

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: June 30, 2016

TO: Marlin O. Osthus, Regional Director  
Region 18

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Walter G. Anderson, Inc.,  
Case 18-CA-171822

530-6050-1625

530-6050-1693

This case was submitted to Advice as to whether the Employer violated Section 8(a)(3) of the Act by discriminatorily denying a bonus amount to two employees that was commensurate with their seniority because they had filed grievances against the Employer, where the Region preliminarily concluded that the bonus payments were not a term or condition of employment subject to bargaining but rather “gifts.” We conclude that these substantial employee bonuses, ranging from \$1,000 to \$40,000 were not “gifts,” but rather constituted a mandatory subject of bargaining, and the Employer’s failure to give notice and an opportunity to bargain over the bonuses violated Section 8(a)(5) of the Act. Accordingly, the Employer also violated Section 8(a)(3) by discriminatorily paying amounts to two employees that were not commensurate with their length of service.

### FACTS

The Employer manufactured paperboard packaging used primarily to package beverage products and other consumer goods. The Employer had facilities in Newton, Iowa and Hamel, Minnesota. The Hamel facility employed about 180 full-time employees. Most of the hourly employees employed at the Hamel facility were represented by one of two unions, either the Charging Party -- the United Steel Workers Local 11-1259 (the Union) -- or the Graphic Communications Conference of the International Brotherhood of Teamsters. The Union represented the production and maintenance employees at the Hamel facility.

Prior to its February 16, 2016 sale to Graphic Packaging International, Inc., the Employer was family-owned and operated.<sup>1</sup> The Anderson family had built the

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<sup>1</sup> An Anderson family member continues to be employed by Graphic Packaging International, Inc., as the vice president and general manager of the Hamel facility.

company over a period of 65 years, and the CEO and majority stock holder of this family-owned company knew each employee personally. On February 8, shortly before the sale was completed, the CEO gave bonus checks to employees to thank them for their service. There is no dispute that the Employer did not notify or bargain with the Union prior to issuing the bonus checks. Each employee of the Employer -- with the exception of a very recent hire -- received a bonus.

Employees received bonuses ranging from \$1,000 to \$40,000, based on years of service, with \$5,000 increments added to their bonus sum for each successive five-year period of service. Thus, employees with 0 to 4 years received \$1,000; employees with 5 to 9 years of service received \$5,000; employees with 10 to 14 years of service received \$10,000; etc.

The Union has asserted that only four employees did not receive the appropriate bonus amounts. Two of these did not engage in any Union or protected activity and therefore, there can be no evidence of an unlawful motive under the National Labor Relations Act. Of these two, one was told that (b) (6), (b) (7)(C) did not get the requisite amount for (b) (6), (b) (7)(C) tenure because of a lack of contribution to the company. The second was out (b) (6), (b) (7)(C) when the checks were distributed, and a check in the appropriate amount is allegedly waiting for (b) (6), (b) (7)(C) at the Hamel facility.

The remaining two employees had recently filed grievances against the Employer. The first employee was discharged for a safety violation on (b) (6), (b) (7)(C), 2015. The Union filed a grievance contesting the discharge. After an arbitration hearing on (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C), 2015, the arbitrator ordered the employee reinstated and made whole. After (b) (6), (b) (7)(C) received (b) (6), (b) (7)(C) bonus award in the amount of \$1,000 and realized that coworkers with comparable seniority received \$15,000, (b) (6), (b) (7)(C) talked to (b) (6), (b) (7)(C) about it. In explaining the discrepancy, (b) (6), (b) (7)(C) told the employee that the grievance had cost the Employer a lot of money because it had to pay the cost of the arbitration, backpay, healthcare premiums, and lost vacation time.

The Union filed a grievance on behalf of the other employee on (b) (6), (b) (7)(C), 2015, contesting the fact that the Employer hired an outside candidate for a (b) (6), (b) (7)(C) position rather than moving the grievant into the position. Had the employee received the position, (b) (6), (b) (7)(C) would have received an \$ (b) (6), (b) (7)(C) hour raise. The Union intended to arbitrate the grievance, but then the employee quit when (b) (6), (b) (7)(C) found out (b) (6), (b) (7)(C) bonus check was \$4,000 less than coworkers with comparable seniority. This employee did not speak to (b) (6), (b) (7)(C) about the amount of (b) (6), (b) (7)(C) bonus, but the Employer failed to offer

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He has held the position since the February 16, 2016 sale. However, there is no evidence that Graphic Packaging International, Inc. had knowledge of Anderson's intention to distribute the bonuses prior to signing the purchase agreement

a credible explanation for this employee receiving less, and the employee's employment record with the Employer was a relatively good one.

### ACTION

We conclude that the Employer violated Section 8(a)(5) by unilaterally providing substantial bonus checks to the entire bargaining unit based on tenure and performance, without giving the Union notice or opportunity to bargain over those bonuses. In addition, the Employer violated Section 8(a)(3) of the Act by discriminatorily failing to give two employees a benefit commensurate with their service because these employees had recently filed grievances against the Employer.

