

Happy Holidays From The NLRB!

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With member Hayes' term on the NLRB expiring on Dec. 16, 2012, the Board noted the occasion with a virtual blitzkrieg of pro-Union decisions all of which were announced in time for Christmas and the holidays. Even the Board's website, www.nlr.gov, acknowledged the decisions as "significant." Most of them were decided during Hayes' last week on the Board but release was delayed for editing and formatting which is not uncommon.

Here's a quick run through on the decisions:

Facebook firings. The Board overturned the firing of five employees in *Hispanics United of Buffalo*. In a 3-1 decision, the Board found the online chatter to be protected concerted activity. Member Hayes found it to be employee "venting" and he dissented from the protected concerted activity finding.

Beck Rights. The Board also chipped away at the rights of Beck objectors to refuse to pay for Union political activity. Though the Board set the case back down for further analysis, it did note in its opinion in *United Nurses & Allied Professionals (Kent Hospital)* that it was inclined to adopt an approach using a rebuttable presumption that lobbying expenses are in fact germane (and thus chargeable to a Beck objector). The National Right to Work Foundation has already charged that the Board is attempting to “gut” the Beck decision.

Bargain over Discretionary Discipline. In *Alan Ritchey, Inc.*, the Board created a prospective rule that where there is no collectively bargained grievance-arbitration system, employers are required to bargain with the Union before it applied discretionary discipline against any of the employees.

Losing Employers Must Pay Taxes as Part of a Make Whole Remedy. In most cases where backpay is awarded as a remedy, losing employers not only have to pay the backpay (and the interest remedy that this Board previously created), employers must also gross up the backpay award to cover the extra taxes the employees had to pay due to the lump sum payment. A copy of the decision in *Latino Express* is available [here](#).

Jurisdiction over Charter Schools . In *Chicago Mathematics & Science Academy*, the Board actually disagreed with the petitioning teachers union and concluded that it and not the Illinois Educational Labor Relations Board had jurisdiction over a teachers union in a charter school.

Post-Expiration Collection of Dues. And as we have recently reported [here](#), the Board also determined in *WKYC-TV*, that employers will continue to be required to deduct and pay union dues even after the expiration of a collective bargaining agreement.

In a decision issued at the start of this flurry of activity ([Dish Network](#)), member Hayes showed his exasperation with the current state of the Board. *Dish Network* deals with the Board’s right to exercise discretion and reconsider precedent and while Hayes acknowledged in that decision that the NLRA does not prevent that, Hayes’ parting shot was that “more is afoot here.” He criticized the Board for demonstrating a willingness to reconsider precedent not urged by the parties to the appeal. Hayes noted that the majority was “paving the way for the Board in any case, regardless of the scope of exceptions filed or issues litigated, to address and overrule precedent...To the extent that nay member of the public has any faith left that this Board holds even a semblance of allegiance to concepts of stare decisis and due process, that faith should evaporate with this opinion.”