THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-4440-ag

UNITE HERE

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on a petition filed by UNITE HERE ("the Union") to review and set aside a Decision and Order issued by the National Labor Relations Board ("the Board") dismissing one portion of an unfair labor practice complaint filed by the Board's General Counsel against North American Pipe

Corporation ("the Company"). The Board's Decision and Order issued on July 31, 2006, and is reported at 347 NLRB No. 78. (A 120-39.)[1] The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Union's petition for review was timely filed on September 25, 2006, as the Act places no time limit on such filings. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), as the Union transacts business within this Circuit.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably determined that a corporatewide award of stock was a gift, which removed it as a mandatory subject of bargaining, and therefore dismissed the portion of a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act by failing to give the Union advance notice and an opportunity to bargain regarding it.

---

[1] "A" references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Upon charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Company, among other things, had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by admittedly awarding approximately 56 bargaining-unit employees in Van Buren, Arkansas, 100 shares of corporate stock without affording the Union prior notice and an opportunity for bargaining. Based upon evidence adduced at a hearing, the Board (Chairman Battista and Member Schaumber, Member Walsh dissenting) affirmed its administrative law judge's dismissal of this portion of the complaint on the grounds that the stock award was in the nature of a gift, rather than compensation for services, and therefore was not a mandatory subject of bargaining.[2] The pertinent facts follow.

[2] The Board found it unnecessary to decide (A 120 n.3) whether there was a second ground for dismissal—whether a provision in the parties' collective-bargaining agreement authorized the Company to give the stock without additional bargaining.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Parent, as Part of an Initial Public Offering, Decides To Confer 100 Shares of Stock on All Full-Time Company Employees; the Union Represents 56 of the Approximately 1566 Employees Who Receive the Stock

The Company is a subsidiary of Westlake Chemical Corporation ("Westlake"), which, until August 14, 2004, was wholly owned by Albert Chao and various relatives through a series of family trusts. Westlake operates 13 manufacturing facilities in the United States, employing approximately 1566 individuals, ranging from executives to hourly workers. (A 120; 16-26, 40, 68, 109.) At the time pertinent to this case, the Union represented approximately 56 production and maintenance employees at a manufacturing facility operated by the Company in Van Buren, Arkansas. The Union began representing those employees in 2002, when it merged with a smaller union that had represented the unit for approximately 4 years. (A 120; 90-91.)

On May 24, 2004, Westlake filed a registration statement with the Securities and Exchange Commission concerning a planned initial public offering of stock ("IPO"). On August 10, Westlake issued a prospectus for that offering. The registration statement revealed that the Company planned to make unspecified awards of stock to unspecified employees, and that, "at the discretion of the

administrator, [such] . . . awards may be made in the form of a performance award" —that is, "an award that is subject to the attainment of one or more future performance goals." (A 120; 7, 10, 17.) Westlake initiated the IPO on August 14. (A 120.)

On that same date, Westlake Vice President of Administration David Hanson convened a meeting of all Westlake human resource managers, and informed them that Westlake was making a corporatewide award of 100 shares of common stock to all full-time Westlake employees, from corporate managers on down. Hanson distributed copies of a memorandum from CEO Chao concerning the award. (A 120; 117.) The memorandum was addressed to "[a]ll regular, full time employees" with at least 6 months employment with Westlake. In pertinent part, the memorandum read:

> In recognition of this important historic company event and the significant contribution made by each of you toward the growth and success of the company, the Board of Directors has authorized an award of *100 shares* of common stock to each full-time, regular employee with at least six months of service as of today. These shares will be awarded to you initially in the form of stock units, and shares will be distributed to you at the conclusion of six months, provided you remain a regular, full time employee during that period.
>
> Please accept our appreciation of your efforts. We are confident that as we work together we can continue to build a strong and successful Westlake Chemical Corporation for all of our shareholders, including each of you.

(Emphasis in original) (A 120; 32). The memorandum was posted at the Van Buren facility on August 16. (A 120; 32, 93-94.)

