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The NLRB needs to learn how to take a joke

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What's the worst that could happen when you tweet a joke?

You might get ratioed by the online peanut gallery. You might even find yourself on Siraj Hashmi's "List." Those risks come with the territory. But you certainly wouldn't expect that your tweet could literally turn into a federal case. That's what happened to Ben Domenech, the publisher of the online politics and culture magazine the *Federalist*. He tweeted: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." Surprisingly, the *Federalist* doesn't have a salt mine, which is one reason its own writers viewed the tweet as a joke.

But that was just the start — because a random online bystander with no connection to the *Federalist* reported the tweet to the National Labor Relations Board, the federal agency in charge of enforcing federal labor law. That agency then dragged the *Federalist's* parent company through a lengthy bureaucratic process that culminated in an order finding the tweet to be illegal. Now the case has been appealed to the 3rd U.S. Circuit Court of Appeals. The Cato Institute has filed an amicus curiae brief urging a reversal of the NLRB's decision. Cato is joined on the brief by a broad coalition of free-speech supporters, including satirist P.J. O'Rourke, former ACLU President Nadine Strossen, and magicians and authors Penn & Teller.

As our brief explains, the NLRB's decision was wrong because it fundamentally misunderstood Domenech's tweet. It was a joke, not a serious threat to punish union activity. The context of a remark matters. Domenech, like many political commentators, uses his Twitter account to speak out on current events. He has cultivated a large online audience that appreciates his often irreverent and humorous tone, and his tweets are delivered to that audience. But the NLRB ignored that context and read Domenech's tweet as if he had emailed it privately to the *Federalist's* employees alone. That's like interpreting President Barack Obama's public joke about drone-striking the Jonas Brothers as if he made it in a private phone call to Kevin, Joe, and Nick themselves. Domenech's tweet was public and performative, just like a speech at the White House Correspondents' Dinner.

Even putting that context aside, the *Federalist* obviously does not have a salt mine to which insubordinate writers are periodically banished. The absurdity of that image is what made Domenech's tweet funny (joining a long history of jokes about toiling in salt mines and sugar caves). That's why two of the *Federalist's* own employees submitted affidavits explaining that they understood the tweet was a joke. To properly interpret everyday language, courts have to understand humor. First-year law students learn from a famous case that a Pepsi commercial "offering" to sell a Harrier jet to teenagers did not create a real contract. As the court explained, the image of flying the jet to school was absurd, and the commercial was "clearly in jest." The

NLRB should have realized that the same principle applies here, but instead, it implausibly read "salt mine" as a euphemism for some unspecified but draconian workplace punishment. That's like interpreting "the beatings will continue until morale improves" on a workplace poster as a serious threat of violence rather than an ironically humorous slogan.

The NLRB's decision isn't just wrong; it's dangerous. Twitter is home to thousands of jokes a day, from the cringeworthy to the edgy to the brilliant. But if humorless federal agencies start looking for tweets to take out of context, everyone will speak less freely. Tweeters might self-censor rather than express themselves as they wish, and freewheeling discourse will suffer. After all, if a joke about salt mines can become a federal case, who's to say a joke about firing pineapple pizza haters won't be next? Punishing Domenech's tweet would thus set a dangerous precedent. The 3rd Circuit can avoid going down that path by reversing the NLRB's order. The court should uphold the right to tweet freely. And the NLRB should learn to take a joke.

Thomas Berry is a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and the managing editor of the Cato Supreme Court Review. He co-authored a brief supporting FDRLST Media in the case FDRLST Media, LLC v. NLRB.