

**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 ANSWERING BRIEF TO AMICUS CURIAE BRIEF BY
CENTER ON NATIONAL LABOR POLICY, INC.**

Pursuant to the September 9, 2020 Order of the National Labor Relations Board in this matter, General Counsel submits this brief in answer to the brief by amicus Center on National Labor Policy, Inc. (“CNLP”). In its brief, CNLP argues that venue was inappropriate in this case and that the June 6, 2019 Tweet of Respondent’s admitted agent, Publisher, and Executive Officer does not constitute a threat of retaliation. CNLP’s venue argument is irrelevant to this case and relies on hearsay statements not properly a part of the record in this case. CNLP’s other two arguments are: (i) “The Board must show record evidence of the employer’s retaliatory intent”¹ to find a threat to retaliate against Section 7 activity unlawful and (ii) the standard applicable to allegations of unlawful discipline imposed upon an employee also applies to allegations that an employer’s statement constitutes an unlawful threat of reprisal.² Both arguments miss the mark and misapprehend the case law upon which they rely.

I. Allegedly Improper Venue Provides No Basis for Reversal or Rehearing

Starting with the issue of venue, General Counsel has already pointed out that CNLP’s brief misrepresents the record by claiming Respondent moved for a change of venue.³ Respondent did no

¹ Brief to the National Labor Relations Board on Behalf of Amicus Curiae the Center on National Labor Policy, Inc. (“CNLRP Brf.”), p. 12.

² CNLP Brf., pp. 17–19.

³ General Counsel’s Opposition to Motion to File Amicus Curiae Brief by Center on National Labor Policy, Inc. (“GC Opp. To CNLP Mot.”), pp. 1–2.

such thing, preferring to rely on its motion for dismissal.⁴ General Counsel has also previously shown that neither the location of the hearing nor the release of witnesses from subpoena had any effect on Respondent's ability to subpoena or otherwise call witnesses.⁵ Indeed, at the hearing Respondent did not claim it had been prevented from calling witnesses but instead chose to not make witnesses available for cross-examination, i.e., eschewed live testimony, because counsel believed presenting witnesses would waive Respondent's right to contest personal jurisdiction (in some unexplained way that submitting hearsay would not).⁶ In light of the facts that (1) no party sought to call witnesses and (2) the case proceeded on a record that was almost entirely undisputed,⁷ there can be no point to directing a rehearing, which could only serve to permit Respondent to modify or abandon its previously unsuccessful litigation strategy.

Additionally, CNLP's venue arguments rely on the claims that "FDRLST conducts no operations within Region 2 [and] [n]o FDRLST employees work in Region 2."⁸ The only purported record evidence supporting those claims is the inadmissible hearsay affidavit of Ben Domenech, which, as already argued in General Counsel's brief in support of his cross-exceptions,⁹ was improperly admitted by the Administrative Law Judge as Respondent Exhibit 3. Thus, there is no competent record evidence to form the basis for CNLP's venue arguments.

Most significantly, both the Board and the General Counsel have already noted that even if venue had been incorrect, that would provide no basis for reversing the decision of the Administrative

⁴ Tr. 7:8–8:24 (Respondent counsel stating that Respondent was making a "special appearance," did "not concede...personal jurisdiction," and intended "to appeal the [Board's order denying Respondent's] motion to dismiss").

⁵ GC Opp. To CNLP Mot., p. 2, n.3 (pointing out Respondent had five months in which to subpoena or otherwise prepare to call witnesses) and p. 3, n.6 (noting CNLP relied on an erroneous assumption regarding General Counsel's motives for withdrawing subpoenas).

⁶ Tr. 24:20–24.

⁷ Indeed, the only disputed portions of the record were Respondent's exhibits, to which General Counsel objected. Thus, Respondent does not dispute any aspect of the record.

⁸ CNLP Brf., p. 3.

⁹ Brief in Support of the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge ("Cross-Exc. Brf. in Support"), pp. 5–9

Law Judge.¹⁰

Finally, because a charge may be transferred from one Region to another at the discretion of the General Counsel,¹¹ CNLP wholly fails to show how the allegedly improper filing of the charge in Region 2 taints the location of the hearing in this matter.

