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No ‘Twitter Exception’ for Federalist Publisher, NLRB Argues

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The National Labor Relations Board defended before a federal appeals court its decision that the publisher of the conservative online magazine The Federalist illegally threatened employees when he tweeted he would send them “back to the salt mine” if they tried to form a union.

In a brief filed to the U.S. Court of Appeals for the Third Circuit, NLRB attorneys shot back at the publication’s assertion that the tweet by FDRLST Media Publisher Ben Domenech was merely satirical and protected by the First Amendment. Courts “long ago rejected the argument that an employer can avoid a finding of coercion by simply calling its threat a joke,” agency lawyers wrote, adding that an employer’s power over workers could lead employees to take such remarks seriously.

The NLRB ruled against FDRLST Media in November 2020, upholding an administrative law judge’s decision in the case. The three-member panel included John Ring (R), who was the chair at the time, William Emanuel (R) and Lauren McFerran (D). FDRLST Media appealed the decision to the federal courts.

FDRLST Media had argued that Domenech’s 2019 tweet wasn’t directed at employees because it was made on Twitter, a public forum with “performative” elements.

The publication’s lawyer, Aditya Dynar, said in a November statement that the NLRB’s decision “shows that NLRB lacks both common sense and a sense of humor.”

“It disregarded sworn employee statements saying that they perceived the tweet as just a joke,” Dynar added.

In the NLRB’s brief, agency attorneys said the medium had little bearing on whether the remark was legal, and that the board “was not required to create a Twitter exception.”

The publication’s appeal is backed by prominent conservative organizations such as the Reason Foundation and the Cato Institute, which filed amicus briefs in the case.