On August 18, the Company distributed a follow-up letter to each unit employee setting forth the terms and conditions of the award. Identical letters were sent or delivered to every Westlake employee covered by the award, all 1566 of them. The letter reiterated that the restricted stock units would vest, and shares of common stock would be issued, 6 months after the grant date, provided that the recipient's employment with Westlake or a related entity did not terminate within the 6-month period, in which case the stock units would be forfeited. The letter also specified that provisions were being made for any tax withholding obligations applicable to the award—that Westlake would "withhold an appropriate number of shares of Common Stock . . . to satisfy the minimum federal, state, and local tax withholding obligation" or, in the alternative, the "tax withholding [could] be satisfied by a cash payment to the Company, by withholding an appropriate amount of cash from base pay." (A 121 n.5; 33-34, 40, 68.)

B. Westlake Distributes the Stock Units, Without Giving the Union Advance Notice of the Planned Award or an Opportunity To Bargain Concerning It

As announced, Westlake proceeded to distribute stock units to 1566 Westlake employees, including 70 employed at the Van Buren facility, 56 of whom were represented by the Union. No one from Westlake or the Company

provided the Union with advance notice of the stock award, or an opportunity to bargain concerning it. At the time the stock units were conferred, Westlake's stock was selling at $14.50 per share, making each employee's award worth $1450. (A 121; 109-10, 117.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based upon the foregoing, the Board found, in agreement with the administrative law judge, that the Company did not violate Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to give the Union advance notice and an opportunity to bargain regarding the award of stock to bargaining-unit employees. The Board found that the award was inextricably tied to Westlake's IPO and bore an insufficient connection to wages or benefits or any other form of compensation to bring it within the realm of mandatory bargaining under the Act. The Board accordingly dismissed this aspect of the General Counsel's unfair labor practice complaint. (A 120-27.)[3]

---

[3] In the absence of exceptions from the Company, the Board adopted the judge's findings that the Company violated Section 8(a)(1) of the Act by (1) maintaining, giving effect to, and enforcing an overly broad no-solicitation rule, (2) selectively and disparately enforcing a facially valid employee rule, and (3) prohibiting employees from distributing union literature to other employees on the Company's parking lot. (A 120 n.2.) The Board is not seeking enforcement of its Order because the Company is voluntarily complying with it.

SUMMARY OF ARGUMENT

The Board's finding that Westlake's corporatewide award of stock was in the nature of a gift that did not require bargaining constitutes a reasonable exercise of the Board's expertise based upon fully supported findings of fact. The Board emphasized that the award was a one-time event tied to Westlake's IPO. Indeed, employees had no expectation, reasonable or otherwise, that the award would be given, or that it was due to anything but the generosity of Westlake's owners on the occasion of what clearly was a seminal event for them. The Board also emphasized that the award bore no connection to employment-related criteria that could warrant the conclusion that it was a part of employee compensation. Rather, every employee who had a baseline connection to Westlake received the exact same amount of stock under the exact same conditions, regardless of seniority, standing in the corporate hierarchy, contributions to profitability, or rate of pay. As such, the Board reasonably concluded that the award bore all the earmarks of an act of largesse about which bargaining was not required.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT A CORPORATEWIDE AWARD OF STOCK WAS A GIFT, WHICH REMOVED IT AS A MANDATORY SUBJECT OF BARGAINING, AND THEREFORE DISMISSED THE PORTION OF A COMPLAINT ALLEGING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO GIVE THE UNION ADVANCE NOTICE AND AN OPPORTUNITY TO BARGAIN REGARDING IT

A. Applicable Principles and Standard of Review

Section 8(d) of the Act (29 U.S.C. § 158(d)), which defines the duty to bargain imposed by Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), makes bargaining mandatory with respect to "wages, hours, and other terms and conditions of employment." The mandatory duty to bargain is limited to those subjects; as to all other matters, each party is free to bargain or not. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Among those other matters not requiring bargaining are gifts given to employees by their employers:

> The rule is that gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make such payments as he pleases, but if the gifts or bonuses are so tied to the remuneration which employees received from their work that they were in fact a part of it, they are in reality wages and within the statute.

NLRB v. Wonder State Mfg. Co., 344 F.2d 210, 213 (8th Cir. 1965). *Accord Benchmark Industries*, 270 NLRB 22, 22 (1984), *affirmed sub nom., Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985).

