3rd Circ. Ruling Shows Limits Of Regulating Employer Speech

By **Daniel Johns** (July 29, 2022)

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A recent decision from the U.S. Court of Appeals for the Third Circuit in FDRLST Media LLC v. National Labor Relations Board[1] highlights the ongoing tension that exists between the constitutional protection of free speech under the First Amendment and the regulation of speech in the labor law arena.[2]

More specifically, the Third Circuit held that the NLRB erred in deciding that the publisher of a conservative magazine unlawfully threatened the magazine's workers when he tweeted that he would send them "back to the salt mine" if they tried to unionize.

With respect to the NLRB's claim that the tweet constituted a threat, the substance of the employer's defense essentially amounted to an assertion that the tweet was a joke that was protected by the First Amendment.[3]

The court agreed with the employer, finding that, read in context, the tweet constituted a joke and not a threat to the magazine's employees. The context included the fact that there was no active union organizing campaign at the employer and that the tweet was not directed internally to employees, but instead was directed externally to the public.

The court also relied upon the fact that the statement was made through the use of a means of communication, Twitter, that generally encourages the communication of exaggerated sarcasm.

In finding that the tweet constituted a joke, the court explicitly recognized the difficulty inherent in drawing lines between protected speech and an unlawful employer threat in the labor law context.

The Third Circuit stated, "To give effect to Congress's intent and avoid conflict with the First Amendment, we must construe the Act narrowly when applied to pure speech, recognizing that only statements that constitute a true threat to an employee's exercise of her labor rights are prohibited."

The FDRLST case is significant in that it represents a pushing back against the NLRB from the standpoint of what employer speech can be deemed illegal notwithstanding the application of the First Amendment.

It is clear that the current NLRB, particularly given President Joe Biden administration's stated support for unions, wants to regulate employer speech more strictly in the context of union organizing campaigns. The courts may not be ready to allow the NLRB to expand its regulation in that area.

The First Amendment tension inherent in the enforcement of federal labor law protections in the context of employer speech is not unique to the FDRLST case. Indeed, much of the early history and litigation surrounding the passage of the National Labor Relations Act involved the balancing of the tensions between what employer speech is protected by the First Amendment and what speech constitutes illegal employer threats in the context of union organizing campaigns.

In 1940 in Thornhill v. Alabama, the U.S. Supreme Court confirmed that employer speech was protected by the First Amendment, holding that "[t]he dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[4]

Just a few years later, Congress codified the Supreme Court's holding by amending the NLRA to include a free speech proviso which protects "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form."[5]

The free speech proviso further states that such expression "shall not constitute or be evidence of an unfair labor practice under any of the provisions of [the NLRA], if such expression contains no threat of reprisal or force or promise of benefit."[6]

The free speech proviso notwithstanding, the Biden administration has made clear that one of the battlegrounds for labor law reform over the next few years will involve an attempt to limit or prevent employer speech during union organizing campaigns.

For example, Jennifer Abruzzo, general counsel of the NLRB, issued a memorandum in April that expressed her intent to limit or prohibit employer speech during captive audience meetings.[7] Abruzzo explained her goal in the first paragraph of the memo:

> In workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns. As I explain below, those meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech. I believe that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor-law principles, our statutory language, and our congressional mandate. Based thereon, I plan to urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful.[8]

Of course, the general counsel's statement of intention must be squared with the Supreme Court's and the NLRB's long-standing protection of employer speech in the context of union organizing campaigns.

One thing is certain, however — employers must recognize that the current political landscape for the regulation of employer speech during union organizing campaigns is not a favorable one, and they should expect heightened scrutiny of any anti-union speech made during the pendency of representation petitions.

The NLRB's general counsel has not only stated her position on employer speech at captive audience meetings, but also has acted upon it. In Cemex Construction Materials Pacific LLC,[9] the general counsel asked the NLRB to declare that employer captive audience meetings during representation campaigns are per se unlawful under the NLRA.

The U.S. Chamber of Commerce fired back against the general counsel in a letter to the NLRB dated June 14. The chamber summarized its objections to the general counsel's agenda as follows:

> With regard to employer speech, in Cemex, the [General Counsel] has asked the Board to find that mandatory staff meetings to discuss union issues are "inherently coercive" and to prohibit them. This completely disregards [the free speech proviso]

> of the NLRA... . Leaving aside potential Constitutional issues, this section of the Act was included in 1947 specifically to protect employer speech rights, and the Board and [the General Counsel] are not at liberty to disregard it.[10]

Although it is unclear what will happen in Cemex, there is no question that the next few years will see some of the fundamental First Amendment questions inherent in the regulation of employer speech litigated before the NLRB, the circuit courts of appeal and perhaps even the Supreme Court.

As noted above, employers need to monitor this landscape closely so as not to risk the overturning of a favorable NLRB election result based upon speech that occurs during an organizing campaign. Employers can expect NLRB scrutiny of all types of speech to employees during campaigns, including handouts, formal speeches and electronic communications.

Employers also should expect the NLRB to seek the broadest remedies for unfair labor practices in this context, including a potential expansion of the use of bargaining orders where an employer may be ordered to bargain with a union even without the union winning a representation election.

Perhaps the best advice for employers in this environment is to avoid the NLRB process altogether. That is, employers need to put the time and effort into employee relations before a union representation petition is filed.

Efforts to increase employee morale, deal with bad supervisors and correct issues of unfairness in the workplace are always the best way to avoid a union, particularly where, as now, an employer's ability to talk to employees during a union campaign may be limited by the NLRB.

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[1] FDRLST Media, LLC v. NLRB, No. 20-3434 (3d Cir. May 2, 2022).

[2] Some of the themes set forth in this article are more fully developed in this author's article, "The Coddling of the American Worker's Mind: The Anti-Free Speech Nature of Popular Labor Law Reforms," William and Mary Bill of Rights Journal (forthcoming 2022).

[3] The court rejected the employer's procedural argument that the individual who brought the charge, a member of the public from Massachusetts who had no connection to the magazine, lacked standing to bring the claim.

[4] Thornhill v. Alabama, 310 U.S. 88 (1940).

[5] 29 U.S.C. Sec. 158(c) (2000).

[6] Id.

[7] NLRB Memorandum GC 22-04. A captive audience meeting is a meeting in which an employer requires the attendance of employees and discusses union organizing issues during the meeting.

[8] Id.

[9] Cemex Constr. Materials Pacific, LLC 28-RC-232059.

[10] See Chamber of Commerce letter, available at https://www.uschamber.com/employment-law/unions/coalition-letter-to-the-nlrb-on-the-joy-silk-doctrine#:~:text=Under%20Joy%20Silk%2C%20if%20a,why%20the%20cards%20were%20invalid.