

06-4440-ag
Unite Here v. NLRB

1
2 UNITED STATES COURT OF APPEALS

3
4 FOR THE SECOND CIRCUIT

5
6 August Term 2007

7
8 (Argued: April 7, 2008 Decided: October 14, 2008)

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10 Docket No. 06-4440-ag

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14 UNITE HERE,

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16 Petitioner,

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18 -- v. --

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20 NATIONAL LABOR RELATIONS BOARD,

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23 Respondent.

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27 B e f o r e : WALKER, CABRANES, and RAGGI, Circuit Judges.

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30 Petitioner Union appeals from a decision of the National
31 Labor Relations Board that found that a one-time stock award
32 given in an equal amount to all employees of a company after an
33 initial public stock offering was a gift and therefore not
34 subject to mandatory bargaining. The petition for review is
35 denied.
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20 JOHN M. WALKER, JR., Circuit Judge:

21 Petitioner, Unite Here ("the Union"), seeks review of a
22 National Labor Relations Board ("NLRB" or "Board") order
23 dismissing a portion of the Union's complaint alleging unfair
24 labor practices against employer North American Pipe Corporation
25 ("NAP"). The Union claimed that NAP was required to bargain over
26 a one-time stock award before distributing it to NAP's employees
27 pursuant to Sections 8(a)(1) and (5) of the National Labor
28 Relations Act ("NLRA"). Section 8(a)(1) of the NLRA makes it
29 unlawful for an employer "to interfere with, restrain, or coerce
30 employees in the exercise of the rights guaranteed [under the
31 NLRA]," and Section 8(a)(5) makes it unlawful for an employer "to

1 refuse to bargain collectively with the representatives of his
2 employees.” 29 U.S.C. § 158(a)(1), (5).

3 On appeal, the Union argues that the NLRB erred by applying
4 an incorrect legal standard when it determined that the stock
5 award qualified as a non-bargainable gift. The Union also
6 contends that the NLRB’s ultimate factual determination was
7 erroneous.

8

9

BACKGROUND

10 Westlake Chemical Corporation (“Westlake”), of which NAP is
11 a subsidiary, operates thirteen manufacturing facilities in the
12 United States, with approximately 1500 employees. The Union
13 represents fifty-six NAP employees at one of Westlake’s
14 manufacturing facilities.

15 Westlake was privately owned until August 11, 2004, when
16 Westlake conducted an initial public offering (“IPO”) of stock.
17 The IPO was successful, and, a few days after the IPO, Westlake
18 decided to make a one-time transfer of 100 shares of its stock to
19 every Westlake employee. In a memorandum to all Westlake
20 employees, Westlake announced:

21 In recognition of this important historic company event and
22 the significant contribution made by each of you toward the
23 growth and success of the company, the Board of Directors

1 has authorized an award of 100 shares of common stock to
2 each full-time, regular employee with at least six months of
3 service as of today. These shares will be awarded to you
4 initially in the form of stock units, and shares will be
5 distributed to you at the conclusion of six months, provided
6 you remained a regular, full-time employee during that
7 period.

8
9 Please accept our appreciation for your efforts. We are
10 confident that as we work together we can continue to build
11 a strong and successful Westlake Chemical Corporation for
12 all of our shareholders, including each of you.

13
14 Westlake followed this announcement with a letter to each
15 employee explaining that Westlake had taken steps to account for
16 the tax obligations applicable to the award of stock and that
17 each employee could elect to have the requisite tax paid either
18 by withholding shares of common stock or by withholding cash from
19 the employee's base pay. Westlake awarded the same number of
20 shares to all eligible hourly, supervisory, and management
21 employees at all of its facilities. The value of the 100 shares
22 was approximately \$1450 at the time of their issuance.

23 Westlake never sought to bargain with the Union over the
24 stock award. After learning of the stock award, the Union filed
25 an unfair labor practice complaint alleging among other things
26 that NAP, through whom Westlake had distributed the shares, had
27 violated Sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. §
28 158(a)(1), (5), by awarding shares of stock to the employees it

1 represented without affording the Union prior notice and an
2 opportunity to bargain. The Board, with one member dissenting,
3 found that no violation had occurred because the stock award was
4 a one-time-only gift tied to the success of the IPO and that the
5 award bore an insufficient connection to wages to bring it within
6 the scope of the NLRA under the doctrine of Benchmark Indus., 270
7 N.L.R.B. 22 (1984), aff'd, Amalgamated Clothing v. NLRB, 760 F.2d
8 267 (5th Cir. 1985) (unpublished table decision).