Determining whether payments or other emoluments provided by an employer are gifts or remuneration depends on the extent to which they are tied to "various employment-related factors" such as wage rates, production, performance, seniority or hours worked. *See Benchmark Industries*, 270 NLRB at 22 n.5 (adopting the Eighth Circuit's analysis in *Wonder State*). This analysis will produce a finding that an award or emolument is a gift where there are no meaningful ties to employment-related factors, even when the award or emolument is of considerable value. *See Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493, 1496 (10th Cir. 1994) (appreciation bonuses of $1000 were gifts not requiring bargaining), and cases cited; *Wonder State*, 344 F.2d 213 (bonuses of one week's pay were gifts not requiring bargaining).

In one circumstance, however, even when awards or emoluments are not tied to the various employment-related factors set forth above, the Board will regard them as part of remuneration requiring bargaining "'if they are of such a fixed nature and have been paid over a sufficient length of time to have become a reasonable expectation of the employees and, therefore, part of their anticipated remuneration.'" *Phelps Dodge Mining*, 22 F.3d at 1496 (quoting *NLRB v. Nello*

Pistoresi & Son, Inc., 500 F.2d 399, 400 (9th Cir. 1974)). On the other hand, the absence of comparable awards in the past can supply the "most telling factor" against a finding that bargaining is required, especially where, as here, the award is not tied to employment-related factors. *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 977 (D.C. Cir. 1998).

The issue presented is one of fact, but the ultimate assessment of whether an award qualifies as a gift, or as remuneration for services, implicates the Board's expert judgment. Where, as here, the Board is called upon to give breadth and meaning to an ambiguous statutory term, its assessment regarding the import of all the facts is entitled to deference if that assessment is "'a reasonably defensible' interpretation" of the Act. *Ollivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 185 (2d Cir. 1990) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-97 (1979)). The Board's findings regarding the underlying operative facts are subjected to review for substantial evidence—the Court "must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 361 (1998). We show below that, tested by these principles, the Board's dismissal of this portion of the General Counsel's complaint is entitled to affirmance by the Court.

B. The Board Reasonably Concluded that Westlake's Corporatewide Award of Stock in Connection With Its IPO Did Not Constitute Remuneration for Services and Therefore Did Not Require the Company To Give the Union Notice and an Opportunity To Bargain

The Board's finding (A 122) that the stock award was not compensation, but instead qualified as a gift, was solidly rooted in the fact that "it was not tied to employee remuneration." As the Board emphasized (*id.*), the amount of the award that each employee got—100 stock units convertible to 100 shares of common stock—bore no connection to "any employment-related factors, including work performance, wages, hours worked, seniority or productivity," and its dollar value "was determined solely by market demand for equity shares in Westlake." Indeed, any notion that the award was in the nature of compensation for past or future services was belied, in the Board's considered judgment, by the reality that "all eligible employees . . . received the same amount of stock [under the very same restrictions] whether they were the highest paid managers or the lowest-paid hourly employees." (A 122.)

Not only was the award devoid of any meaningful connection to employment-related criteria, but it was a "one-time event" (A 122) of precisely the sort that might be considered an act of corporate largesse. Westlake's IPO was a seminal event for its owners. The corporatewide award of stock tied to such an event portended "no promise or prospect of repetition" (A 122) and clearly was not

expected, reasonably or otherwise, by the Union or any employees as a regular feature of compensation. Rather, the very nature of the IPO itself, and the one-size-fits-all nature of the award, provided "telling" proof that the award fell outside the realm of mandatory bargaining, as a one-time gift. *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 977 (D.C. Cir. 1998).

The Union protests (Br 4, 18-20) that Westlake itself declared that it was rewarding employees for their past and future contributions, thereby hoping to engender employee loyalty and productivity. However, as the Board emphasized (A 123), "the award was not dependent on the quality or quantity of work performed during . . . any period" and Westlake's "'recognition of the . . . significant contribution made by each [employee]' . . . d[id] not relate the award to any discrete and specific work performed by the [Company's] bargaining unit employees." Indeed, Westlake's IPO was the culmination of the efforts of many Westlake employees and managers over a span of many years; Westlake's declaration acknowledging that fact is hardly inconsistent with the Board's finding that the stock award had "far too tenuous" a tie to employees' performance to support the conclusion that 100 shares of stock were being conferred "*because of* their performance" over just a one-year period. (A 123 (emphasis in original).)

