

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1177

September Term, 2017

FILED ON: MAY 25, 2018

XPO LOGISTICS FREIGHT, INC.
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 17-1192

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Before: ROGERS, KAVANAUGH and PILLARD, *Circuit Judges*.

JUDGMENT

The court considered this petition for review and cross-application for enforcement on the record from the National Labor Relations Board (Board) and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). We accorded the issues full consideration and determined they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the petition for review be denied and the Board's cross-application for enforcement be granted.

I.

In October 2016, the Board held a union representation election at the Aurora, Illinois, facility of XPO Logistics Freight, Inc. (XPO). *XPO Logistics Freight, Inc.*, 365 NLRB No. 105, at *2 (July 6, 2017). The eligible employees—truck drivers and hostlers—voted 38 to 33 in favor of unionization. *See id.* XPO objected to the election result, claiming that the Union's supporters had created an environment of harassment and coercion that made a fair election impossible. *See* Petr's' Objections at 1–4, *XPO Logistics Freight, Inc.*, No. 13-RC-184190 (NLRB Oct. 19, 2016), Joint App'x (J.A.) 9–11. The "Offer of Proof" XPO filed with its objections listed the witnesses

it would call at an objections hearing, and generally asserted that the witnesses would testify to harassment and coercion that materially altered the results of the election. *See* Petr’s Offer of Proof at 1–5, *XPO Logistics Freight, Inc.*, No. 13-RC-184190 (NLRB Oct. 19, 2016), J.A. 13–18.

A Board Regional Director overruled the objections and certified the Union. XPO’s Offer of Proof was, in the Regional Director’s view, insufficient to warrant a hearing. *See* Report on Objections and Certification of Representative, *XPO Logistics Freight, Inc.*, No. 13-RC-184190 (NLRB Nov. 2, 2016), J.A. 21–26. The Board denied XPO’s request for review. *XPO Logistics Freight, Inc.*, 2017 WL 1294849 (NLRB Apr. 6, 2017); *see* 29 C.F.R. § 102.69(c)(2). The Board’s General Counsel charged XPO with violating the National Labor Relations Act after the company refused to bargain with the newly certified Union. *See* Complaint, *XPO Logistics Freight, Inc.*, No. 13-CA-196637 (NLRB Apr. 3, 2017), J.A. 51–53. The Board found a violation. *XPO Logistics Freight, Inc.*, 365 NLRB No. 105 (2017). XPO petitioned for review, and the Board cross-applied for enforcement.

II.

XPO principally contends that the Regional Director and the Board abused their discretion in declining to order a hearing on its objections. *See 800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017) (noting that we review for abuse of discretion a Board decision to overrule objections). It alternatively urges that, even in the absence of an evidentiary hearing, its objections—especially if considered cumulatively and in the context of the closeness of the election—should have sufficed to decertify the Union.

As a substantive matter, an election may be set aside where Union misconduct “created such an environment of tension and coercion” as to have “materially affected” the results of the election. *AOTOP, LLC v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003). Where claimed misconduct is not by the Union itself or its agents, but by third parties such as employees who favor the Union, “the Board will overturn an election only if the misconduct is so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Id.* It is not enough for an objecting party to assert that misconduct occurred; it must have a nexus to the election, and be of a kind and severity as to call into doubt whether the employees felt free to choose how to vote. *800 River Rd.*, 846 F.3d at 389. This is an “objective standard.” *In re Corner Furniture Discount Ctr.*, 339 NLRB 1122, 1123 (2003).

As a procedural matter, a party does not have an automatic right to a hearing on its objections. 29 C.F.R. § 102.69(c)(1). An evidentiary hearing is called for only when a party makes a *prima facie* showing of substantial and material issues of fact that, if true, would warrant setting aside the election. *See id.*; *Durham School Servs. v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016). A *prima facie* showing “cannot be conclusory.” *N. of Market Sr. Servs. v. NLRB*, 204 F.3d 1163, 1167 (D.C. Cir. 2000). Rather, it “must point to specific events and specific people.” *Id.* Under the Board’s precedent, “the mere allegation that the Petitioner threatened, intimidated, and coerced employees constitutes a general conclusion devoid of any specific content or substance, which fails to satisfy the Board’s requirement of reasonable specificity in the filing of objections.” *In re Affiliated Comput. Servs.*, 355 NLRB 899, 903 (2010). Such generalized allegations do not suffice to show misconduct that, when viewed objectively, created an environment of tension and coercion materially impeding the fairness of an election. *See In re Corner Furniture*, 339 NLRB at 1124.

XPO's objections were general and conclusory. The "proof" it offered in support of the three objections it pursues here named witnesses and asserted that they would testify on the kinds of topics the law makes relevant—that the witnesses were "intimidated," "harassed," "threatened," or "coerced." The Offer of Proof was devoid of factual specifics about who said or did what to whom that, if credited by a factfinder, could support a determination that the workplace was materially coercive.

