, DC 20001

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered

(OVER)

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.