UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FDRLST MEDIA, LLC,

Respondent,

and CASE No. 02-CA-243109

JOEL FLEMING,

Charging Party.

MOTION OF THE CENTER ON NATIONAL LABOR POLICY INC.
TO FILE BRIEF AMICUS CURIAE INSTANTER

Comes now the Center on National Labor Policy, Inc., by and through counsel, in support of Respondent and respectfully requests its motion to file the attached brief be granted in the case regarding the ALJD, JD(NY)-04-20.

The Center on National Labor Policy, Inc. is a national non-profit legal foundation concerned with protecting the individual rights of employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act. It has presented the public interest in amici briefs to the Courts and the Board which the Board has not opposed. E.g., Roundy's, Inc., 30-CA-17185 (2010), Rite-Aid, Inc., No. 31-RD-1578 (2010); Dana Corp., 351 N.L.R.B. 434 (2007); Tradesmen Int'l, Inc. v. NLRB, 275 F.3d 1137 (D.C. Cir. 2002); Koons Ford of Annapolis, Inc. v. NLRB, 833 F.2d 310, 126 L.R.R.M. (BNA) 3032 (4th Cir. 1987), cert denied, 485 U.S. 1021 (1988); NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc., 767 F.2d 1100 (4th Cir. 1985); Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983).

The Center provided comments to the Board in its recent Proposed Rules Governing Representation—Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, RIN 3142-AA16, 84 Fed. Reg. 39930 (Aug. 12, 2019), Proposed Rules Governing Notification of Employee Rights under the National Labor Relations Act,

RIN 3142-AA07, 75 Fed. Reg. 80,410 (December 22, 2010), and in testimony during its 2011 Proposed Rules Governing Representation Proceedings, RIN 3142-AA08, 76 Fed. Reg. 36812 (June 22, 2011).

The Board has recognized the unique status of the Center in formulating policy under the Act and has always consented to the Center's direct participation as *amicus curiae* in the public interest. See, e.g., Sparkling Springs Water, Inc., 13-RC-20559 (Order, Aug. 2, 2001) ("The Motion of the Center on National Labor Policy Inc. Requesting Permission to File an Amicus Curiae Brief in the Above-Captioned Case Is Granted").

Through these years, the Center has both supported the Board and opposed it. It brings a unique experience the Board should consider because the Center has represented both individual employees and small employers. The Center defended employees in litigation in UFCW, Local 400 v. Marval Decertification Comm., 708 F. Supp. 761 (W.D. Va. 1989), upheld employee Section 7 rights in Paul Parden (Vanity Fair Mills), 256 N.L.R.B. 1104 (1981), enforced Section 7 rights in Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 1908 (1984), and protected employer rights in Roy Spa, LLC, JD (ATL)–12–14 (Feb. 28, 2014), and Colorado-Ute Electric Ass'n v. NLRB, 939 F.2d 1392 (10th Cir. 1991), cert. denied, 504 U.S. 955 (1992).

The following will be addressed in support of the current case:

1) Whether a Region should conduct a hearing in a location where no party or witnesses are located and the claim did not arise;
2) whether an 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; and
3) whether 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).

It is the Center's position the Administrative Law Judge's ruling in the shoe of a person he considers would be reasonable employee, presents significant threshold legal questions under Sections 8(a)(1)(A) and (c) of the Act that must be answered by the Board. It would be in the public interest for the Board to be presented with the airing of all views in evaluating the merits of the Region's decision to proceed in this case and the ALJ's resolution of a finding of threat upon a stipulated record.

Argument over the facts is a task better left to the parties involved, and a task in which amicus does not intend to undertake. The attached brief is confined to the more difficult and theoretical questions of law and public policy regarding employer's right to speak under the Act, the Board's case law, and the constitutional right for employers to exercise protected speech under the First Amendment.

CONCLUSION

WHEREFORE, *amicus curiae* Center on National Labor Policy, Inc. respectfully requests that the Board grant the Motion and file the attached *amicus curiae* brief in support of Respondent.

Respectfully submitted,

/s Michael E. Avakian
Michael E. Avakian
CENTER ON NATIONAL LABOR
POLICY, INC.
5211 Port Royal Road, Suite 103
No. Springfield, VA 22151
(703) 321-9180

Dated: August 17, 2020

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the MOTION OF THE CENTER ON NATIONAL LABOR POLICY INC. TO FILE BRIEF AMICUS CURIAE INSTANTER, was electronically filed with the National Labor Relations Board and served by email to the following persons on this 17th day of August 2020, to:

Jamie Rucker
Counsel for the General Counsel
NLRB Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
jamie.rucker@nlrb.gov

Aditya Dynar
Caleb Krukenberg
Kara Rollins
Jared McClain
New Civil Liberties Alliance
1225 19th Street, N.W., Suite 450
Washington, D.C. 20036
Adi.Dyner@NCLA.legal
Caleb.Kruckenberg@NCLA.legal
Kara.Rollins@NCLA.legal
Jared.McClain@NCLA.legal

Joel Fleming
Block & Leviton LLP
260 Franklin Street, Suite 1860
Boston, MA 02110
fleming.joel@gmail.com

/s Michael E. Avakian
Michael E. Avakian
CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Road, Suite 103
No. Springfield, VA 22151

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BRIEF TO THE NATIONAL LABOR RELATIONS BOARD ON BEHALF OF AMICUS CURIAE THE CENTER ON NATIONAL LABOR POLICY, INC.

