

XPO Logistics (NYSE: XPO)

Company faces growing liability from “wage theft” and worker misclassification-related litigation

Company Overview:

Following two years of \$9+ billion worth of acquisitions, XPO Logistics (NYSE:XPO) has grown to one of the top ten global transportation and logistics companies with projected revenue of \$15 billion and about \$1.1 billion of EBITDA¹. Before these acquisitions, XPO had revenues of \$2.4 billion and \$157 million EBITDA². The key acquisitions that put the company on the map are: Pacer Cartage (intermodal/drayage), Bridge Terminal Transport (drayage), Norbert Dentressangle (largest owned truck fleet in Europe, contract logistics), and Con-Way (2nd largest less-than-truckload carrier in USA). While XPO now owns significant assets, it will still remain predominantly an “asset-light” logistics company with assets accounting for only about one-third of its revenue.

What makes XPO a top ten global logistics leader?

- #2 LTL provider in North America
- #2 contract logistics (3rd party warehouse) provider by square footage: e-fulfillment, reverse logistics, cold storage, chemical, value-added warehousing
- #2 freight brokerage firm worldwide by net revenue
- #1 last mile logistics provider for heavy goods in North America (i.e., white glove delivery and installation of heavy appliances by “independent contractors”)
- #3 provider of intermodal/drayage in North America (railyards + ports)
- Largest owned fleet in Europe
- Largest platform for outsourced e-fulfillment in Europe
- Growing global freight forwarding and expedited transportation businesses

Key People

Bradley Jacobs, CEO and Chairman:

Bradley Jacobs made his entry to XPO through his equity company, Jacobs Private Equity LLC, which in September 2011 made an equity investment in XPO that made him CEO and chairman of the board. Bradley has been identified as the person who developed XPO Logistics’ “aggressive” merger and acquisition growth strategy.³ Prior to XPO, Jacobs founded four successful companies:

- **United Rentals:** became the world’s largest construction equipment rental company
- **United Waste:** became the 5th largest solid waste business in North America and in 1997 was sold to USA Waste Services for over \$2 billion.
- **Hamilton Resources:** grew global oil trading company to over \$1 billion in revenue.
- **Amerex Oil Associates:** one of the world’s largest oil brokerage firms.

¹ Net earnings with interest, taxes, depreciation and amortization added back in

² In 2013, XPO had revenues of only \$700 million.

³ <http://www.bizjournals.com/columbus/blog/2014/01/xpo-ceo-bringing-hard-charging-style.html?page=all>

Litigation and government labor enforcement actions could present financial liability in excess of \$250 million:

Primarily as a consequence of the company falsely labeling employees as independent contractors, XPO Logistics faces an estimated ten class action lawsuits, plus “mass action” and individual government wage claims that could present financial liability in excess of \$250 million. The potential extremely high financial liability stems from the practice of deducting business operating expenses, such as the cost of diesel fuel, truck lease payments, insurance and maintenance, which is illegal to do for company employees.

XPO and its subsidiaries are facing several legal and enforcement agency actions for alleged wage theft due to misclassification of their drivers as independent contractors. This issue is apparently so serious, XPO’s SEC filings indicate that they are accounting for the cost of the resulting liability they are facing. In their 2014 Form 10-K, XPO disclosed that during the fourth quarter of 2014, the company established a reserve for the estimated probable loss with respect to certain lawsuits related to misclassification. The company estimates that given the recent adverse decisions, there is a possibility that a loss may be incurred in excess of the reserved amount. However, there is no mention in their filings of any plans to avoid future liability by reforming their business model and properly reclassifying their drivers as employees.

Following is a summary of related DLSE decisions, and pending claims in the legal system and the NLRB:

California Labor Commissioner

- In March 2014, the California Division of Labor Standards Enforcement (DLSE) San Diego office issued findings in the wage claims of seven individual Pacer Cartage, Inc. (currently known as XPO Cartage) drivers, all of whom it found to be employees who had been illegally misclassified as independent contractors. The DLSE awarded these drivers a combined \$2.1 million. That ruling was subsequently upheld by the California Superior Court in September 2015 following XPO appeal of the DLSE’s initial decision. XPO has again appealed, (fourth Appellate District, Div. 1, D069425) and that case remains pending.
- In 2015, the Long Beach DLSE office determined that XPO Cartage (then Pacer Cartage) had misclassified five other drivers, and awarded them a total of \$950,000 in unlawful deductions, reimbursable expenses, and penalties. Pacer has since appealed and the cases remains pending in court.
- Pending Claims: At the end of 2015, another four XPO Logistics drivers filed DLSE claims due to misclassification and wage theft. The total combined liability from these claims is \$1.1 million.

Private Litigation

- Class Actions: XPO Cartage, then Pacer Cartage, is facing a class action lawsuit involving over 600 drivers and the estimated liability amounts to over \$5 million. Pacer and the class representative recently reached a tentative agreement to settle this litigation. However, the court approval and the acceptance of the settlement by a minimum percentage of members

of the purported class remains pending. The settlement offer does not discuss the reclassification of employees.

- **Mass Actions:** In 2014, a total of 169 drivers filed individual complaints in three separate “mass action” lawsuits against their respective companies—HRT, Pacer Cartage, and the now-defunct former XPO subsidiary PDS Trucking—for wage and hour violations arising due to misclassification as “independent contractors.” All cases are still pending.

NLRB Charges: Violations of workers’ right to unite and have a voice

Labor charges regarding misclassification and retaliation: In April 2015, XPO Port Services, Inc. d/b/a XPO Logistics and XPO Cartage drivers filed charges against their respective companies with Region 21 of the NLRB in Los Angeles and an investigation is currently taking place. The charges against XPO Logistics allege that the company violated federal law by subjecting pro-union drivers to constant harassment. Moreover, XPO Logistics allegedly terminated one of its drivers, Alfredo Gonzalez, in retaliation for asserting his rights. The charges against XPO Cartage allege that the company violated the National Labor Relation Act by: interrogating employees regarding their union support, forbidding employees from discussing the union with their co-workers, and threatening workers with retaliation for engaging in union activity. Finally, the charges also allege that the very act of misclassification in and of itself is a violation of the National Labor Relations Act.

“Last Mile” delivery driver litigation

XPO Logistics faces putative class action lawsuits brought by Last Mile delivery drivers who are also labeled by the company as independent contractors who asserting they are employees of the company and owed unpaid wages, overtime, meal and rest break periods, and reimbursement of business expenses deducted from their paychecks. These suits are very similar to the ones brought by port and rail intermodal drivers against the company. XPO faces class action lawsuits in California, Connecticut, Illinois, Massachusetts, New Jersey and Pennsylvania.

Company faces risk of repeat lawsuits because it continues to misclassify drivers as independent contractors: XPO has tried to settle the class action lawsuits without changing its practice of misclassifying its drivers. As a result, on March 11, 2016 XPO Last Mile drivers filed a new class action lawsuit alleging multiple violations of the Federal labor Standards Act (FLSE) and California labor laws because they continue to be labeled independent contractors by the company. But the company only weeks prior announced a settlement of its California class action lawsuit for the same group of drivers.

OSHA Violations: Over 100 health and safety violations over past five years: XPO Logistics and its subsidiaries have been cited 105 times since 2010 for violations to federal health and safety rules resulting in fines over \$200 thousand. Sixty-nine (69) of these citations were deemed serious violations. XPO subsidiaries have also had three fatalities.