II. The June 6, 2019 Tweet Is A Threat, Is Not Opinion or Commentary, and Is Not Protected by Section 8(c) of the Act

General Counsel now turns to CNLP’s arguments that the June 6, 2019 Tweet by Ben Domenech was not a threat. CNLP begins with the unremarkable propositions that the First Amendment protects certain speech from government regulation but moves quickly past that to the claim that the June 6, 2019 Tweet was either “a view on a contemporary issue of public discussion” or a “factual statement[] about union activity.”¹² In so doing, CNLP ignores the most directly relevant Supreme Court case law, *NLRB v. Gissel Packing Co.*,¹³ in which the Court (1) held that Section 8(c) of the Act “merely implements the First Amendment,”¹⁴ (2) concluded that if a statement “contains [a] threat of reprisal,” it is outside the scope of First Amendment protection and Section 8(c) of the Act,¹⁵ and (3) described the kinds of predictions and opinions an employer could express while remaining within the limits of protected speech: “If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.”¹⁶

¹⁰ *FDRLST Media, LLC*, 02-CA-243109, pp. 1–2 (February 7, 2020) (unpublished order); GC Opp. to CNLP Mot., p. 2 (citing *Earthgrains Co.*, 351 NLRB 733, 733 n.2 (2007)).

¹¹ Rules & Regulations, Section 102.33.

¹² CNLP Brf., p. 10.

¹³ 395 U.S. 575 (1969).

¹⁴ *NLRB v. Gissel*, supra, 395 U.S. at 617.

¹⁵ 395 U.S. at 618.

¹⁶ *Id.*

Ben Domenech’s June 6, 2019 Tweet is not the kind of statement about unionization the Supreme Court has said is protected by the First Amendment. That Tweet was not an expression of opinion, a factual statement, or a prediction of “demonstrably probable consequences beyond his control” protected by Section 8(c) of the Act.¹⁷ Rather, Ben Domenech’s announcement to employees of his intent to send the first one of his employees who tried to unionize back to the salt mine plainly carries the “implication that [Domenech] may...take action solely on his own initiative” and is thereby “a threat of retaliation...without the protection of the First Amendment.”¹⁸

CNLP also claims the Administrative Law Judge’s conclusion that the June 6, 2019 Tweet threatened to retaliate against protected Section 7 was somehow “based only on his personal experiences.”¹⁹ CNLP, like Respondent, ignores both the shared, public meaning of the words in Ben Domenech’s June 6 Tweet and the ALJ’s discussion of that meaning, a meaning which all reasonably recognize and understand. Because the meaning of the June 6, 2019 Tweet is clear from its words, the determination that the Tweet contained a threat of reprisal against employees is not “uncorroborated hearsay or rumor,” as suggested by CNLP,²⁰ but an inescapable conclusion directly established by the meaning of the words as they appear in a statement Respondent admits was made by its agent.

For similar reasons, *Clark Equip. Co.*, 278 NLRB 498 (1989), fails to support CNLP’s argument. The portion of the decision quoted by CNLP in its briefs concerns leaflets distributed by the employer in that case which “the General Counsel conceded[] and the judge found...did not contain any express threats or promises.” Here, in contrast, the General Counsel contends, the judge found, and the meanings of the words used establish that the June 6, 2019 Tweet was an express threat.

The *Clark Equip.* case also directly undermines CNLP’s arguments that the General Counsel

¹⁷ Id.

¹⁸ Id.

¹⁹ CNLP Brf., p. 10.

²⁰ Id.

was required to present evidence of the effect of the threat on employees²¹ and that the Board cannot determine whether a statement constitutes an unlawful threat by relying on the words of that statement. The Board there did not rely on testimony—much less hearsay—about what employees understood the leaflets to convey, but instead examined the words of the leaflets in question and discussed the publicly known and understood meanings of those words.

CNLP’s reliance on *NLRB v. Kaye*²² is also misplaced because it is entirely inapposite. That case involved determining the employer’s motives in discharging an employee; here the issue of motive is irrelevant. The *Kaye* court rejected the conclusion that the employer did not know about certain alleged conduct by the employee in question when unrebutted evidence established the contrary; here the ALJ relied on the established meanings of the words of the admitted statement to “determine how a reasonable employee would interpret the...statement,”²³ as required by the applicable Board law. The ALJ’s conclusion is not the least bit undermined by the inadmissible hearsay assertions of the two employees that they did not understand the June 6, 2019 Tweet in the ordinary way both because (i) the ALJ relied on the undisputed evidence of the words in the admitted statement, i.e., on unrebutted facts, and (ii) because the claimed understanding of the two employees is legally irrelevant.²⁴

CNLP also cites various circuit court cases as supposed support for its claim that Ben Domenech’s June 6, 2019 Tweet should not be attributed to Respondent.²⁵ Those cases are not Board

²¹ CNLP Brf, pp. 11–12.

