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## Labor Board Rounds Out 2019 With A Few More Obama-Era Reversals

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The NLRB capped off an end-of-year flurry of high profile activity – including a [revamp of election rules](#), an [expiration for dues check off provisions](#), and a [reversal on investigation confidentiality](#) – with a couple of additional decisions that left employers smiling heading into the holidays.

First, the board overturned the controversial [2014 Purple Communications decision](#) which granted employees the presumptive right to use their employer's email system for union organizing purposes, so long as their employer granted them use of the email system for work-related purposes.

On Dec. 16, 2019, the board reversed that decision in [Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino](#) and returned to its longstanding policy that respects the right of employers to control their own systems. That right is, of course, still subject to a prohibition on discrimination against union-related communications. In a press release issued the day the decision was handed down, the NLRB stated:

“Overruling *Purple Communications*, the Board today holds that employees do not have a statutory right to use employers' email and other information-technology (IT) resources to engage in non-work-related communications. Rather, employers have the right to control the use of their equipment, including their email and other IT systems, and they may lawfully exercise that right to restrict the uses to which those systems are put, provided that in

doing so, they do not discriminate against union or other protected concerted communications. To this extent, the Board effectively reinstated the holding of *Register Guard*, 351 NLRB 1110 (2007). Recognizing that employees must have adequate avenues to engage in communications protected by Section 7 of the NLRA, the Board's decision creates an exception for circumstances where the use of employer-provided email is the only reasonable means for employees to communicate with one another on non-working time during the workday."

Additionally, the board returned to its decades-old standard for when it would defer to arbitration proceedings, overturning the [2014 \*Babcock & Wilcox Construction Co.\* decision](#). The board's post-arbitration deferral policy is most frequently invoked to determine when the board should defer to an arbitrator's prior resolution of a grievance regarding an employee's discipline or discharge that has been alleged to violate the NLRA.

In *Babcock & Wilcox*, the board adopted a much more restrictive policy of deferring to an arbitrator's prior decision. However, in its Dec. 23 decision on [United Parcel Service](#), the board overruled that decision, returning to its prior longstanding standard. In a press release from the day of the decision, the board stated:

"Under the restored standard, the Board will defer to the arbitrator's decision where (1) the arbitral proceedings appear to have been fair and regular, (2) all parties have agreed to be bound, (3) the arbitrator considered the unfair labor practice issue, and (4) the arbitrator's decision is not clearly repugnant to the Act.

Today's decision overrules *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127 (2014), and represents a return to the post-arbitral deferral standards set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). In addition, the decision restores policies for pre-arbitral deferral established in *United Technologies Corp.*, 268 NLRB 557 (1984), and for deferral to pre-arbitral settlement agreements set forth in *Alpha Beta Co.*, 273 NLRB 1546 (1985).

Under the restored traditional standard, the Board will continue to safeguard the exercise of Section 7 rights—particularly by ensuring that arbitral awards are not clearly repugnant to the Act—while better promoting the strong federal policy in favor of arbitration as the parties' agreed-upon mechanism for resolving employment disputes."

With these two decisions, the current NLRB continues to restore its longstanding policies after sweeping and oft-criticized changes made while the board was comprised of a majority of members appointed by the previous presidential administration. Stay tuned, as 2020 is likely to bring its share of notable developments at the board as well.