

**UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD**

FDRLST MEDIA, LLC

and

Case No. 02-CA-243109

JOEL FLEMING, an Individual

**GENERAL COUNSEL’S OPPOSITION TO MOTION TO FILE AMICUS CURIAE
BRIEF BY CENTER ON NATIONAL LABOR POLICY, INC.**

Proposed Amicus Center on National Labor Policy, Inc. (“CNLP”) seeks leave to file a brief in support of Respondent in this matter, arguing that venue was inappropriate and that the June 6, 2019 Tweet of Respondent’s admitted agent, publisher, and Executive Officer does not constitute a threat of retaliation.¹ Because support CNLP’s venue argument is irrelevant to this case, that portion of CNLP’s brief cannot assist the Board in its consideration of this case. Because CNLP’s arguments regarding the Tweet misapprehend the applicable law and add nothing to what Respondent has already argued, those arguments also will not help the Board decide this case. Finally, the facts and law applicable to this case are simple and well-established. The Board does not need any assistance to apply clear and long-standing legal principles to stipulated facts.

CNLP misrepresents the record when it writes, “Respondent FDRLST sought to change venue, but the request was denied, Transcript p. 7:11-23.”² In fact, at that section of the transcript, Respondent counsel said, “We could, you know, maybe discuss the availability of a transfer venue.” Tr. 7:11–12. That is hardly a motion for a transfer of venue and the ALJ did not deny any such motion, saying only

¹ Motion of the Center on National Labor Policy, Inc. to File Brief Amicus Curiae Instanter (“Motion”), p. 2; Brief to the National Labor Relations Board on Behalf of Amicus Curiae the Center on National Labor Policy, Inc., (“Proposed Brf.”), pp. 5 ff.

² Id.

he would not revisit the matters on which the Board had already ruled, viz., regarding dismissal of the complaint: “I’m not going to discuss any of the rulings that the Board made in this order.” Tr. 7:17–18. Nor did Respondent counsel make any motion to change venue at any other time, limiting itself to motions to dismiss the complaint. Instead, Respondent filed its answer, appeared in Region 2, and there defended against the complaint allegations on the merits by submitting evidence into the record, making arguments, and subsequently submitting briefs. Thus, any purported issues with venue are irrelevant. *Earthgrains Co.*, 351 NLRB 733, 733 n.2 (2007) (“[W]here a charge should be filed is essentially a venue matter, and improper venue is not fatally defective. *Allied Products Corp.*, 220 NLRB 732, 733 (1975). The Respondent was served with all charges and had a full opportunity to defend against the charged allegations on the merits. Thus, we find no prejudice to the Respondent.”)³

CNLP characterizes its second argument as “whether an [sic] supervisor’s social media tweet of an idiom containing no direct threat of retaliation in circumstances where there are no pending unfair labor practices loses the protection of Section 8(c) of the Act.”⁴ While it is difficult to understand how CNLP believes a threat to send someone to the salt mines if s/he decides to unionize is not a “direct threat of retaliation,” the wholly meritless argument that a threat cannot constitute an unfair labor practice standing alone has already been made by Respondent in its brief in support of its exceptions.⁵ Thus, CNLP’s second proposed argument offers nothing new to assist the Board in deciding this case.

CNLP’s last claim is that “the ALJ failed to apply the correct burden of proof on the General Counsel in Section 8(a)(1) cases under General Motors, LLC, 369 N.L.R.B. No. 127 (July 21, 2020).”

³ CNLP makes the unsupported claim that Respondent was deprived of any opportunity to call witnesses. Proposed Brf, pp. 7–8. This is a puzzling assertion, at best. The complaint in this matter issued September 11, 2018, five months before hearing was held in this case. Clearly, Respondent had more than ample time to subpoena witnesses if it desired to present testimony subject to cross-examination.

⁴ Motion, p. 2.

