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NCLA Asks Third Cir. to Reject NLRB's Jurisdiction over Satirical Tweet Case

FDRLST Media, LLC v. National Labor Relations Board

Washington, DC (March 22, 2021) – SWATting and Doxxing are noxious strategies that some immoral, left-of-center activists have employed to complicate and endanger the lives of their ideological adversaries. Perhaps unwittingly, the National Labor Relations Board (NLRB) has read its governing statute so broadly that it is now permitting a similarly abusive strategy to take root. Rather than send a SWAT team to your house under false pretenses, NLRB has passed a rule that allows "any person" to file "unfair labor practice" charges against a company and thereby launch the agency's formidable investigative and enforcement apparatus against that company. By contrast, the statute Congress passed limits the ability to file such unfair labor practice claims to "aggrieved" persons who have some kind of connection to the company or its employees.

The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed its opening brief today in *FDRLST Media, LLC v. National Labor Relations Board*. The brief asks the U.S. Court of Appeals for the Third Circuit to reverse the flawed ruling of the National Labor Relations Board from last November that it was an unfair labor practice for Mr. Domenech to have posted a satirical tweet from his personal account. Mr. Domenech's employer, FDRLST Media, publisher of the online magazine *The Federalist*, is fighting back.

NCLA argues that NLRB has no statutory authority to prosecute this action because the governing statute only allows an "aggrieved" person (such as an employee) to file a charge with the Board. The National Labor Relations Act does not empower random, unaffiliated people on Twitter, like Mr. Joel Fleming, to weaponize NLRB to harass employers for their employees' personal speech. NLRB ordered FDRLST to "direct Domenech to delete the statement from his personal Twitter account," but it has no power to make FDRLST silence its employees. And without a valid Charging Party, NLRB has no subject-matter jurisdiction over this case.

Further, nothing in this case has any connection to New York, yet NLRB prosecuted FDRLST in its New York branch. NLRB has subjected FDRLST to an onerous enforcement action that the agency lacks the personal jurisdiction to pursue lawfully.

Finally, NCLA argues that the Court should not defer to the NLRB's interpretation of the statutory person-aggrieved requirement under any judicial deference doctrines (like *Chevron*, *City of Arlington*, *Auer*, or *Brand X*), because such deference is unconstitutional. First, agency deference requires judges to abandon their duty of independent judgment, which is part of the judicial oath. Second, agency deference violates the Fifth Amendment's Due Process Clause by commanding judicial bias toward a litigant. If a court defers to the legal interpretation of one of the parties before the court—such as a federal agency—that denies a fair trial before a neutral tribunal to the other party before the court.

The Third Circuit should reverse NLRB's decision and vacate its order because NLRB has neither subject-matter jurisdiction over this case nor personal jurisdiction over this defendant. In addition, it should set aside the NLRB regulation that allows "any person" to file an unfair labor practice charge. If the court decides that NLRB does have jurisdiction over this case, then it should still reverse the Board. Mr. Domenech's tweet is (1) protected by

the First Amendment and 29 U.S.C. § 158(c), which allow people to speak freely and satirically to the public at large, and (2) NLRB cannot constitutionally order FDRLST to demand Mr. Domenech delete the tweet from his personal account.

NCLA released the following statements:

"NLRB is attempting to muzzle precisely the type of speech it was created to protect. Its display of boorish tendencies before its own ALJs and board members should work only to its detriment in federal court."

– Adi Dynar, NCLA Litigation Counsel

"The Constitution ensures that defendants cannot be dragged into court in jurisdictions with no connection to the parties or the alleged wrongdoing. That same rule applies when a federal agency is the prosecutor. There was simply no reason—let alone a constitutionally permissible one—for NLRB to bring this case in New York other than the Board's brazen insistence that it's above the law."

– Jared McClain, NCLA Litigation Counsel

For more information visit the case page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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