Respectfully submitted by:

Michael E. Avakian, Esq.
THE CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Road, Suite 103
No. Springfield, Virginia 22151-2100
(703) 321-9180

Attorney for Amicus Curiae

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BRIEF TO THE NATIONAL LABOR RELATIONS BOARD
ON BEHALF OF AMICUS CURIAE
THE CENTER ON NATIONAL LABOR POLICY, INC.

STATEMENT OF THE CASE AND AMICUS CURIAE POSITION

The above-captioned proceeding is before the National Labor Relations Board ("the Board") on exceptions filed by the Respondent FDRLST Media, LLC ("FDRLST") to the Administrative Law Judge's Decision ("ALJD") dated April 22, 2020, JD(NY)-04-20. The Center on National Labor Policy supports the position of Respondent for the reasons set forth below.

The Center on National Labor Policy, Inc. is a national non-profit legal foundation concerned with protecting the individual rights of employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act, from defending employees in litigation, upholding employee Section 7 rights, enforcing Section 7 rights, protecting employer rights, and presenting the public interest.

It is the Center's position in this case that the Administrative Law Judge ("ALJ") Kenneth Chu's Decision presents significant threshold legal questions under Sections 8(a)(1)(A) and 8(c) of the Act that the Board must redress. It would be in the public interest for the Board

to be presented with airing of all views in evaluating the merits of the Region's decision to proceed to complaint and the decision rendered by the ALJ against FDRLST.

The Board has recognized the unique status of the Center in formulating policy under the Act and has always consented to the Center's participation as *amicus curiae* in the public interest in federal cases. Further interests of *amicus* are set out in the Center's prior Motion for Leave to file a Brief *amicus curiae*.

Argument over the facts is a task better left to the parties and a task in which amicus does not intend to undertake. Therefore, for this brief, the facts alleged in the Stipulation are accepted as true and accurate. This brief will be confined to the more difficult and theoretical questions of law and public policy regarding management statements made in an atmosphere free of union activity and unfair labor practices.

STATEMENT OF FACTS

The facts set forth in the Stipulation of the Parties, GC Ex. 2, must be accepted. Any subjective observations and considerations of the ALJ are given no special presumption because he made no findings based on credibility. The record is reviewed *de novo*.

Mr. Benjamin Domenech held the position of "Executive Officer of Respondent." Stipulation ¶ 9. His employer, the Respondent FDRLST Media, LLC holds a Twitter account, @FDRLST, and Mr. Domenech has a personal Twitter account, @bdomenech. Stipulation ¶¶ 24, 25.

On June 6, 2019, Mr. Domenech posted a note on Twitter on his personal Twitter account, @bdomenech, stating: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." Stipulation ¶ 26.

On June 7, 2020, Mr. Joel Fleming, a resident of Massachusetts, not an employee of FDRLST, and with no relation to any employee of FDRLST, filed a Charge with Region 2

alleging a default violation of Section 8(a)(1) of the Act on Form NLRB-501, Charge Against Employer. In it, Mr. Fleming alleged no fact suggesting any employee had been adversely affected by the Twitter statement. The Charge also incorrectly alleged FDRLST was located at 6160 N. Cicero Avenue, Suite 410, Chicago, IL, rather than Washington, D.C. The Charge further alleged FDRLST employed fifty (50) workers when it employed six (6).

The hearing was held over the objection of Respondent on Monday, February 10, 2020. It lasted 55 minutes. The transcript comprises thirty pages with no witness testimony. Charging Party made no appearance.

The record further reveals that FDRLST conducts no operations within Region 2. No FDRLST employees work in Region 2. Respondent FDRLST sought to change venue, but the request was denied, Transcript p. 7:11-23; the ALJ believing the Board's Order of February 7, 2020, stating "Decisions regarding where to prosecute a complaint are primarily an administrative function within the GC's discretion, and he has the authority to transfer a case," could not be reconsidered by him.