An employer must bargain with the exclusive representative of its employees before granting or altering a term or condition of employment.<sup>2</sup> Employer-provided bonuses are subject to this mandatory duty to bargain if they are “so tied to the remuneration which employees receive for their work that they are . . . in reality wages . . . .”<sup>3</sup> The Board in *Phelps Dodge*, for example, found that an employer's annual bonus program could not lawfully be terminated unilaterally because the bonuses constituted significant amounts of money and were calculated on the basis of the employment-related factors of wages and hours worked.<sup>4</sup> Some bonuses, however, are exempt from mandatory bargaining because they are “merely gifts” given to employees “regardless of their work performance, earnings, seniority, production, or other employment-related factors.”<sup>5</sup> Thus, in *North American Pipe Co.*, the Board found that a one-time award of stock, given without regard to such employment-related factors, was a non-mandatory subject of bargaining and could be granted by the employer unilaterally.<sup>6</sup>

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<sup>2</sup> *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

<sup>3</sup> *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), *petition for review denied sub nom. UNITE HERE v. NLRB*, 546 F.3d 239 (2d Cir. 2008).

<sup>4</sup> *Phelps Dodge Mining Co.*, 308 NLRB 985, 985 n.3 (1991), *enforcement denied*, 22 F.3d 1493 (10th Cir. 1994).

<sup>5</sup> *Benchmark Industries*, 270 NLRB 22, 22 (1984) (holding that employer lawfully discontinued its annual giving of Christmas hams and dinners without bargaining because these items were “merely gifts”), *affirmed mem. sub nom. Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985).

<sup>6</sup> 347 NLRB at 837-38 (holding that employer did not violate Section 8(a)(5) by unilaterally issuing each employee 100 shares of stock, worth \$1450, in recognition of the company's initial public stock offering).

We conclude that the Employer's bonuses starting at \$1,000 and increasing in \$5,000 increments based on seniority, and contingent on successful work performance, were benefits "so tied to remuneration" that they were "in reality wages," and constituted a mandatory subject of bargaining. Unlike the one-time award of stock shares in *North American Pipe Corp.*, which was "predicated [on] ... an event wholly unrelated to any worked performed or seniority attained by the Respondent's employees," these bonuses were specifically tied to seniority and satisfactory service.<sup>7</sup> Thus, the Employer was required to give the Union notice and an opportunity to bargain over the bonuses, and its failure to do so violated Section 8(a)(5) of the Act.<sup>8</sup>

Further, we agree with the Region that the Employer's failure to give bonuses commensurate with employment tenure to the two employees who had recently filed grievances against the Employer violated Section 8(a)(3) of the Act. In regard to both employees, the Employer's statement to one of them that the reason for the lower bonus amount was the grievance that employee filed, which cost the Employer money

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<sup>7</sup> *Id.* at 838.

<sup>8</sup> Although the bonuses in this case are a one-time event and employees have no reasonable expectation that they will recur, the existence of a recurring practice is not a prerequisite for finding a duty to bargain, but rather one factor that the Board considers in determining whether an employer has a duty to bargain. *See, e.g., Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 174 (1979) (practice of awarding Christmas bonus checks had been sufficiently established as a term and condition of employment where the practice was maintained over a three-year period and the employer joined this course of conduct with a promise to continue the bonus), *enforced*, 613 F.2d 1338 (5<sup>th</sup> Cir. 1980); *Waxie Sanitary Supply*, 337 NLRB 303, 303-304 (2001) (unilateral discontinuance of holiday bonus unlawful, where bonuses were paid for three consecutive years, creating a reasonable employee expectation).

The conclusion in this case is specifically tied to the nature of these benefits, i.e., their linkage to seniority and performance, and does not rely on any theory related to an established practice or the employee's expectations regarding that course of conduct. Indeed, employee expectations of a re-occurrence are as irrelevant here as they would be in determining whether a severance payment is a mandatory subject of bargaining. *See, e.g. Regal Cinemas*, 334 NLRB 304, 305 (2001) (noting that severance pay is a mandatory subject of bargaining), *enforced on other grounds*, 317 F.3d. 300 (D.C. Cir., 2003).

to defend and in backpay, constitutes an admission of an unlawful motive, and the Employer failed to present credible evidence to rebut this prima facie case.<sup>9</sup>

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) of the Act by issuing bonus checks to employees without notice to or bargaining with the Union and violated Section 8(a)(3) by discriminatorily failing to give two employees an amount that was commensurate with their tenure when compared with similarly situated employees.

/s/  
B.J.K.

ADV.18-CA-171822.Response.Wanderson. (b) (6), (b) (7)

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<sup>9</sup> See *Wright Line*, 251 NLRB 1083, 1091 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1982). We note that while this case was pending in Advice, the Employer submitted an additional position paper in which it defended its actions by asserting that long-time Union stewards and other employees who filed grievances received bonuses that were commensurate with their seniority. The Board law is clear, however, that a finding of discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out everyone involved in concerted activity. See *Igramo Enterprise*, 351 NLRB 1337, 1339 (2007), *petition for review denied mem.*, 310 F. App'x. 452 (2d Cir. 2009).