

## Losing the Forest for the Trees: Third Circuit Reverses NLRB in Joke' v. Threat' ULP Case

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It was all a joke.

That's what the Third Circuit Court of Appeals concluded on May 20 when it issued a strong rebuke to the National Labor Relations Board in reversing a decision that found the publisher of *The Federalist* violated the NLRA by tweeting he would send his employees, "to the salt mine" if they tried to unionize.

The Third Circuit concluded the tweet was a "joke" and not an illegal "threat."

*The Federalist* was exonerated in this case, but it still sends an important reminder about how an employer must be very careful about "jokes" when using social media.

In [FDRLST MEDIA LLC, v NLRB, 2022 WL 1594755 F.4th \(2022\)](#), the employer publishes *The Federalist*, a right-leaning online magazine. In June 2019, the unionized employees of the left-leaning digital media company, Vox Media, walked off the job during union contract negotiations. That day, Ben Domenech, the CEO and Publisher of *The Federalist*, posted a tweet on his personal Twitter account that read:

*"FYI @fdrlst first one of you tries to unionize, I swear I'll send you back to the salt mine."*

The next day, a Massachusetts resident with no connection to the company filed an unfair labor practice (ULP) charge with the NLRB. Based on the charge, the Regional NLRB office issued a ULP complaint, alleging the company violated Section 8(a)(1) of the NLRA which prohibits employers from engaging in practices that "interfere with, restrain, or coerce employees in the exercise" of their protected rights to organize.

Notably, none of the company's six employees complained or were interviewed by the NLRB.

The NLRB Administrative Law Judge (ALJ) found that the tweet was "an obvious threat" that "had no other purpose except to threaten the employees." On appeal, the Board agreed and relied solely on the words of the tweet itself to affirm the ALJ decision.

To constitute an illegal "threat," generally, the employer's statement must warn of adverse consequences in a way that "would tend to coerce a reasonable employee" not to exercise their labor rights.

On appeal, the Third Circuit panel found that the NLRB erred when it disregarded "relevant contextual evidence," and ignored the tweet's circumstances. In its decision, the court focused on the context of the statements, the nature of the company's work, its employees, and the timing of the statements, stating: *"The tweet's suggestion that these employees might be sent 'back' to work in a Salt mine" is farcical. The image*

*evoked-that of writers tapping away on laptops in dimly-lit mineshafts alongside salt deposits and workers winging pickaxes-is as bizarre as it is comical."*

In supporting its decision to reverse the NLRB, the panel noted that it has never affirmed a finding of an unfair labor practice based on employer speech alone, absent any indication of labor friction. The court stated: *"Here the Board spent its resources investigating an online media company with seven employees because of a facetious and sarcastic tweet by the company's executive officer. Because the Board lost the forest for the trees by failing to consider the tweet in context, it misconstrued a facetious remark as a true threat."*

**Two Takeaways:** First, this case is a reminder that "any person" can file a ULP charge. The law is not limited to employees. Second, taken alone, the tweet's content reads like the types of "threats" that this author warns employers to never make! (That advice still stands!). The Third Circuit panel appeared most concerned with the fact that the NLRB ignored and rejected essential and material facts concerning that the *context* in which the employer's statements were made (including the fact that no employees complained about the tweet and stated they did not feel it was a threat).

Although context certainly matters, a "best practice" is to be careful about labor "jokes" and avoid the issue altogether. One person's "joke" can be any person's "threat."

If you have any questions concerning labor issues, please reach out to [Kevin Moore](#) or any member of [Barley Snyder's Labor Law group](#).

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