

## **UPDATE: Fifth Circuit Affirms NLRB Ruling In Tesla Case, Ordering Elon Musk to Delete Union-Related Tweet**

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On March 31, 2023, the United States Court of Appeals for the [Fifth Circuit](#) affirmed a National Labor Relations Board (“NLRB”) decision issued in 2021 (previously discussed [here](#)), which held that Tesla Inc. violated the National Labor Relations Act (“NLRA”) by (1) prohibiting employees from contacting the media in accordance with an overbroad confidentiality policy, and (2) its CEO, Elon Musk, tweeting the following to his 22 million followers in 2018, which the Fifth Circuit agreed was unlawfully coercive:

“Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues and give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare.”

As we previously discussed, the NLRB delivered a three-part holding in its 2021 decision:

1. Tesla violated the NLRA after prohibiting employees from talking to the media;
2. Tesla did not violate the Act by calling employees into a meeting to discuss their potential unionization; and
3. Musk must delete his tweet about the employees’ attempt to unionize because it was unlawfully coercive in violation of the Act.

In response, Tesla challenged the first and third holdings, while the Union challenged the second.

The Fifth Circuit, in a per curiam opinion, found that the NLRB’s findings were supported by “substantial evidence”—the appellate standard for such agency decisions— and granted the NLRB’s cross-application to enforce its Order.

The Fifth’s Circuit’s Opinion reinforces the risks that employers and supervisors take when they communicate publicly about unionization efforts, particularly on social media. Musk’s tweet that

Tesla employees “would give up stock options for nothing” if they vote to join the union rose to the level of an unlawful threat according to the NLRB and Fifth Circuit; it did not constitute a mere communication about a potential consequence of good-faith bargaining, which would have been within the bounds of the NLRA. The Fifth Circuit, like the NLRB, rejected Tesla’s argument that Musk’s subsequent social media posts provided more context that illustrated the tweet was not a threat; since the subsequent tweets were not “contemporaneous” with the threatening tweet, the purported “context” did not provide a sufficient safe harbor for Tesla and Musk.

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