Two FDRLST employees submitted affidavits for consideration, R Exs. 4 & 5, executed by Emily Jashinsky and Madeline Osburn. On July 24, 2020, both employees submitted an amicus brief to the Board asserting the ALJ wrongly dismissed their truthful understanding of the satire evidenced in Mr. Domenech's tweet. They informed the Board of the improper charge made by Mr. Fleming in their behalf and for the ALJ's purported claim to understand the journalistic communication in Mr. Domenech's satire, substituting and interpreting for them their professional understanding of journalistic expression made under the First Amendment.[1]

[1]The hearing was held on February 10, 2020. Counsel for the General Counsel withdrew the subpoena testificandum to Mr. Domenech on February 3, 2020. For the hearing originally scheduled for December 3, 2019, Counsel for the General Counsel subpoenaed four FDRLST employees to (continued...)

FDRLST filed a special appearance to argue against venue in New York City, Region 2, and the location's hampering of its ability to call witnesses and appear in a location unrelated to any party. The request was denied on belief that the Board had rejected the request in a separate motion dismiss filed by Respondent. ALJD 8:17-9:1; 17.

The ALJ then considered the question:

> Here, the alleged threat tweeted by Domenech was, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." This expression is an idiom. An idiom is an expression, word, or phrase that has a figurative meaning conventionally understood by native speakers. This meaning is different from the literal meaning of the idiom's individual elements. In other words, idioms don't mean exactly what the words say. Obviously, the FDRLST employees are not literally being sent back to the salt mines. Idioms have, however, hidden meanings. The meaning of these expressions is different from the literal meaning or definition of the words of which they are made. The literal definition of salt mine explains the origin of the figurative meaning. Work in a salt mine is physically challenging and monotonous, and any job that feels that tedious can be called a salt mine. The term is sometimes used in a lighthearted or joking way: "It was a great weekend, but tomorrow it's back to the salt mine." See, Farlex 10 Dictionary of Idioms. © 2015 Farlex, Inc, all rights reserved. Nevertheless, the expression "salt mine" is most often used to refer to tedious and laborious work.

ALJD 4-5.

SUMMARY OF ARGUMENT

Section 7 "rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." Beth Israel Hosp. v. NLRB, 437 U.S. 483, 492 (1978), citing Republic Aviation v. NLRB, 324 U.S. 793, 797-98 (1945). The fortuity of the union provides "no substantial defense[]." NLRB

[1](...continued)
testify. Those subpoenas were withdrawn on November 26, 2019, seven days before the hearing and not reissued.

v. Local No. 1229, IBEW (Jefferson Hotel), 346 U.S. 464, 476 (1953).

The burden is on the General Counsel and Charging Party to explain any ambiguity in the Domenech tweet, but did not do so based on the two Stipulations. Instead, on a record devoid of any information regarding the delivery of a single worded communication, a/l/a a banner or stationary sign, Eliason &Knuth, 357 N.L.R.B. No. 44 at 4 (2011), the ALJ erred when he substituted his understanding of the tweet's impact upon employees who he never met, considered their credibility, their education or evaluated their history of professional communications with Mr. Domenech. Rather than relying upon the presentation of actual proof adduced from the General Counsel or Mr. Fleming for their alleged implied threat in a written (nonpersonal) communication, there is no evidence of any adverse effect on concerted activity following it. With no adverse impact on concerted activity, there is no violation of Section 8(a)(1).

Here, the record shows the Charging Party and General Counsel failed to prove that the threat and coercion of a "policy" it presented from the Domenech tweet to FDRLST workers had any impact at all on Section 7 rights. Failing to present any explanation on the record to show a threat arising from this pure communicative speech, it is an "expression of any views" which does not violate the Act, 29 U.S.C. § 158(c).

Finally, the ALJ improperly refused to consider the inappropriateness of the venue. No Board Regulation applies to limit venue to the General Counsel's druther. It was an abuse of the ALJ's authority and plain error to limit the hearing to a location where no interested party or witness was located.

ARGUMENT

I.
A HEARING HELD IN NEW YORK CITY WHERE NO BUSINESS OCCURRED OR WITNESS LIVED FUNDAMENTALLY DEPRIVES THE RESPONDENT, WITNESSES, AND INTERESTED PARTIES OF THE FULL OPPORTUNITY TO DEFEND THEIR

INTERESTS, CONTRARY TO STATUTORY LAW AND BOARD INTERPRETATION OF VENUE.

It is the position of *amicus curiae* that the Board's authority to conduct hearings under Section 10(b) of the Taft-Hartley Act, is to ensure a full and fair hearing of the unfair labor practice charged.

The purpose for Congress's permitting the Board to hear cases throughout the United States "was not conferred for its sole benefit, but for the benefit also of those subject to the provisions of the Act. It was not intended that those affected by the Act should be penalized by being required to travel and transport witnesses unreasonable distances to attend hearings pursuant to complaint, nor was it intended that the Act should be used as an instrument of intimidation or oppression on those affected by it." NLRB v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941).