⁵ Respondent FDRLST Media, LLC’s Brief in Support of Exceptions to the Administrative Law Judge’s Decision, pp. 42–43 (asserting that “The Supreme Court has said that the statement itself ‘shall not be evidence of an unfair labor practice’ unless there is proof, independent of the statement, that shows the statement ‘contains...threat of reprisal or force or promise of benefit.’”)

The *General Motors* decision involves the question of employer motive in taking an adverse employment action against an employee. In that decision, the Board wrote, “[W]e conclude that the *Wright Line* burden-shifting framework is the appropriate standard for cases where the General Counsel alleges that discipline was motivated by Section 7 activity.” The complaint in this case did not allege any discipline at all, employer motive is entirely irrelevant in this case, and the *General Motors* decision is entirely inapplicable here.⁶ CNLP’s proposed third argument therefore also fails to

⁶ CNLP’s confusion regarding the applicable legal standards is evident in its claims that General Counsel (i) needed to prove “evidence of animus by the employer,” (ii) “withdrew all his subpoenas which must imply he knew their testimony would be averse to his position,” and (iii) an “adverse inference must be found against allegations in the Complaint.” Proposed Brf., p. 16.

On the first point, the Board wrote more than three decades ago, “It is too well settled to brook dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer’s motive nor on the successful effect of the coercion. Rather, the illegality of an employer’s conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act.” *Waco, Inc.*, 273 NLRB 746, 748 (1984). The Board has reaffirmed that principle. *Teamsters Local 391 (UPS)*, 357 NLRB 2330, 2330 (2012) (“The applicable test, an objective one, is whether a remark can be reasonably interpreted by an employee as a threat, regardless of the actual effect upon the listener”) (internal quotation marks omitted). Thus, motive is not at issue, the *Wright Line* test is not applicable, and General Counsel need not show animus to establish that the June 6, 2019 Tweet constituted an unlawful threat.

On the second claim, CNLP has no basis for speculating about General Counsel’s motives in withdrawing subpoenas. But General Counsel here represents that the subpoenas were withdrawn because Respondent stipulated to sufficient facts to make witness testimony unnecessary. General Counsel is not concerned with the legally irrelevant question of whether the employees would testify to separate evidence of Respondent animus to protected activity.

On the third claim, CNLP apparently misunderstands the relevant law concerning adverse inferences based on a party’s failure to call a witness. That law is neatly summarized in the following passage from *Sparks Restaurant*, 366 NLRB No. 97, slip op. at 10 (2018):

[T]he adverse inference rule consists of the principle that “when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” *Auto Workers v. NLRB*, 459 F.2d 1329, 1335–1336 (D.C. Cir. 1972) (describing the adverse inference rule as “more a product of common sense than of the common law”); see also *Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at p. 2–3 and at fn. 13 (2014); *SKC Electric*, 350 NLRB 857, 872 (2007). An adverse inference may be drawn based upon a party’s failure to call a witness within its control having particular knowledge of the facts pertinent to an aspect of the case. See *Chipotle Services, LLC*, 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015) (adverse inference is particularly warranted where uncalled witness is an agent of the party in question); *SKC Electric, Inc.*, 350 NLRB at 872–873.”

Here, the employees in question were not in General Counsel’s control, were not reasonably expected to testify favorably on behalf of his case, and, once Respondent agreed to a suitable set of stipulated facts, had no testimony relevant to the case. Hence, there is no basis for drawing an adverse inference from General Counsel’s decision not to call Respondent’s employees.

offer anything which could assist the Board in deciding this case.

For the reasons above, the General Counsel respectfully requests that the Board deny the request of the Center on National Labor Policy, Inc., to file a brief in support of Respondent in this straightforward case, which involves no novel issues and should not be further delayed by additional irrelevant and unsupported briefings.

DATED at New York New York, this 21st day of August 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of General Counsel's Opposition to Motion to File Amicus Curiae Brief by Center on National Labor Policy, Inc. were served on the 21st day of August 2020 on the following parties by the methods indicated below:

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