For similar reasons, the Board found unpersuasive the Union's related contention that the award was based upon past and future performance simply

because Westlake chose to limit the award to only those employees who had certain ties to Westlake—full-time employment for the previous 6 months and continued full-time employment for another 6 months. The Board reasonably refused to equate Westlake's effort to set these minimal parameters for receipt of the award with predicating the award on the quality, quantity, or longevity of work.

There is nothing to suggest that Westlake had ever before resorted to awards of this sort as an incentive for rank-and-file performance, and there was no reason to conclude that it was doing so in this instance. To the contrary, employee eligibility was based upon little more than a fortuity (the presence on the payroll dating back at least 6 months before the IPO). The Union has yet to explain in any practical way what Westlake possibly could have had to gain by making such an award of stock as an incentive for employees to do nothing more than remain employed for another 6 months. In this context, the Board reasonably concluded that there was nothing in Westlake's announcement or the conditions placed upon eligibility that could convert this corporate largesse into something that it was not.

Equally infirm is the Union's claim (Br 4, 17-18) that Westlake's making provision for the award's being regarded as a taxable event by federal, state and local authorities, compels a finding that the stock was not a gift for collective-bargaining purposes. As the Board explained (A 124 n.12), it is "counter-

intuitive[] to conclude that the IRS, in deciding whether to tax, would be bound by the same considerations that bear on the issue of whether the matter is bargainable under the Act." Thus, while Westlake understandably took precautions so that recipients would not incur a subsequent tax bill that they were unprepared to meet, the Board found that the question before it could not be decided on the anticipated tax consequences of the stock award. Rather, the Board reasonably concluded that any weight accorded this factor was more than eclipsed by the compelling case that the stock award was a gift based upon traditional labor-law criteria.

The Union's repeated insistence (Br 25-45) that the Board analyzed the issue in this case improperly stems only from a paradigm of the Union's own creation and which the Board was under no obligation to adopt. Contrary to the Union, neither the Board nor any court has ever adopted a paradigm recognizing that there is any such thing as a "presumptive gift," or has ever held that only gifts of token value given on occasions of customary giving (holidays such as Christmas) are exempt from bargaining. As the Board itself emphasized (A 123), *Wonder State Manufacturing*, the seminal case in the area, which found no bargaining obligation, involved a substantial gift of one week's salary, and many other cases involving substantial awards have turned on precisely the same type of analysis. *See*, *for example*, *Phelps Dodge Mining Co. v. NLRB*, 22 F3d 1493, 1498 (10th Cir. 1994), and cases cited.

The Union's one-size-fits-all approach to such matters fails to account for the nuanced differences that different circumstances present. Thus, in some circumstances, a large bonus will clearly be seen to be a form of remuneration. In other circumstances, such as those present here, it was reasonable for the Board to view the bonus as an act of corporate largesse falling outside the realm of mandatory bargaining. Indeed, the Board here repeatedly emphasized (A 122-24) that its finding of a gift was in no small way grounded on the tie between the stock award and the IPO that occasioned it. The IPO was a milestone event in Westlake's history and portended tremendous rewards for Westlake and the Chao family. That this would be the occasion of an act of corporate largesse to employees is every bit as compelling as the holiday gift-giving scenario that the Union would have this Court impose on the Board.

Contrary to the Union (Br 7-8), the Board's decision in *Waste Management de Puerto Rico*, 348 NLRB No. 26, 2006 WL 2826430 at *2 n.2 (September 29, 2006), *review pending*, *E.C. Waste, Inc. v NLRB*, No. 06-2522 (1st Cir. pet. brief due Jan. 16, 2007) neither undercut the Board's decision here, nor distanced itself from any part of it. Rather, in *Waste Management*, the Board did no more than explain why its prior holding in the instant case was inapplicable to the different issue posed in *Waste Management*, where the bonus discontinued by the employer had been "given to employees annually for a number of years" and had been

"explicitly characterized . . . as part of employees 'salaries and benefits.'" Thus, far from undercutting the Board's reliance here "on employment related factors," as the Union maintains (Br 7), the Board in *Waste Management* expressly reaffirmed its decision here but found the bonus there to stand on a decidedly different footing because the employees there had a reasonable expectation that they would "receive the bonus as a part of their remuneration for work, making the statutory bargaining obligation applicable."[4] *Id*. at *2 n.2.

