FDRLST Media, LLC *and* Joel Fleming. Case 02–CA–243109

November 24, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND MCFERRAN

On April 22, 2020, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1] The General Counsel also filed cross-exceptions and a supporting brief, to which the Respondent filed an answering brief, and the General Counsel filed a reply brief. In addition, the Center on National Labor Policy, Inc. (CNLP) filed an amicus brief,[2] to which the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[3] findings,[4] and conclusions and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, FDRLST Media, LLC, Washington, D.C., its officers, agents, successors, and assigns, shall

[1] The Respondent also filed a motion requesting oral argument. The Respondent's request is denied as the record and the briefs adequately present the issues and the positions of the parties.

[2] On September 9, 2020, the Board granted CNLP's motion for permission to file an amicus brief and accepted its brief, which was attached to the motion. On September 15, 2020, the Board denied Respondent employees Emily Jashinsky and Madeline Osburn's motion for leave to file an amici curiae brief, finding it would not assist the Board in deciding this matter.

[3] We find merit in the General Counsel's contention that the judge erred by allowing the Respondent to enter affidavits of Ben Domenech, Emily Jashinsky, and Madeline Osburn into evidence without establishing that the affiants were unavailable to testify. See *G.M. Mechanical, Inc.*, 326 NLRB 35, 35 fn. 1 (1998); *Valley West Welding Co.*, 265 NLRB 1597, 1597 fn. 3 (1982); *Limpco Mfg. &/or Cast Products*, 225 NLRB 987, 987 fn. 1 (1976), enfd. mem. 565 F.2d 152 (3d Cir. 1977). However, the judge's ruling was harmless error, as the affiants' statements regarding the Respondent's motive for its conduct and their subjective interpretations of it are irrelevant to determining whether the Respondent violated Sec. 8(a)(1) as alleged. See, e.g., *American Freightways Co.,* 124 NLRB 146, 147 (1959) ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.").

[4] In their briefs, the Respondent and CNLP contend that the Board lacks subject-matter jurisdiction and that Region 2 lacks personal jurisdiction and is an improper venue. These contentions were previously considered and rejected in a February 7, 2020 unpublished Order denying the Respondent's motion to dismiss the complaint. Member McFerran did not participate in the Board's consideration of the motion to dismiss, but she agrees that these contentions do not raise anything not previously considered and rejected.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) when its statutory agent and supervisor, Ben Domenech, stated in a tweet: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." We find that employees would reasonably view the message as expressing an intent to take swift action against any employee who tried to unionize the Respondent. In addition, the reference to sending that employee "back to the salt mine" reasonably implied that the response would be adverse. Accordingly, we adopt the judge's finding that the Respondent threatened employees with unspecified reprisals if they engaged in union activity. See, e.g., *Peter Vitalie Co.*, 310 NLRB 865, 873 (1993) (finding employer conveyed threat of unspecified reprisals by stating that one response to unionizing could be to "make it rough" on its employees). In adopting this finding, however, we do not rely on evidence that the Respondent's website hosts editorials about unionization or that Vox Media employees engaged in a walkout on June 6, 2019, as there is no evidence that employees who viewed the tweet were aware of either the editorials or the walkout.

We find without merit the Respondent and CNLP's contention that Domenech's Twitter statement conveys a personal view protected under Sec. 8(c). By its express terms, Sec. 8(c) excludes threats of reprisal from the protection it otherwise affords to the expression of views, arguments, or opinions. See also *Webco Industries,* 327 NLRB 172, 173 (1998) (Sec. 8(c) does not protect implicit threat to discipline employees if they engage in prounion activities) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)), enfd. 217 F.3d 1306 (10th Cir. 2000). We also reject their contention that because the statement was posted on Twitter, it does not evince an intent to communicate with the Respondent's employees. The words of the statement itself leave no doubt that it is directed at the Respondent's employees. In any event, the parties stipulated that at least one employee viewed the tweet, and the Board has found that a threat "not intended for the eyes of employees" but nonetheless seen by them violates Sec. 8(a)(1). *Crown Stationers*, 272 NLRB 164, 164 (1984). Finally, we reject CNLP's contention that our recent decision in *General Motors, LLC*, 369 NLRB No. 127 (2020), holds that the General Counsel must establish the respondent's motive in all cases involving alleged violations of Sec. 8(a)(1). Nothing in *General Motors* changed the longstanding principle that *Wright Line* applies "in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) *turning on employer motivation*." *Wright Line*, 251 NLRB 1083, 1089 (1980) (emphasis added) (subsequent history omitted). As we have explained, the Respondent's motive is not at issue here.