Section 10258.2 of the General Counsel's Casehandling Manual provides for the selection of hearing space. The hearing room at the National Office in Washington, D.C. would have been ideal for the hearing where Respondent was located and where all the witnesses subpoenaed by the General Counsel were located.

The Charge should have been filed where the Tweet occurred, the employees are located, and the employer is located. The Board's Rules and Regulations requires it.

> §102.10 Where to file. Except as provided in §102.33, a charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of those Regions.

Here, there was no basis for Mr. Fleming to file the charge in New York City. He also had no obvious relation to Region 2 or New York City. Violation of this specific regulation occurred. Region 2 should have immediately transferred venue to Baltimore Region 5 as Rule

102.10 requires and as a matter of efficiency and cost to the Agency. The matter of changing venue should have been treated seriously by Region 2 before the hearing and remedied before the hearing, not refused.

Unless the Board's Rules and Regulations are no longer mandatory on all participants and were intended to be advisory and manipulated by the Board's Regional Directors, even though promulgated under the Administrative Procedure Act ("APA"), Region 2's action will represent Board approval of arbitrary and capricious activity under the APA, 5 U.S.C. § 706(2)(D) ("without observance of procedure required by law"). Unless the Board finds the Act has not been violated, the case cannot advance unless a new hearing is directed as the Board's Rules and Regulations and the Act requires the parties' interests to be accommodated.

Here, there is no party best accommodated by holding the hearing in New York City, except for the counsel for the General Counsel in Region 2. But even that concept is incorrect, when counsel for the General Counsel are located nationwide. Counsel for the General Counsel was available in Region 5 and its subregional National Office location. "Fair play, under the statute, required the Board to hold a hearing at a place convenient to each of the parties," near where they live or work. Prettyman, 117 F.2d at 791.

The Board has stated its current practice is to consider the "inconvenience and possible unfairness to the other affected parties" when deciding the time and place of hearings, such as facts showed occurred. Jacques Syl Knitters, Inc., 247 N.L.R.B. 1525, 1529 (1980). That policy was not applied.

Here, neither Region 2 nor the ALJ recognized the unfairness of proceeding even though Respondent's counsel argued his special appearance to the ALJ because the case was being held in the wrong place and deprived it of calling witnesses after the General Counsel released all subpoenaed witnesses from the hearing. The General Counsel had subpoenaed Ben Domenech

and four of the six FDRLST employees to New York City. Their short-fuse release before the hearing required the procedure and service rules of Board Rule 102.31 be completed in the next week before the hearing, shifting the burden to produce these witnesses upon Respondent to bear the enormous expense of serving subpoenas upon witnesses to New York City, rather than Region 2, if it could even be accomplished. In early February 2020, the Covid-19 epidemic in the United States found New York City to be the nation's viral hotspot. The New York Governor has since required persons from forty-one States to self-quarantine for fourteen (14) days before entering any social interaction in New York State. See https://coronavirus.health.ny.gov/covid-19-travel-advisory

Fair play and maintenance of public confidence for the Act and the Board are not promoted when the Board does not provide all the parties and prospective witnesses, except those associated with counsel for the General Counsel, the courtesy and due process expectation not to compel travel distances and costs greater than necessary and safely to hear a case when a convenient, proper, and a neutral alternative site is available where the parties are located.

Board Rule 102.16(a) provides that the Regional Director may change the place of hearing for proper cause. For no known reason the Regional Director denied the Request and failed to transfer the case to Region 5 in Baltimore, Maryland.

As the stipulated record reveals, no witness/person is connected to Region 2. The only apparent explanation for the Charging Party to file the charge in Region 2 was to game the system with a sympathetic regional director and/or regional attorney who felt free to refuse to comply with the Board's extant Rule and Regulations.

To maintain public confidence in the Board and compliance with its Rules and Regulation, the Board should find the Regional Director and the ALJ violated the Board's Rules and Regulations and set aside the Decision of the ALJ.

II.
EMPLOYER STATEMENTS AND COMMENTARY REGARDING MATTERS OF PUBLIC INTEREST ABOUT LABOR UNIONS IS PROTECTED BY SECTION 8(c) OF THE ACT AND ARE NOT VIOLATIONS OF SECTION 8(a)(1) OF THE ACT WHERE NO EVIDENCE OF CONCERTED ACTIVITY OR AN ATMOSPHERE INVOLVING UNFAIR LABOR PRACTICES EXISTS.

The Labor Management Relations Act ("LMRA") was not enacted to thwart the dissemination of ideas or to suffocate the First Amendment right of free speech which employees, employers, and corporations enjoy. First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

> Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification. [Citations omitted].

To disseminate information regarding matters involving the NLRA, Congress imposed Section 8(c), 29 U.S.C. § 158(c), to prevent the Board from entering this expressive sphere.