²² 272 F.2d 112, 113 (7th Cir. 1958).

²³ *FDRLST Media, LLC*, JD(NY)-04-20 (Apr. 22, 2020) (“ALJD”) at 4:28–29.

²⁴ The rationale for CNLP’s citation and quotation of *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) is opaque. That case stands primarily for the proposition that the Supreme Court will not reverse a conclusion of a Court of Appeals about the weight of the available evidence even where the Supreme Court might have come to a different conclusion about that weight. The Court’s mention of Section 8(c) of the Act, which CNLP italicizes, apparently for emphasis, is only to mark that the Court would not discuss whether or how that part of the Act might bear on the case. That is, the Court explicitly declined to interpret or discuss the scope of Section 8(c).

²⁵ CNLP Brf, p. 12, citing *NLRB v. Hart Cotton Mills, Inc.*, 190 F.2d 964 (4th Cir. 1951); *NLRB v. Tennessee Coach Co.*, 191 F.2d 546 (6th Cir. 1951) (incorrectly cited as 191 F.2d 964); *E.I Du Pont de Nemours & Co. v. NLRB*, 116 F.2d 388 (4th Cir. 1940), cert. denied, 313 U.S. 571 (1940); *NLRB v. Cleveland Trust Co.*, 214 F.2d

precedent, all but one antedate the Supreme Court’s decision in *NLRB v. Gissel Packing*,²⁶ and all are readily distinguished from the facts of the present case:

- In *NLRB v. Hart Cotton Mills* the Court of Appeals found no violation where four low-level supervisors made threats or promises to eight of 557 employees; the court described that conduct as “isolated statements by supervisors, contrary to the proven policy of the employer and neither authorized, encouraged nor acquiesced in by [the employer].”²⁷ Ben Domenech is far from a low-level supervisor and there is no evidence here of any Respondent policy Domenech’s Tweet contravenes. The *Hart Cotton Mills* decision is best interpreted as holding that, in the context of an established employer policy of which employees are aware that workers are free to engage in union activity, a reasonable employee would not be coerced by isolated remarks to the contrary because s/he would understand the low-level supervisor was acting outside the scope of his or her authority. Plainly, given Ben Domenech’s position and the absence of any evidence employees were aware of a policy reassuring them of their rights to engage in union activity, the *Hart Cotton Mills* decision is not the least bit instructive.
- Regarding the Sixth Circuit’s *NLRB v. Tennessee Coach* decision, the Sixth Circuit itself later interpreted that decision as depending on the “Court[’s] f[indin]g that the statements were not accompanied by any threats or coercion” and noted that “a threat of discharge...is one of the most effective means of coercion.”²⁸ In the present case, in contrast, the June 6, 2019 Tweet is in fact a threat of reprisal.

95 (6th Cir. 1954); *NLRB v. Swank Prod. Co.*, 108 F.2d 872 (3d Cir. 1939); *NLRB v. J.L. Brandeis & Sons*, 145 F.2d 556 (8th Cir. 1944); and *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984).

²⁶ Only *Burger King Corp v. NLRB* came after *NLRB v. Gissel Packing*. As noted below, *Burger King* involved interrogation rather than alleged threats and is therefore inapplicable.

²⁷ 190 F.2d at 974.

²⁸ *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 925–926 (6th Cir. 1967).