[5] The General Counsel contends that the judge's remedy should be amended to require the Respondent to delete Domenech's tweet. Instead, we shall order the Respondent to direct Domenech to delete the statement from his personal Twitter account, and to take appropriate steps to ensure Domenech complies with the directive. In addition, we shall modify the recommended Order to conform to the violation found (by substituting "protected union activity" for "protected activity" in para. 1(a)) and to our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall also substitute a new notice to conform to the Order as modified.

1. Cease and desist from

(a) Threatening employees with unspecified reprisals if they engage in protected union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Direct its agent and supervisor, Ben Domenech, to delete his June 6, 2019 statement—"FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine"—from the @bdomenech Twitter account, and take appropriate steps to ensure Domenech complies with its directive.

(b) Post at its Washington, D.C. facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 24, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals if you engage in protected union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL direct our agent and supervisor, Ben Domenech, to delete his June 6, 2019 statement—"FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine"—from the @bdomenech Twitter account, and WE WILL take appropriate steps to ensure Domenech complies with our directive.

The Board's decision can be found at http://www.nlrb.gov/case/02-CA-243109 or by using the QR code below. Alternatively, you can obtain a copy of

[6] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Jamie Rucker, Esq., for the General Counsel.
Aditya Dynar, Esq., Kara Rollins, Esq., and *Jared McClain, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in New York, New York on February 10, 2020. Joel Fleming, an individual filed the charge on June 7, 2019. Region 2 of the National Labor Relations Board (NLRB) issued the complaint on September 11, 2019.[1] The complaint alleges that FDRLST Media, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) when its executive officer, Ben Domenech, who serves as the publisher of the Respondent's website, The Federalist, issued a public "Tweet" on June 6, 2019 that had threatened employees with the comment, "FYI@fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine" (GC Exh. 1(c)).[2] The Respondent provided a timely answer denying the material allegations in the complaint (GC Exh. 1(e)).

On the entire record and after consideration of the posthearing briefs filed by the General Counsel and the Respondent, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the publication of websites, electronic newsletters, and satellite radio shows. The Respondent admits it is a Delaware corporation, with an office at 611 Pennsylvania Avenue, S.E. Washington, D.C. The Respondent further admits, in conducting the operations as described, Respondent receives revenues sufficient to meet the Board's discretionary jurisdictional standard for newspapers and spends more than $5000 on goods and services that are received or provided directly from points outside of Washington, D.C. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

The parties stipulated to the following verbatim findings of fact (GC Exh. 2):

> Since at least January 1, 2016, The Federalist has been a division of Respondent. Since at least January 1, 2016, Respondent has operated The Federalist as a website at the domain name "thefederalist.com." Since at least January 1, 2016, Ben Domenech ("Domenech") has held the position of executive officer of Respondent. Since at least January 1, 2016, Domenech has held the position of publisher of The Federalist. Since at least January 1, 2016, Domenech has been a supervisor of Respondent within the meaning of Section 2(11) of the National Labor Relations Act ("Act"). Since at least January 1, 2016, Domenech has been an agent of Respondent within the meaning of Section 2(13) of the Act. 13. Since before June 2019, Respondent has employed employees at The Federalist. The Federalist is a 'web magazine focused on culture, politics, and religion that publishes commentary on a wide variety of contemporary newsworthy and controversial topics.' (GC Exh. 2, paras. 5, 6, 9–13, 31.)
>
> Twitter is a microblogging and social networking service on which users post and interact with messages known as "tweets." Tweets are limited to 280 characters and may contain photos, videos, links and text. Registered users can post, like, and retweet tweets, but unregistered users can only read them. User's access Twitter through its website interface, through Short Message Service (SMS), or Twitter's mobile-device application software ("app"). Users can "follow" another user, which means that the follower subscribes to the user's tweets. If a user tweets, the message will appear on each follower's timeline. Tweets are posted to a user's profile, sent to the user's followers, and are searchable on Twitter. On Twitter, replies to tweets that are part of the same "thread" or conversation are indicated by replying to a Twitter account's username with "@," e.g., "@bdomenech." Tweets may be viewed, retweeted, republished, or reported on or in Twitter, Facebook, radio, television, newspapers, news media, and various other print and social media platforms. The Federalist website maintains a Twitter account under the user or account name "@FDRLST" (GC Exh. 2, paras. 15–24).
>
> Since at least June 5, 2019, Ben Domenech has had a Twitter account with the listed account name @bdomenech. On about June 6, 2019, Ben Domenech, through the Twitter account @bdomenech, posted the following Tweet: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine" (GC Exh. 2, paras. 25, 26).
>
> At least one employee of Respondent viewed the Tweet described in the preceding paragraph. Since at least January 1, 2019, Ben Domenech has communicated with (and continues to communicate with) Respondent employees about

[1] All dates are 2019 unless otherwise indicated.

[2] The exhibits for the General Counsel are identified as "GC Exh." and Respondent's exhibits are identified as "R. Exh." The closing briefs are identified as "GC Br." and "R. Br." for the General Counsel and the Respondent, respectively. The hearing transcript is referenced as "Tr."

[3] No witnesses were called at the hearing.

[4] The Respondent admits to corporate status, corporate location, operations, and revenue in a stipulation entered with the counsel for the General Counsel (GC Exh. 2).

Respondent's business matters using his own personal e-mail accounts) as well as an email account owned by Respondent. Ben Domenech uses his Twitter account @bdomenech to promote and discuss Respondent's published content (GC Exh. 2, paras. 27–29).

It is not disputed that Joel Fleming, the individual who filed the charge in this complaint, is not and never has been an employee of the Respondent.

The counsel for the General Counsel contends that on June 6, online media and news sites, including the Washington Post, CNN, Bloomberg News, Yahoo, and among others, carried a story of a walkout by union employees at Vox Media. Vox Media is an online digital media network that carries the stories, podcasts, and events produced by other companies, including the Federalist. The counsel for the General Counsel maintains that the walkout by unionized employees resulted in online magazines, like the Federalist, to "go dark" (GC Exhs. 3.8 and 3.9; GC Br. at 4). On the same day as the walkout, Ben Domenech (Domenech) tweeted, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." The counsel for the General Counsel argued that the tweet was a threat made by Domenech even though the tweet was made on Domenech's own personal Twitter account (@bdomenech). The tweet from his personal account had a @fdrlst salutation and it is not disputed that some employees of the Respondent read this tweet.

The counsel for the General Counsel maintains that the tweet was consistent with The Federalist's anti-union editorial position, as demonstrated by its digital articles titled "Public-Sector Unions Deserved to be Destroyed;" Baltimore's Real Police Problems: Unions;" and "Why Pay Full Pensions to Unions That Bankrupted Taxpayers [sic] Pockets and Kids' Minds?" (GC Exhs. 3, 3.1–3.7; GC Br. at 4). The counsel for the General Counsel argues that the tweet is not protected under the First Amendment (or Sec. 8(c) of the Act) because the comment is a threat of unspecified reprisal (GC Br. at 5).

The counsel for the Respondent maintains that the General Counsel failed to establish that Domenech speaks for or on behalf of the Respondent on all occasions when he posts tweets on his personal account. The Respondent denies that Domenech spoke on its behalf in the tweet (R. Br. at 4, 5). The Respondent further maintains that a reasonable FDRLST employee would not take Domenech's tweet as a threat of reprisal with loss of employment or other benefits. Indeed, counsel for the Respondent provided two affidavits prepared by employees of the Respondent denying that the tweet was a threat and perceived the tweet to be a humorous expression by Domenech (R. Exhs. 4, 5; R. Br. 5–7).[5] Finally, counsel for the Respondent denies that the Respondent is anti-union. It is maintained that the articles cited by the General Counsel were republished from other sources on the Respondent's website and that the Respondent was merely acting as a forum for different viewpoints of the authors of these articles and not the viewpoint of FDRLST (R. Br. 7–9; R. Exhs. 1, 2).[6]

III. DISCUSSION AND ANALYSIS

Section 7 of the Act provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations..." Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." See, *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009). The test for evaluating if the employer violated Section 8(a)(1) is "whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities." *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). Additionally, the test of interference, restraint, and coercion under Section 8(a)(1) does not turn on the employer's motive or on whether the coercion succeeded or failed. *American Tissue Corp.,* 336 NLRB 435, 441 (2001); *Hanes Hosiery, Inc.*, 219 NLRB 338, 338 (1975) ("we have long recognized that the test of interference, restraint and coercion . . . does not turn on Respondent's motive, courtesy, or gentleness . . . the test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act."); also, *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (2019).

As noted, in determining whether an employer's actions violate Section 8(a)(1), the employer's motivation is immaterial; what matters is whether the employer's conduct, viewed from the perspective of a reasonable person, tends to interfere with the free exercise of employee rights. E.g., *Crown Stationers*, 272 NLRB 164, 164 (1984). As with all alleged 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer…and such a determination appropriately takes account of the surrounding circumstances." *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011) (totality of the circumstances).

[5] The counsel for the General Counsel strenuously objected as hearsay the acceptance of the three affidavits proffered by the Respondent (Tr. 21–24; GC Br. at 9, 10). As with other rules of evidence, the Board applies the hearsay rules "so far as practicable." Sec. 10(b) of the Act, 29 U.S.C. § 160(b), states: "Any [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." See also NLRB Rules and Regulations, Sec. 102.39, and Statements of Procedure, Sec. 101.10(a). Like other administrative agencies, the Board does "not invoke a technical rule of exclusion but admit[s] hearsay evidence and give[s] it such weight as its inherent quality justifies." *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997). As such, I allowed the three affidavits in the record giving limited probative value to the affidavits.

[6] The Respondent had raised other arguments in its motion to dismiss the complaint filed with the Board on January 13, 2020. The Respondent's motion to the Board maintained that the NLRB lacks subject matter jurisdiction because Fleming was not aggrieved; lacks personal jurisdiction because the Respondent was not amenable to service under New York State laws; and that Region 2 is an improper venue for the issuance of the complaint because the Respondent's principle place of business is located in Washington, D.C. The entire motion was dismissed in an order issued by the Board on February 7, 2020 (of record). The Respondent again asserted the lack of jurisdiction of the NLRB in its posthearing brief (R. Br. at 11, 12). For the same reasons as in the Board's Order, this argument has little merit.

Here, the alleged threat tweeted by Domenech was, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." This expression is an idiom. An idiom is an expression, word, or phrase that has a figurative meaning conventionally understood by native speakers. This meaning is different from the literal meaning of the idiom's individual elements. In other words, idioms don't mean exactly what the words say. Obviously, the FDRLST employees are not literally being sent back to the salt mines. Idioms have, however, hidden meanings. The meaning of these expressions is different from the literal meaning or definition of the words of which they are made. The literal definition of *salt mine* explains the origin of the figurative meaning. Work in a salt mine is physically challenging and monotonous, and any job that feels that tedious can be called a salt mine. The term is sometimes used in a lighthearted or joking way: "It was a great weekend, but tomorrow it's back to the *salt mine*." See, Farlex Dictionary of Idioms. © 2015 Farlex, Inc, all rights reserved. Nevertheless, the expression "salt mine" is most often used to refer to tedious and laborious work.

Domenech provided an affidavit in this proceeding. Domenech stated that he is the publisher of the Respondent. He further stated that the tweet was from his personal account and was set for public viewing. He maintained that the tweet was a satire and an expression of his personal viewpoint on a contemporary topic of general interest (R. Exh. 3). It is significant to note that although the tweet was from Domenech's personal account, the tweet itself was prefaced with the Respondent's name and it was "FYI" or 'For Your Information', which, in my opinion, was clearly directed to the employees of FDRLST and not to the general public. This is a reasonable conclusion to draw since the statement "if you unionize, you will be sent to the salt mines" was meant for the FDRLST employees and not the public. The expression that he will send the FDRLST employees back to the salt mine for attempting to unionize is an obvious threat. In viewing the totality of the circumstances surrounding the tweet, this tweet had no other purpose except to threaten the FDRLST employees with unspecified reprisal, as the underlying meaning of "salt mine" so signifies.

The Respondent proffered two additional affidavits from FDRLST employees, both stating that the tweet was funny and sarcastic and neither one felt that the expression was a threat of reprisal (R. Exh. 3).[7] However, a threat is assessed in the context in which it is made and whether it tends to coerce a reasonable employee. *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000). The standard for assessing alleged 8(a)(1) threats is objective, not subjective. *Multi-Add Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Any subjective interpretation from an employee is not of any value to this analysis. *Miami Systems Corp*., 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997); *Roemer Industries*, 367 NLRB No. 133 (2019). Moreover, threats allegedly made in a joking manner also violate the Act. *Southwire Co.,* 282 NLRB 916, 918 (1987), citing *Champion Road Machinery*, 264 NLRB 927, 932 (1982) (Applying an objective standard, the Board found a supervisor's statement violated Sec. 8(a)(1) of the Act, although the threatened employee testified he felt certain the comment was a joke).[8]

I agree with the counsel for the General Counsel that a reasonable interpretation of the expression meant that working conditions would worsen or employee benefits would be jeopardized if employees attempted to unionize. The timing of the tweet contemporaneous to the internet blackout at Vox Media is significant. Domenech clearly expressed his displeasure with the Vox walkout and made that known to his employees through his tweet. As such, the tweet is reasonably considered as a threat because it tends to interfere with the free exercise of employee rights. It is irrelevant that the threat by Domenech, as the publisher of FDRLST, was his personal opinion or that it was made from his personal Twitter account. His tweet was directed to the FDRLST employees and originated from the Respondent's publisher and executive officer. A statement by a supervisor or agent of an employer threatening a plant closure violates the Act, even if the speaker attempts to couch the statement as his personal opinion. *Twistex, Inc.,* 283 NLRB 660, 663 (1987). A threat stated as a matter of personal opinion is still coercive. *Mid-South Drywall Co., Inc.,* 339 NLRB 480, 481 (2003), citing *Clinton Electronics Corp*., 332 NLRB 479 (2000) (finding a threat of job loss threat couched as personal opinion violated Sec. 8(a)(1)). Statements are viewed objectively and in context from the standpoint of employees over whom the employer has a measure of economic power. See, e.g., *Mesker Door, Inc.,* 357 NLRB 591, 595 (2011). When an employer tells employees that they will jeopardize their jobs, wages, or other working conditions by supporting a union or engaging in concerted activities, such communication tends to restrain and coerce employees if they continue to support a union or engage in other concerted activities in violation of Section 8(a)(1). *Noah's Bay Area Bagels, LLC,*331 NLRB 188 (2000); *Bloomfield Health Care Cent*er, 352 NLRB 252 (2008); *Green Apple Supermarket of Jamaica, Inc*., 366 NLRB No. 124 (2018).[9]

I find that the threat alleged by the General Counsel in the complaint would reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act.

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[7] Emily Jashinsky, cultural editor at the Federalist (a division of FDRLST) stated in her affidavit that she read the tweet on June 6 and found it "funny and sarcastic" and did not believe the tweet was made as a threat. Madeline Osburn, also a FDRLST employee, stated that the tweet was satirical and a funny way of expressing (Domenech's) personal views.

[8] I would give little weight to the two employee affidavits as corroborating documents to support Domenech's assertion that his tweet was satirical. It is unknown why these two employees were chosen to provide the affidavits, it is not clear whether there were absent any implied threats if they did not provide such statements, and no assurances were given by the Respondent that there would be no reprisals for refusing to provide a statement or regardless of what they may state in the affidavits. *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964).

[9] The Respondent also argued that NLRB was infringing on the First Amendment right of free expression by Domenech or the Respondent. However, these rights do not extend to threats made by employers to workers. Statements made by an employer to employees may convey general and specific views about unions or unionism or other protected activity as long as the communication does not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969).

CONCLUSIONS OF LAW

1. The Respondent FDRLST Media, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on June 6, 2019 when Ben Domenech, the publisher and executive officer of FDRLST Media, LLC, threatened FDRLST employees by stating: "the first one of you tries to unionize I swear I'll send you back to the salt mine."

3. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, FDRLST, Media, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisal because they engaged in protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days after service by the Region, post at its facility in Washington, D.C. copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2019.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 22, 2020

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisal or otherwise discriminate against you because you engage in protected activities or to discourage you from engaging in these or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reaffirm that you have the right to exercise your Section 7 rights guaranteed by the Act.

FDRLST MEDIA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-243109 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purpose.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."