

Shanor Folder 24 copy1
Shanor, Charles
Labor Law Final Exam Fall 2000
Excellent Student Answers



**Labor Law
Exam Answers
December 2000 Examination
Professor Shanor**

**Attached are Excellent
Answers given by a Student in Response to the
Questions Distributed in Class
For use in Exam Preparation**

1. Scrooge & Marley (S&M) makes children's toys in North Pole, Georgia. Tiny Tim, a student employed as a seasonal helper by S&M, is the first worker to assist National Association of Exploited Laborers (NOEL) organize at S&M. When NOEL begins organizational picketing, S&M President Ebenezer Scrooge reminds all employees that the employee handbook says: "Solicitation of any kind is prohibited during working time and in working areas." When Tim wears a t-shirt to work picturing a bare Christmas tree labeled S&M and a logo saying "Put Presents Under Your Tree. VOTE NOEL!," Scrooge fires Tim. Has S&M committed any unfair labor practices?
2. Mr. Potter, President of Santa Bank, is an outside director of S&M. One day, four people dressed as elves appear in the bank parking lot handing out leaflets that read: "BOYCOTT THE SANTA BANK! POTTER IS ON THE BOARD OF S&M. HE ALLOWS S&M TO EXPLOIT THE WORKERS WHO MAKE YOUR KID'S TOYS." The leaflets are signed "NOEL." Later that day, the local TV station runs a news spot in which George Bailey, an S&M employee, says Potter is "a slave of the status quo at S&M." Advise Potter what he can do about these "outrages."
3. As the busy Christmas season approaches, NOEL wins a "wall-to-wall" election at S&M. Scrooge sits down with NOEL President Bob Cratchit, who says: "We're here to bargain a contract, but if we don't get a contract by tomorrow the strike begins. I'll shut you down for Christmas, you old windbag!" Scrooge responds "That's blackmail!" and storms out, saying there is "no point in talking at gunpoint." As NLRB Regional Director, would you issue a complaint on one, both, or neither of the refusal-to-bargain charges filed by S&M and NOEL?
4. Eventually, the parties sign a collective bargaining agreement containing grievance arbitration and no strike clauses but neither a "maintenance of benefits" nor a "management rights" clause. Georgia subsequently enacts a drug testing law providing "No employer acting in accord with this chapter shall be liable in any action challenging its drug tests." Scrooge discusses bringing its drug testing within the new law's safe harbor with NOEL and then makes the changes. Bob Cratchit is soon fired for failing a drug test. Advise NOEL what to do.
5. Tiny Tim finds himself at odds with Bob Cratchit's leadership of NOEL. Though concerned that the collective bargaining agreement with S&M says the company will fire "anyone who refuses to join or remain in the union," Tim speaks up in a union meeting in opposition to preferences given to union officers on job assignments and layoffs, regardless of seniority. He is told to "sit down and shut up" or he will be expelled from NOEL for "conduct unbecoming a union member." Tim doesn't shut up, is expelled from NOEL, and faces imminent discharge by S&M. Advise Tim.

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1.

Tim might not, for NLRB picketing purposes, be considered an 'ee' as seasonal help; also since he is only seasonal 'ee' was the first worker to assist NREL, you might infer that he was an undercover union organizer (Salting). In that case, might not really be considered an 'ee' since his loyalty would rest w/ NREL and not their. But Bd. would likely even consider a salt an 'ee' & decide if Tim's discharge was an 8(A)(3) or 8(a)(1) ULP. To find an 8(A)(3) ULP, Scrogge must have acted in firing Tim w/ anti-union animus. Since Tim was a union organizer, the first, and the firing came probably soon after the picketing then one might infer an anti-union motive in his actions. However, Scrogge will defend saying that Tim broke a valid work rule (no solicitation during work time) that the t-shirt was a form of solicitation; that the discharge was for just cause. But, has Scrogge enforced this policy even handed and consistent? Scrogge had just 'reminded' the ees about the rule himself, which leads me to think it was a rule that was not enforced if that is the case, then the discharge of Tim, a union organizer, when he violated the rule would likely show the anti-union animus necessary if others not fired for other types of this solicitation (note, it is likely that others have worn such t-shirts, ex: vote for Clinton etc, did Scrogge fire these people? If he claims that t-shirts are a form of solicitation - weak claim, maybe it's the sign of anti-union animus - then he must enforce it evenly against all such t-shirt wearers, union (non-union alike). Should facts arise that Scrogge not being even handed, he could assert a same delinquent way defense (Transpiration must), that Tim despite Scrogge's anti-animus, had been luxury seasonal help and would have been fired anyway. Even if no 8(A)(3), maybe Tim's firing is an 8(A)(1) violation; Tim was the first (and likely last) union organizer, his firing might have a chilling effect on the other help - they will think if they support the union, they will get fired (a big increase w/ 57 rights of ees to organize) But, the 57 rights here would have to be balanced against Scrogge's legitimate business reasons. He will claim that his right to fire Tim for insubordination (violate work rule) outweighs incidental effect on other ees' rights. But probably weak argument since the rule itself, as enforced against t-shirt wearers, might not be valid. While a rule that bans solicitation during work time, work area is presumptively valid (NLRB v. Retail Store Employees Local 983); this rule, as enforced by Scrogge, seems broader than that since t-shirt wearing might not really be considered solicitation. Scrogge might have to defend the broader rule by claiming that such t-shirt wearing, w/ messages, the like, interfere greatly w/ other ees' production levels, since all the ees might gawk over it and whisper etc. Since the co. at Xmas time is likely on a tight schedule such enforcement of the rule to ^{production} ~~the~~ purposes might be okay. But if Bd. doesn't buy this, the rule as enforced, especially against a union organizer like Tim likely to be held an 8(A)(1) violation.