On its first objection, XPO's Offer of Proof reads in full:

Employees Paul Biever, Steve Ayala, Joseph Smith, Manuel Mira, Angela Holguin, Dennis Fugett, Steve Ayala, and Jose Anaya will all testify that they were repeatedly harassed, intimidated and accosted by vocal Union supporters and Union agents at the entrance of XPO's facility. This behavior was routine and threatened and intimidated employees throughout the proposed unit.

Angel Holguin and Steve Ayala will testify that, in an attempt to threaten and coerce their vote, the Union visited their homes without invitation. These visits perceived to be threatening by Mr. Holguin and Mr. Ayala.

Petr's Offer of Proof at 2, J.A. 14. The Board agreed with the Regional Director that these allegations were insufficient to warrant an evidentiary hearing or to set aside the election because XPO "neither identified the alleged Union agents or supporters who purportedly threatened employees into supporting the Union nor specified the objectionable statements they assertedly made." *XPO Logistics*, 2017 WL 1294849 at *1 n.1. That comports with the Board's requirement that factual allegations concretely illustrate how Union agents ostensibly created an environment that was objectively coercive and materially affected the election outcome. Similarly, allegations that Union agents visited the homes of employees for campaign purposes to "threaten and coerce" employee votes are alone insufficient; XPO did not allege facts showing what it claims the Union agents did that could have amounted to objectively threatening or coercive behavior. *See, e.g., Canton, Carp's, Inc.*, 127 NLRB 513, 513 n.3 (1960); *Peoria Plastic Co.*, 117 NLRB 545, 545–46 (1957).

On the second objection, the Offer of Proof says:

Steve Ayala will testify that he and other employees were intimidated and/or harassed by a Union supporter, Juan Galicia-Guerra. Specifically, Mr. Ayala will testify that he was harassed, threatened and intimidated by a Union supporter who was attempting to influence the election and coerce his and other votes, including by verbally accosting Mr. Ayala, telling him to "go fuck [him]self," getting into arguments with other employees relating to job duties, and otherwise creating a threatening and coercive work environment. Mr. Ayala will testify that he believes that the behavior of the pro-Union employee and Union agent was designed to intimidate voters.

Petr's Offer of Proof at 3, J.A. 15. The lack of specifics is fatal to this objection, too. It does not say whether the profane statement was made by an agent of the Union, nor provide facts tying it to the election. It includes nothing concrete to illustrate how employees' arguments over "job

duties” could have affected their votes, nor what their “work environment” was “threatening and coerc[ing]” them to do or avoid. Even if the objection clearly referred to employees arguing in the workplace about the Union, that would not, without more, show that workers were impeded from freely casting their ballots in the representation election.

On the final objection, the Offer of Proof reads:

Employee Paul Biever will testify that, during the critical period, vocal Union supporters and Union agents Ryan Janota and Jose Ramirez verbally accosted, intimidated and threatened him with respect to his discarding of Union literature. Mr. Biever responded that it was his right to discard Union literature or otherwise express his opinions (conduct which is protected by Section 7). Thereafter, Mr. Biever was intimidated, accosted and threatened by the Union supporters with respect to his perceived support for the Employer. Mr. Biever will testify that he shared the contents of this threatening altercation with employees prior to the vote and that employees were aware of the incident.

Pet’r’s Offer of Proof at 4, J.A. 16. XPO also attached a handwritten note from Mr. Biever, which states:

I was down in [the] break room [getting] my bag to go on the street. I put a paper that was on the table in the trash can when Kenny walked over to me and got in my face and told me I can’t [throw] it out, and then what am I going to do about it two times I said I would do nothing. Cliff told me the same thing it’s not my right. I felt [harassed] and upset that Kenny [would] do that. I thought we were good friends. I hope we still can [be].

Pet’r’s Offer of Proof at 8, J.A. 20. The Offer of Proof is at its most specific here, describing a scenario in which Union supporters were apparently angry with Paul Biever for throwing away Union literature. Here, too, however, the Regional Director permissibly concluded that no hearing was warranted, because XPO failed to spell out conduct was sufficiently egregious to render employees’ free choice “impossible,” and thus warrant setting aside the election. Report on Objections at 4, J.A. 24.

In sum, the Board did not abuse its discretion in denying XPO’s request for review of the Regional Director’s decision to overrule XPO’s objections and certify the election results. XPO’s separate contention that the Offer of Proof itself, even without substantiation at an evidentiary hearing, suffices to set aside the election plainly fails for the reasons discussed above—particularly in light of the “extraordinary deference” we afford the Board on questions of election certification. *800 River Rd.*, 846 F.3d at 386. The Board therefore permissibly concluded that XPO violated the Act by refusing to bargain with the Union.

* * *

Because the decision under review comports with Board precedent and our law, we deny the petition for review and grant the Board's cross-application for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. See Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk