

# Recent Developments Under the National Labor Relations Act

Rod Tanner  
Robert Sheeder

30th Annual Labor and Employment Law Conference | June 1, 2023 | Austin, Texas

1

## The Current Board



2

## Threatening Tweet Violated the NLRA

The Fifth Circuit upheld the NLRB's finding that a tweet by Tesla CEO Elon Musk in May 2018 constituted an implied threat to rescind employee stock options as retaliation for unionization at the company's Fremont, California plant.

- The court held that the tweet was not protected under Section 8(c) as an expression of opinion or argument, and subsequent statements made by Musk did not change the coercive nature of the original tweet.
- This action violated Section 8(a)(1) of the Act, so the court enforced the Board's order requiring Musk to delete the tweet.

*Tesla, Inc. v. NLRB*, 2023 WL 2728224 (5<sup>th</sup> Cir. Mar. 31, 2023)

3

3

## Coercive Conduct of Union

Union violated Section 8(b)(1) by threatening employees for protected comments.

- During a meeting between employer and employees, an employee expressed his dissatisfaction that the most senior employees benefitted from the job assignment process, stating that they did not work diligently. A union official responded that it was nobody's business who did not work, and that negative consequences would result for "snitching" on a co-worker.
- The Board found that the "snitches" remark would reasonably be understood to threaten employees with bodily harm or other unspecified reprisals for engaging in protected concerted activity.

*International Brotherhood of Teamsters, Local 70 (United Parcel Service)*,  
372 NLRB No. 18 (December 6, 2022)

4

## General Counsel Memorandum 23-02 Impact of Technology on Employees' Rights

General Counsel Abruzzo announced her intent to urge the Board to protect employees from electronic monitoring, AI, and automated management programs that might interfere with employee rights.

“I will urge the Board to find that an employer has presumptively violated Section 8(a)(1) where the employer’s surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.”

5

### *Boeing Co., 365 NLRB No. 154 (2017)*

In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things:

- (1) the nature and extent of the potential impact on NLRA rights, and
- (2) legitimate business justifications associated with the requirements.



Generally Lawful



It Depends

*(case-by-case assessment needed)*



Generally Unlawful

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: NLRB Update

Also available as part of the eCourse

[2023 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the  
30<sup>th</sup> Annual Labor and Employment Law Conference session  
"NLRB Update"