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Without Section 8(c), Section 8(a)(1) of the Act would restrict almost any employer speech relating to union organization. Hertzka v. NLRB, 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1974). Congress intended that Section 8(c) would also prevent the Board from attributing antiunion motives to an employer based on past statements. Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1966): "We acknowledge that the enactment of § 8 (c) manifests a congressional intent to encourage free debate on issues dividing labor and manage-

ment." Section 8(c)'s purpose "manifest[s] a 'congressional intent to encourage free debate on issues dividing labor and management.'" Chamber of Commerce v. Brown, 554 U.S. 60, 67 (2008); NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). "[P]ermitting the fullest freedom of expression by each party nurtures a healthy and stable bargaining process." Americare Pine Lodge Nursing & Rehab. Ctr. v. NLRB, 164 F.3d 867, 875 (4th Cir.1999).

The ALJ's proposed interpretation to sanction Mr. Domenech's tweet would impede the employer's statutory right and the individual supervisor's right to express itself/himself using its own property to express a view on a contemporary issue of public discussion which the First Amendment also protects. Because of the Board's decision in Clark Equip Co., 278 N.L.R.B. No. 85 (1986), it is difficult to discern how factual statements about union activity and impact on employee rights as the ALJ opines, can be based only on his personal experiences. His personal perception is entitled to no deference on the stipulated record. The ALJ's perceptions may equally be treated as not coercive of employee rights, but a direct interference with the employer's right of free speech when there is no admissible evidence to the contrary. "[A]dministrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 217 (1938).

In Clark, supra, the Board agreed the statements made,

> accurately reflect the obligations and possibilities of the collective bargaining process. They do not contain any threats the Respondent will not bargain in good faith, or that only regressive proposals will result....The leaflets contain permissible campaign materials within the protection of Section 8(c), and we, accordingly, dismiss this allegation.

The point about the information in the notice in Clark is that the content is not neutral. The point made in Bellotti, supra, was also not content neutral, but still protected. As the ALJ

recognizes, the information provided in the tweet is an idiom with multiple meanings where it is equally likely that a non-reprisal purpose for the tweet by Mr. Domenech on a matter of contemporary public discussion can be readily observed—humor.

It is far-fetched for the Board to consider a tweet to become the central focus in an organizing campaign when there is no evidence of an organizing campaign before or after the tweet was made and the Stipulation provided no evidence of employee concerted activities.

In NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951), aff'g, 180 F.2d 731 (6th Cir. 1950), the Supreme Court affirmed the circuit court's rejection of a Board order finding the employer liable for the isolated remarks in letters and conduct of agents who "had expressed hostility to the union in conversation with members of crews or in their presence." Id. at 501.

> The Board also relied on the testimony of union organizers, partly corroborated, that officers of some of the respondents ships had expressed hostility to the union, in conversation with members of crews or in their presence. Evidence of respondent's intent to coerce employees was also found in two letters of the president of the steamship company circulated among the crews. Each assured that union membership would not affect an employee's position in the company. But an officer of the union testified that some of the polices attributed to the union in the letters were inaccurate and the Board found that these letters, although 'not unlawful per se * * * constitute an integral and inseparable part of the respondent's otherwise illegal course of conduct and when so viewed they assume a coercive character which is not privileged by the right of free speech.' 69 N.L.R.B. at 1396. *
> *Since we do not disturb the conclusion of the Court of Appeals that these letters are not substantial evidence of an unfair labor practice under the Wagner Act, we express no opinion on the possible effect of s 8(c) of the Taft-Hartley Act. 61 Stat. 142, 29 U.S.C. (Supp. III) s 158(c), 29 U.S.C.A. s 158(c). *This section provides that expression of views, argument or opinion shall not be evidence of an unfair practice*. [Emphasis added].

Here, counsel for the General Counsel asks the Board to turn the clock back seventy years to retry the ruling made by the Supreme Court. The only record evidence admitted by the ALJ is from two employee affidavits with evidence contrary to the ALJ's conclusion. Therefore,

"[t]he finding is based upon a dubious inference, in face of direct and positive evidence to the contrary. In this connection, it is pertinent to note that there is no proof of any anti-union bias or activity on the part of respondent. It has been held, and we think properly, that inferences contrary to direct testimony are not ordinarily sufficient to support a finding. See N.L.R.B. v. Fox Mfg. Co., 5 Cir., 238 F.2d 211, 214, and cases therein cited and discussed." NLRB v. Kaye, 272 F.2d 112, 113 (7th Cir. 1958).

The Board *must* show record evidence of the employer's retaliatory intent.

In subsequent cases, unchallenged by the Board in almost seventy years, where isolated instances occurred, employer agents have not bound their employer's where the statements were contrary to the employer's proven policy to permit organization, NLRB v. Hart Cotton Mills, Inc., 190 F.2d 964 (4th Cir. 1951); where there is a no adverse labor relations history, NLRB v. Tennessee Coach Co., 191 F.2d 964 (6th Cir. 1951); or where only a few supervisors made antiunion statements. 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 95 (6th Cir. 1954).