- The *DuPont* case is similar to *Hart Cotton Mills*; in *DuPont* the court held that half a dozen isolated and unrelated incidents, contrary to the established instructions of the employer’s managers, in a labor force of more than 2,000 employees, did not amount to unlawful domination of an employee organization.²⁹ Employer domination of a labor organization is not at issue here and, as already noted, there is no evidence Domenech’s June 6, 2019 Tweet was in any way contrary to Respondent’s policies such that employees would be able to ignore the coercive nature of the Tweet.
- *Cleveland Trust* involved an employer’s motive in granting wage and vacation increases, a letter setting forth various then-existing conditions of employment which contained no threats of reprisal, and two isolated threats from among roughly 200 supervisors contrary to the repeated, explicit reassurances of the company president that employees were free to engage in union activities. The present case does not involve any question of employer motive, does involve an explicit threat, and, as already noted, there is no evidence of any surrounding context which would convince employees they could safely ignore the threat in Domenech’s June 6, 2019 Tweet.
- *Swank Prod. Co.* did not involve any Board finding that a supervisor had made any threat.
- *NLRB v. J.L. Brandeis & Sons* is directly contrary to CNLP’s position, as the court there wrote, “If respondent used coercive language it may be held responsible in these proceedings notwithstanding the constitutional guaranty of the right of free speech. We have fully set forth the remarks of the officers of respondent because a *consideration of the language used must determine its character*. This is a question of law.”³⁰
- Finally, *Burger King Corp. v. NLRB* involved an alleged interrogation, which is analyzed

²⁹ *E.I Du Pont v. NLRB*, supra, 116 F.2d 388, 399–400.

³⁰ 145 F.2d 556, 564 (8th Cir. 1944) (emphasis added).

according to an entirely different test than alleged threats of reprisals.

CNLP's reliance on the Board's decisions in *UARCO, Inc.* and *Churchill Supermarkets, Inc.* is similarly misplaced. Those cases primarily involve alleged interrogations, which, as already noted, are analyzed under a different standard than alleged threats. While *UARCO* also involved a trio of statements, those accurately described the abstract possibilities inherent in bargaining.³¹ The June 6, 2019 Tweet by Ben Domenech is plainly not such a statement. Those cases therefore do not undermine the Administrative Law Judge's conclusion that the June 6, 2019 Tweet constituted an unlawful threat.

CNLP cites a number of Board cases to the effect that statements which do not contain threats of reprisals or promises of benefits are not unlawful under Section 8(a)(1) of the Act.³² But no matter how many times CNLP may make the claim, an explicit threat of reprisal for engaging in union activity is not thereby transformed into a comment or "position on a topic of national conversation."³³

In footnote 2 of its brief, CNLP attempts to analogize Ben Domenech's June 6, 2019 Tweet to a statement the Board held did not amount to a threat in *M.K. Morse Co.*, 302 NLRB 924 (1991). CNLP gets the facts of that case wrong, however. The vice president in the *Morse* case did not make the two statements Respondent attribute to him, but only the one about "a good screwing." The Board there held the vice president's statement was not coercive because it contained "no allusion to union activity." *Id.* at 925. The Board pointed out that the VP made his statement when he "happened upon...employees...engaged in jocular, bawdy conversation and antics [including] one employee [] pantomiming a sex act." *Id.* The Board said nothing about the other statement quoted by CNLP, which was made by a different person during a different conversation and which the ALJ found to be coercive.

³¹ *UARCO, Inc.*, 285 NLRB 55, 56 (1987); *Churchill Supermarkets, Inc.*, 285 NLRB 138, 138–139 (1987).

³² CNLP Brf., pp. 13–16. CNLP also cites various interrogation cases. As already noted, the standard for judging allegedly unlawful interrogation is entirely distinct from that applicable to alleged unlawful threats. Those cases are thus uninformative and do not advance CNLP's or Respondent's arguments.

³³ CNLP brief, pp. 13; see also *id.* at 13 ("[[I]ts use was a noncoercive viewpoint, argument or opinion"); *Id.* at 15 ("Mr. Domenech's alleged opinion of union strikes is an opinion of fact" [sic]).

Id. at 930. Plainly, the June 6, 2019 Tweet not only alludes to but specifically mentions union activity, unlike the vice president’s statement in *Morse*. Further, the June 6 Tweet explicitly threatens to take action against whoever engages in union activity, thereby making an explicit threat.

Finally, contrary to CNLP’s claims in its second and third arguments, whether the June 6, 2019 Tweet constituted an unlawful threat in violation of Section 8(a)(1) does not in any way depend on the existence of any prior union activity, Respondent knowledge of such conduct, or Respondent animus toward it.³⁴

In short, CNLP’s second argument fails to address the straightforward, undisputed facts of this case or the directly applicable case law. Instead, CNLP misstates the record evidence³⁵ and argues from inapplicable legal premises.