For the same reasons, the other cases relied upon by the Union, that involve a unilateral departure from an established practice of periodic bonus payments, are not apposite here. All turn on a finding that the established practice gave rise to a reasonable expectation among employees that they would receive such payments as part of their normal compensation. *See*, *for example*, *Phelps Dodge Mining*

---

[4] Contrary to the Union (Br 33), the Board in *Waste Management* did not adopt the administrative law judge's reliance on the size of the bonus as a ground for finding that the bonus was not a gift. Rather, as noted, the Board made clear that its holding in *Waste Management* was perfectly consistent with its holding in the instant case that the size of a bonus or award cannot determine whether it qualifies as remuneration requiring bargaining or not. In any event, the reasonably unique circumstances surrounding the stock award in this case make a corporatewide gift of stock completely understandable, while a comparably valued cash award in a different context might have different implications. Therefore, as noted earlier, the one-size-fits-all approach propounded by the Union not only badly misreads the case law, but also misses the fact that these cases require some degree of nuanced decision-making, which the Board should be given room to do unless its reasoning is arbitrary or irrational.

Co., 308 NLRB 985, 991-992 (1992) (Board found that regular bonuses based upon various performance-related factors gave rise to a "reasonable expectation" of receipt even though the factors changed from year to year), *enforcement denied*, 22 F.3d 1493, 1498 (10th Cir. 1994) (court found that the bonuses were irregular, belying that the employees had a reasonable expectation that they would receive a bonus; the employer therefore appropriately regarded them as "gifts" about which bargaining was not required); *NLRB v. Niles-Bement-Pond Co.*, 199 F.2d 713, 714 (2d Cir. 1952) ("so-called gifts . . . made over a substantial period of time and in amount . . . based on the respective wages earned by recipients . . . [constitute] remuneration . . . within the scope of statutory bargaining"); *United Shoe Machinery*, 97 NLRB 1309, 1321-22, 1326 (1951) (longstanding practice of giving 10 shares of stock to each employee after 20 years of service constitutes a form of remuneration and is a subject for mandatory bargaining).[5]

[5] The remaining cases cited by the Union stand for the similarly unexceptional proposition that a "'Christmas bonus . . . becomes an element of wages and, therefore, a term or condition of employment that cannot be altered unilaterally' if it is 'tied to other remuneration and paid regularly over an extended period.'" *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 976-77 (D.C. Cir. 1998) (quoting *IBEW Local 1466 v. NLRB*, 795 F.2d 150, 153 (D.C. Cir. 1986) (union waived its right to bargain about Christmas bonus that otherwise would have required bargaining because of an established past practice)); *Sykel Enterprises, Inc*., 324 NLRB 1123, 1125 (1997) (regular receipt of Christmas bonuses, like other periodic bonuses, become part of compensation and may not be discontinued unilaterally).

The Union's effort to select quotes from these cases to try to cobble together a new paradigm for assessing whether a bonus or award constitutes a gift or is otherwise exempt from mandatory bargaining must fail. At bottom, all these cases depend on precisely the same mode of analysis employed by the Board here, and their holdings are perfectly consistent with the result the Board reached. Accordingly, the Board's finding on this unique set of facts—that the stock award, tied as it was to Westlake's IPO and devoid of any connection to employment-related factors, fell outside the realm of mandatory bargaining—is entitled to deference and acceptance by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the Union's petition for review.[6]

RICHARD A. COHEN
Senior Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2995

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
AILEEN A. ARMSTRONG
Deputy Associate General Counsel
ROBERT J. ENGLEHART
Supervisory Attorney
National Labor Relations Board

January 2007

h://unite(northAmerPipe)-brief-rerc.doc

---

[6] If the Court were to reverse the Board's analysis and grant the Union's petition for review, then the Court should remand the case for the Board to determine whether there was a provision in the Union's contract that nonetheless waived the Union's right to bargain over the stock award. See note 2, above, and A 120 n.3, 134-35. If, on remand, the Board were to find that the Union had not waived its right to bargain over the stock award, the issue whether the unlawful refusal to bargain likely swayed employees to support the decertification effort (see Br 20-21 & n.5) can be pressed in the separate representation proceeding (26-RD-1107), a proceeding over which this Court has no jurisdiction. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).