This result obtains even where the foremen and supervisors asking the offensive remarks acted spontaneously and on their own behalf. NLRB v. Swank Prod. Co., 108 F.2d 872 (3d Cir. 1939). Finally, where supervisory employees express themselves in a manner at odds with the employer's policy, no employer liability is found. NLRB v. J.L. Brandeis & Sons, 145 F.2d 556 (8th Cir. 1944).

In UARCO, Inc., 286 N.L.R.B. 55, 56 (1987), a supervisor asked an employee why he thought the employees needed the union and indicated that in bargaining, everything had to be negotiated. The Board held the conversation not to be coercive under § 8(a)(1), but protected employer speech under Section 8(c). Also Churchill's Supermarkets, Inc., 285 N.L.R.B. 138 (1987) (friendly conversation between supervisor and employee about prounion sentiments not

coercive where friendly personal relationship existed). Burger King Corp. v. NLRB, 725 F.2d 1053, 1055 (6th Cir. 1984) (inquiries alone do not amount to coercion; supervisor asked what a union could do for the employees).

Finally, an employer may make predictions about the future if it encompasses no threat of reprisal or promise of benefit under Section 8(c) of the Act.

Because of the Board's decision in Clark Equip Co., 278 N.L.R.B. No. 85 (1986), it is difficult to discern how a single satirical statement made about potential union activity is coercive of unexercised employee rights tantamount to a "threat of reprisal" fitting into the exception to the protection extended to employer expression under Section 8(c) of the Act. In Clark, the Board agreed that the statements made,

> accurately reflect the obligations and possibilities of the collective bargaining process. They do not contain any threats the Respondent will not bargain in good faith, or that only regressive proposals will result....The leaflets contain permissible campaign materials within the protection of Section 8(c), and we, accordingly, dismiss this allegation.

The comments attributed to Mr. Domenech were spoken in an atmosphere where no other independent unfair labor practices were occurring and on a topic receiving significant national press coverage and commentary. See Stipulation Between Respondent FDRLST Media, LLC, Charging Party Joel Fleming, and General Counsel of the National Labor Relations Board ¶ 5 (identifying numerous contemporary news articles on the VOX employee strike).

An idiom is recognized and used in the English language as a satirical statement. Its use was a noncoercive viewpoint, argument or opinion of the employer, taken when there was no overt union activity, like wearing union tee shirts. See NLRB v. Village IX, Inc., 723 F.2d 1360, 68 (7th Cir. 1983) (union was a "cancer" statement not a threat of reprisal); Martin Sprocket & Gear Co. v. NLRB, 329 F.2d 417, 419 (5th Cir. 1964) (isolated statement that "as far as he was

concerned, the Unions just stink" would not violate Section 8(a)(1)).

In Hamilton Standard Div., 313 N.L.R.B. 1303 (1994), the Board held the employer's memorandum to workers, indicating that filing an unfair labor practice charge was improper, did not violate 8(a)(1) of the Act. The Board so found because "the memorandum is devoid of any threats, express or implied, directed against employees or the Union for filing the charge itself and does not contain any language threatening that the Respondent would retaliate because the charges were filed." Id. at 1305-06. Also Somerset Welding & Steel, 314 N.L.R.B. 829, 832-33 (1994) (employer comments that do not threaten to deprive employees of benefits, not violative); Custom Window Extrusions, 147 L.R.R.M. 1070 (1994).[2] Hence, an employer has a First Amendment right to tell its employees what its position is on a national topic of conversation, to convey to employees it does not like to receive unfair labor practice charges, and unionization is unnecessary.

For example, the Board found no unfair labor practice when there was no evidence supervisors engaged in coercive surveillance during counter-leafleting activity:

> An employer has the right to distribute election campaign material of its own. *It has a right to express its opinion* of union literature, even calling it trash—*in writing as well as orally*. And, it has a right to do these things at the very moment the union is trying to persuade the employees to a contrary view—certainly anywhere on its premises, in the inner reaches of the plant or at the front door, even if the door is made of looking-through glass. What the General Counsel's argument really amounts to here is that the Respondent may not do what it legally is permitted to do. [Emphasis added].

Arrow–Hart, Inc., 203 N.L.R.B. 403, 406 (1973).

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[2]If statements by a company vice president stating that "you don't know what a good screwing is" and "if you get that union here I'll bet you'll find out," made in a joking context with employees are not unlawful, M.K. Morse Co., 302 N.L.R.B. 924, 925 (1991), then *amicus* submits an employer's statement that "I'll send you back to the salt mine," surely cannot be stripped of 8(c) protection.