III. Motive Is Irrelevant to Whether the June 6, 2019 Tweet Was an Unlawful Threat

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 NLRB No. 127 (July 21, 2020).” The *General Motors* decision involves the question of employer motive in taking an adverse employment action against an employee. The Board there wrote, “[W]e conclude that the *Wright Line* burden-shifting framework is the appropriate standard for cases where the General Counsel alleges that

³⁴ “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). See also *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); *Franklin Preparatory Academy*, 366 NLRB No. 67, slip op. at 1–2 (2018); *Nellis Cab Co.*, 362 NLRB 1587, 1590 (2015); *Lamar Advertising of Hartford*, 343 NLRB 261, 264–65 (2004); *Miller Electric Pump and Plumbing*, 334 NLRB 824, 824 (2001) .

³⁵ In addition to the misrepresentations already noted, CNLP also appears to claim that no employees saw the June 6, 2019 Tweet: “[E]ven if Mr. Domenech made the statements in an employee’s presence, *which the record shows did not occur*, that opinion [sic] accompanied by no threat is protected speech under the Act.” CNLP Brf. at 16 (emphasis added). That suggestion is contradicted by the stipulated facts of the case, in which Respondent admitted employees saw the Tweet. G.C. Exh. 2, ¶ 27.

discipline was motivated by Section 7 activity.”³⁶ The complaint in this case did not allege any discipline; employer motive is irrelevant here and the *General Motors* decision is therefore inapplicable.³⁷

IV. Conclusion

For the reasons above, CNLP’s brief has no relevance to the Board’s decision in this case. As set forth more fully in General Counsel’s (i) answering brief to Respondent’s exceptions to the decision of the Administrative Law Judge and (ii) brief in support of General Counsel’s limited cross-exceptions, the ALJ properly found, based on long-established case law, that Respondent violated the Act when its Publisher, Chief Executive, and admitted agent Ben Domenech threatened to send employees “to the salt mine” if they had the temerity to exercise their Section 7

³⁶ *General Motors, LLC*, 369 NLRB No. 127, slip op. at 9 (July 21, 2020) (emphasis added).

³⁷ CNLP makes a number of mistaken claims in its argument that General Counsel was required to present evidence of Ben Domenech’s motives in issuing his June 6, 2019 Tweet. First, CNLP wrote, “[T]he ALJ found that ‘what matters’ is the ‘view[] from the perspective of a reasonable person.’” CNLP Brf., p. 18 (emphasis added). The ALJ did not make such a finding but instead correctly cited and characterized the applicable law. Next, CNP asserts that because “General Counsel did not seek to introduce corroborative or contradictory evidence, [that] is supportive of an assumption he knew the FDRLST employees did not support his contentions.” CNLP has no basis for its claim about General Counsel’s motives in withdrawing subpoenas or deciding not to present testimony from Respondent’s employees, since the record is devoid of any evidence on those matters. But General Counsel here represents that the subpoenas were withdrawn because Respondent stipulated to sufficient facts to make witness testimony unnecessary. General Counsel was not and is not concerned with the legally irrelevant questions of whether the employees would testify to separate evidence of Respondent animus to protected activity or being coerced by the June 6, 2019 Tweet. Third, CNLP asserts, “One-third of the FDRLST workforce submitted affidavits,” CNLP Brf., p. 18. Because the record contains no evidence regarding the overall size of Respondent’s workforce, CNLP has no basis for concluding that two employees constitute a third of that group. Cf. G.C. Exh. 2, ¶ 14 (“Respondent employed *at least* the following individuals”). Fourth, CNLP claims the ALJ found that the witnesses were unavailable within the meaning of F. R. Evid. 804(a)(4). CNLP Brf. at 18. The ALJ made no finding that any of the three affiants was unavailable, much less that any affiant was unavailable because s/he was dead or ill.

right to organize. The Board should so conclude and order Respondent to remedy its unfair labor practices.

DATED at New York New York, this 23rd day of September 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of General Counsel's Answering Brief to Amicus Curiae Brief by Center on National Labor Policy, Inc. were served on the 23rd day of September 2020 on the following parties by the methods indicated below:

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