9 The Union now appeals from the NLRB's decision.

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DISCUSSION

12 Congress has delegated authority to the National Labor
13 Relations Board to decide whether a specific grievance is subject
14 to mandatory bargaining. Olivetti Office U.S.A., Inc. v. NLRB,
15 926 F.2d 181, 185 (2d Cir. 1991). "[M]indful that decisions
16 based upon the Board's expertise should receive, pursuant to
17 longstanding Supreme Court precedent, 'considerable deference,'" Ewing v. NLRB,
18 861 F.2d 353, 357 (2d Cir. 1988) (citations
19 omitted), "we afford the Board 'a degree of legal leeway,'" NLRB
20 v. Caval Tool Div., 262 F.3d 184, 188 (2d Cir. 2001) (citation
21 omitted). "This court [therefore] reviews the Board's legal
22 conclusions to ensure that they have a reasonable basis in law."

1 Caval Tool Div., 262 F.3d at 188. Its legal conclusions will be
2 disturbed only if found to be "arbitrary or capricious."

3 Laborers' Int'l Union of N. Am. v. NLRB, 945 F.2d 55, 58 (2d Cir.
4 1991).

5 "Factual findings of the Board will not be disturbed if they
6 are supported by substantial evidence in light of the record as a
7 whole." Caval Tool Div., 262 F.3d at 188. When reviewing for
8 substantial evidence, our inquiry is limited to "determin[ing]
9 whether the supporting evidence, even if not preponderating in
10 this court's view, nevertheless provides a sufficient basis for
11 the Board's decision." NLRB v. Interboro Contractors, Inc., 388
12 F.2d 495, 499 (2d Cir. 1967).

13 The issue before us is whether Westlake's award of its
14 shares amounted to a unilateral increase in wages or an
15 alteration of the terms and conditions of employment such that,
16 in the absence of bargaining, it violated NLRA §§ 8(a)(1) and
17 (5), 29 U.S.C. § 158(a)(1), (5). See NLRB v. Katz, 369 U.S. 736,
18 747 (1962) ("Unilateral action by an employer without prior
19 discussion with the union does amount to a refusal to negotiate
20 about the affected conditions of employment under negotiation,
21 and must of necessity obstruct bargaining, contrary to the
22 congressional policy.").

1 **I. The Board's Legal Conclusions**

2 The Union contends that the Board applied an incorrect legal
3 standard because "gift doctrine case[]law" requires that, to be
4 non-bargainable, an award must be of token value or given on
5 holidays such as Christmas. This argument challenges the Board's
6 legal determination, which we will not disturb unless it is
7 arbitrary and capricious. The Union's argument is without merit,
8 and we perceive nothing erroneous, much less arbitrary and
9 capricious, in the Board's rejection of it.

10 The question of whether an award constitutes wages and
11 therefore is the subject of mandatory bargaining turns upon
12 whether the award is "so tied to the remuneration which employees
13 received for their work that [it was] in fact a part of it."

14 NLRB v. Niles-Bement-Pond Co., 199 F.2d 713, 714 (2d Cir. 1952).

15 In ascertaining whether a stock award is so tied to remuneration
16 that it must be the subject of bargaining, the Board looks to the
17 relationship of the award to other employment-related factors,
18 including work performance, wages, hours worked, seniority, and
19 production. See Benchmark Indus., 270 N.L.R.B. at 22. An award
20 that is sufficiently tied to these work-related factors is
21 considered part of the overall compensation that an employee
22 receives and is therefore mandatorily bargainable. For example,

1 a bonus has been considered "employment-related" when it was tied
2 to the company's profits, Waxie Sanitary Supply, 337 N.L.R.B.
3 303, 304 (2001), or when it was paid based on supervisory
4 recommendations and work performance, Radio Television Technical
5 Sch., Inc. v. NLRB, 488 F.2d 457, 460 (3d Cir. 1973). An
6 additional consideration in the analysis is the regularity with
7 which similar awards or payments have been made in the past.
8 Bonuses that are not tied to other employment-related factors
9 have been found to be the subject of mandatory bargaining when
10 they were "paid over a sufficient length of time to have become a
11 reasonable expectation of the employees and, therefore, part of
12 their anticipated remuneration." NLRB v. Electro Vector, Inc.,
13 539 F.2d 35, 37 (9th Cir. 1976) (citation and internal quotation
14 marks omitted); accord United Shoe Mach. Corp., 96 N.L.R.B. 1309,
15 1314-15 (1951).