In Aladdin Gaming, LLC, 345 N.L.R.B. 585, 585–86 (2005), the Board found no violation where supervisors interrupted union supporters soliciting employees in the employer's cafeteria to give "management's perspective on unionization" because it had a right to do under Section 8(c)).

Case law requires the statement must be considered in the context made, unless coercion is clear from the language itself. NLRB v. Fulton Bag & Cotton Mills, 175 F.2d 675, 676-77 (5th Cir. 1949); NLRB v. King Radio Corp., 416 F.2d 569, 572 (10th Cir. 1969), cert. denied, 397 U.S. 1007 (1969). The language must be both coercive and threatening to lose the protection of Section 8(c). Exxel/Atmos, Inc. v. NLRB, 147 F.3d 972 (D.C. Cir. 1998), cert. denied, 525 U.S. 1067 (1999); Mon River Towing, Inc., 421 F.2d 1 (3d Cir. 1969). Here, the stipulated record reveals no evidence FEDLST threatened any employees to do anything.

Interrogation is not an unfair labor practice if it is free from reprisal. Thomas v. Collins, 323 U.S. 516, 537 (1945) ("employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." See NLRB v. Syracuse Color Press, Inc., 209 F.2d 596, 599 (2d Cir. 1954), cert. denied, 347 U.S. 966 (1954) (requiring coercion). Even the absence of a legitimate purpose for undertaking the questioning is not an intrinsic violation of the Act.

And where a company president asked a worker to identify the union's organizers, no violation was found. NLRB v. Coca-Cola, Bottling Co., 33 F.2d 181 (7th Cir. 1964). No violation was found where a department supervisor rhetorically asked employees "who had made it their business to invite them" into the company, no ULP was found. Imco Container Co. v. NLRB, 346 F.2d 178, 181 (4th Cir. 1965).

Mr. Domenech's alleged opinion of union strikes is an opinion of fact. The issue for section 8(a)(1) requires a threat or a harmful prophecy of the effects of unionization upon the

company's employees. No evidence was adduced in the record that any such prophecy or threat within the company could be made (forcing anyone into a salt mine) or involved in these alleged statements to FEDLST employees.

Under these circumstances, even if Mr. Domenech made the statements in an employee's presence, which the record shows did not occur, that opinion accompanied by no threat is protected speech under the Act. Moreover, Section 8(c) implements the First Amendment and the statement is also speech protected against a governmental sanction. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Indiana Metal Prods. Corp. v. NLRB, 202 F.2d 613, 617 (7th Cir. 1953) (letters to employees expressing view on unionization protected by §8(c)).

The Board must show FEDLST knew of concerted activity. Howard Johnson Co., 209 N.L.R.B. 1122 (1974); NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964). There is no evidence that FEDLST knew of any concerted activity.[3]

Amicus recognizes significant gaps in testimony and evidence to support the conclusion that Section 8(a)(1) was violated. In these circumstances, Counsel for the General Counsel and Charging Party could have called employees to produce employer statements that may have been made to show there was a past practice of any kind or evidence of animus by the employer. Counsel for the General Counsel withdrew all his subpoenas which must imply he knew their testimony would be averse to his position. On this stipulated record, adverse inference must be found against allegations in the Complaint.

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[3]The legislative history of the Act demonstrates the House of Representatives was adamant that the Board be blocked from interfering with employer efforts to prevent destructive employee behaviors, stating that the Board "is inclined to reinstate, with back pay, strikers whom employers discharge for what the Board seems to regard as minor crimes, such as interfering with the United States mail, obstructing railroad rights-of-way, discharging firearms, rioting, carrying concealed weapons, malicious destruction of property, and assault and battery." H.R. Rep. No. 245, 80th Cong., 1st. Sess. 27 (1947), reprinted in I NLRB, Legislative History of the Labor Management Relations Act, 1947 202, 318 (1959).

III.
APPLICATION OF THE BOARD'S *WRIGHT LINE* STANDARD OF CAUSAL CONNECTION IN SECTION 8(a)(1) CASES DOES NOT SUPPORT THE COMPLAINT.

The General Counsel is and always has had to carry the burden of proof in Section 8(a)(1) cases upon the preponderance of the evidence. 29 U.S.C. §160(c). The stipulation of facts containing no employee evidence by the Charging Party or Counsel for the General Counsel as discussed and rendered by the ALJ, only supports the conclusion the case was contrived.

In General Motors, LLC, 369 N.L.R.B. No. 127 (July 21, 2020), the Board determined the shifting burden of proof standard applied in Section 8(a)(3) cases applies to Section 8(a)(1) cases where social media statements are the basis for discipline because causation is in issue. "[G]oing forward, these cases shall be analyzed under the Board's familiar *Wright Line*[, 251 N.L.R.B. 1083 (1980)] standard." Id. at 1, 9 ("workplace, social media, or picket line"). This requirement was imposed because none of the prior Board's standards "actually require any showing of discrimination or antiunion motivation," id. at 9, which the ALJ admits. ALJD 4:3. Hence, whether nondiscriminatory discipline occurred or other protected activity was involved with the employer action had been found had been irrelevant in Section 8(a)(1) cases, but the Board still treated Section 8(a)(1) cases like a Section 8(a)(3) case, id. at 9 n.20. The Board has now determined to apply the Wright Line standard to "all pending cases." Id. at 10.

The three-part test Wright Line test requires the General Counsel to meet his initial burden by showing "(1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, *which must be proven with evidence sufficient to establish a causal connection* between the discipline and the Section 7 activity." Id. at 10 (emphasis added). Counsel for the General Counsel introduced no

evidence in the record to prove the requirement stated in the third section of the Wright Line test.

The ALJ also failed to establish a causal connection from the evidence to Section 7 activity. He states a violation of "Section 8(a)(1) does not turn on the employer's motive or on whether the coercion succeeded or failed." ALJD 4:16-17. Rather, the ALJ found that "what matters" is the "view[] from the perspective of a reasonable person." Not even Charging Party Fleming appeared to provide evidence on what his charge meant to FDRLST employees and why Mr. Domenech's tweet was coercive or threatening to employees. One-third of the FDRLST workforce submitted affidavits (two persons) which show the commentary was not coercive. They went unanswered, which from a policy perspective raises the question of where the necessary threat or coercion arises.

The General Counsel had the complete opportunity to move to suspend the hearing when the affidavits were admitted into evidence, Tr. 26:15-16, and adduce evidence to the contrary. He could have requested a suspension of the hearing to reacquire and enforce his subpoenas for employee testimony to dispute the affidavits. That counsel for the General Counsel did not seek to introduce corroborative or contradictory evidence, is supportive of an assumption he knew the FDRLST employees did not support his contentions. From the perspective of an outside organization, counsel for the General Counsel gamed their adverse testimony by releasing the subpoenas before the hearing which the ALJ recognized caused the employees' unavailability (under Fed. R. Evid. 804(a)(4)). ALJD 3 n.5. The ALJ did not find the affidavits in his opinion to be inadmissible hearsay.

Without the admission of any evidence to contest these employee affidavits, the ALJ imposed his preferred view of the facts they reported and stated a new proposition of possible coercion unsupported by any evidence, by presupposing affidavits must conform to the investigation safeguards in Johnny's Poultry, 146 N.L.R.B. 770 (1964), when the Board has never

stated that proposition.

In this Decision, the ALJ would never consider employee affidavits, unless a Johnny's Poultry affidavit is provided even though the stipulated record presents no evidence of employee coercion to result in that conclusion.[4] The ALJ substituted his intuition for testimonial evidence counsel for the General Counsel failed to produce to meet his burden of proof.

Utilizing the Wright Line the burden of proof standard now required by the Board, which was not applied, the Section 8(a)(1) violation cannot be sustained.

CONCLUSION

WHEREFORE, *amicus curiae* Center on National Labor Policy, Inc. respectfully supports the Respondent's position in requesting the Board reverse the decision of ALJ Chu in Region 2.

Respectfully submitted,

/s Michael E. Avakian
Michael E. Avakian
CENTER ON NATIONAL LABOR
POLICY, INC.
5211 Port Royal Road, Suite 103
No. Springfield, VA 22151
(703) 321-9180

Dated: August 17, 2020

Attorney for Amicus Curiae

[4]The Board's Rules and Regulations Section 102.24(a) presupposes the Board will consider affidavits on summary judgment as a federal court allows under Fed. R. Civ. Proc. 56(c)(1)(A), by "citing to...affidavits or declarations...." The decision in this matter is akin to a summary judgment determination.

CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the Brief of THE CENTER ON NATIONAL LABOR POLICY INC. in this cause was electronically filed with the National Labor Relations Board and served via email to the following persons on this 17th day of August 2020, to:

Jamie Rucker
Counsel for the General Counsel
NLRB Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
jamie.rucker@nlrb.gov

Aditya Dynar
Caleb Krukenberg
Kara Rollins
Jared McClain
New Civil Liberties Alliance
1225 19th Street, N.W., Suite 450
Washington, D.C. 20036
Adi.Dyner@NCLA.legal
Caleb.Kruckenberg@NCLA.legal
Kara.Rollins@NCLA.legal
Jared.McClain@NCLA.legal

Joel Fleming
Block & Leviton LLP
260 Franklin Street, Suite 1860
Boston, MA 02110
fleming.joel@gmail.com

/s Michael E. Avakian
Michael E. Avakian
THE CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Road, Suite 103
No. Springfield, VA 22151