16 Contrary to the Union's argument, the determination of
17 whether an award or bonus is bargainable, does not depend on
18 whether it is of "token value." Although the Board has
19 demonstrated its reluctance to hold that awards of nominal value
20 are subject to mandatory negotiation, see, e.g., Benchmark
21 Indus., 270 N.L.R.B. at 22 (describing dissent's contention that
22 a dinner and a five-pound ham constituted wages as "overly

1 legalistic"), it has found bonuses of significant value not to be
2 the subject of mandatory bargaining where the bonus is
3 insufficiently tied to employment-related factors and not "of
4 such a fixed nature . . . to have become a reasonable expectation
5 of the employees and, therefore, part of their anticipated
6 remuneration," Phelps Dodge Mining Co. v. NLRB, 22 F.3d 1493,
7 1496 (10th Cir. 1994) (citation and internal quotation marks
8 omitted) (holding that "appreciation" bonuses, one of which was
9 given to all employees in an amount equal to eighty hours of work
10 at each employee's standard pay rate, were not subject to
11 mandatory bargaining); see also NLRB v. Wonder State Mfg. Co.,
12 344 F.2d 210, 213 (8th Cir. 1965) (finding award of one week's
13 pay to be a gift and not subject to mandatory bargaining).

14 Whether the award is given during the holiday season is
15 similarly of little consequence. There is nothing in the Board's
16 established test that limits the gift doctrine to holiday gifts.
17 To be sure, many awards given during the holidays have been found
18 to bear an insufficient relationship to employment-related
19 factors to constitute part of the employee's wages, but we have
20 found no case restricting the gift doctrine's applicability to a
21 particular holiday or season. The Board acted reasonably in
22 refusing to recognize such an arbitrary and unprincipled

1 requirement.

2 We thus find that the Board did not err, much less abuse
3 its discretion in rejecting the Union's contention that the gift
4 doctrine is limited to awards of token value or those given at
5 Christmas time.

6

7 **II. The Board's Factual Findings**

8 The Union challenges the Board's factual findings on the
9 same grounds that were the bases for one Board member's dissent.
10 The dissent believed that the stock award was sufficiently tied
11 to compensation that it should have been mandatorily bargainable.
12 The ultimate question of whether the stock award is so tied to
13 remuneration that it is in fact a part of it is "a question of
14 fact [and if] the Board's finding to that effect [is] supported
15 by substantial evidence it ends the matter." Niles-Bemont-Pond
16 Co., 199 F.2d at 714.

17 First, the dissent noted that Westlake made preparations to
18 withhold taxes from the stock award, which is consistent with a
19 view that the stock award constituted wages. The majority
20 acknowledged that this factor might cut against treatment of the
21 stock award as non-bargainable, but concluded that this factor
22 was outweighed by other considerations.

1 Second, the dissent also argued that the stock award was
2 tied to the number of hours worked, in that only full-time
3 employees were eligible for the award. The majority pointed out,
4 however, that the respondent never made this argument before the
5 Board, and it noted both that the record was barren as to how
6 Westlake determined full-time employment and that the Union
7 proffered no evidence that any Union member was excluded because
8 of this condition.

9 Last, the dissent argued that the award was tied to
10 seniority because only employees who had worked for Westlake for
11 six months were eligible and that the award was a condition of
12 employment because it did not vest until the employee remained in
13 full-time employment for six additional months. The majority
14 found the link between the prescribed time periods set forth in
15 the award announcement and the stock award to be "far too tenuous
16 to support a conclusion that employees were receiving the stock
17 because of their performance." N. Am. Pipe Corp., 347 N.L.R.B.
18 No. 78, 2006-2007 NLRB Dec. ¶ 17174, at 4 (July 31, 2006). The
19 majority concluded that the employees received the stock award
20 because the successful IPO permitted it and not as a reward for
21 working at NAP for six months prior to and six months after the
22 stock award.

1 There is no basis to disturb the majority's factual
2 conclusions. The stock award here was a one-time event, given to
3 each employee, regardless of rank, in an equal amount. The
4 record fully supports the majority's finding that the stock was
5 issued to mark the success of the IPO and not because NAP sought
6 to compensate those employees who had been at Westlake for six
7 months and to entice those employees to stay for at least six
8 more. Though the dissent made colorable arguments as to why the
9 Board could have concluded that some of the employment-related
10 factors supported a finding that the stock award should be
11 treated as wages, the majority's conclusion is supported by
12 substantial evidence.

13 In sum, we find that the Board's legal determinations were
14 not arbitrary and capricious and that the Board's ultimate
15 determination is supported by substantial evidence.

16

17

CONCLUSION

18 For the foregoing reasons, the petition is DENIED.

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