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2.

The activity at the bank by NOEL (leaflets signed by them) could be considered a Zaiday boycott, since it might be NOEL placing
Consumer pressure on Mr. Potter/bank to not do business with SSM (the primary is upon whom NOEL has the dispute, not trying to require)
NOEL would be trying to pressure Bank to not take deposits from SSM or for Potter to leave the Board at SSM. NOEL would argue that
the Bank's SSM are allies, so that activity at the bank is not Zaiday. Not a great argument since SSM really does not
derive any special benefit (they could just use another bank, unless having Potter as a Bd. member is considered a special benefit).
But, the Bank is getting economic benefit here, assuming that since Potter is on the Bd of SSM that SSM put all its
plough in the same bank. ^(state of status quo tried to be arrangement) No real explicit arrangement is evident, unless the Bd. relationship of Potter, SSM could be so
considered. Probably not a strong ally argument under Doards or Royal Typewriter. NOEL might claim that the Bank's SSM
are an integrated enterprise, as evinced by the common ownership & control of operations (Potter is president of bank, on
the Bd at SSM) would need more facts here, specifically whether labor relations were under common control between SSM
and the bank, then probably an integrated enterprise and NOEL's activity would be at bank. NOEL likely claim that
its activity is handbilling (just handing out leaflets) and is only an appeal to consumers. If handbilling, depends, are
they patrolling the lot? is there a lot of ingress/egress? are they visiting entrances of bank (many of these likely
to be considered picketing), but if handbilling mail will say it is simply an appeal to consumers, 'don't use this bank'.
These handbills probably - unless they have effect of a bank worker not to do business with in fact that does not appear
to be a problem. If the handbills were deemed to be picketing, it would seem picketed - it is not advising the public that the
bank distributes a product made by SSM, it is advising them that Mr. Potter on Bd at SSM. (could say that it is
what SSM produces and that the Bank does distribute that, but since it is the major ^{SSM} source of a Bank's revenue, such
Zaiday conduct could lead to substantial ruin of bank. Also, the \$ at the bank is integrated, consumers would have no
way of patronizing the bank, but asking not to receive \$ that came from SSM by funds. Potter has some options, considering
very well a Zaiday boycott he could file WUP charges against NOEL and then Bd. must (if they took Zaid. boycott) seek a (UCL)
injunction → this will help Potter get rid of elves quickly. Under 303 he can also pursue actual damages in fact of \$-
are \$ he may have lost as a result of the Zaiday boycott. While state remedy for Zaid. boycotts provided by 303,
he still might have a state claim for trespass (on his parking lot - but possible preemption problem) Mr. Mark a
deliberate claim against Bailey (again, preemption problem since Bailey engaging in actually picketing activity). Back to
trespass, Potter might face a WUP charge himself if he claims trespass on my lot but in the past had let
other groups solicit on the property → could show anti-union animus.

* Also, maybe Potter could agree to NOEL demands (quit the boycott) - stopping business of SSM, and then bring antitrust
violation against NOEL. (illegal induced + outside CBA context, maybe antitrust scrutiny)

Very good

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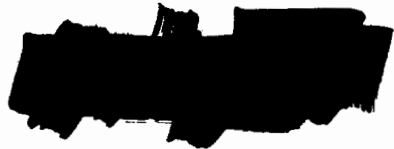


3.

8(b)(3) charge: I would not issue complaint. Scrooge would argue that Bob was acting in bad faith since Bob was not willing to meet at reasonable times - that his demand to get a K that night or else was unreasonable. Well, argument however, since Bob only threatened a strike, which does not suspend duty to bargain, and Bob likely willing to resume meeting through the strike. The various words, while factual, do not indicate a "sincere desire" to reach an agreement "by tomorrow"; sooner like Bob was ready to really get down to business that night. But Scrooge would argue that Bob's tactics in procedure (threat etc) evince bad faith and a real intent to actually bargain, Scrooge would say that the proposal to get a K due that night was so predicably unworkable that it was surface bargaining, but again Bob didn't say it had to be done tonight, or "I won't bargain" he just said "fight or a strike". And since the union is likely very strong here (they can walk the walk) Bob's hard stance would not be bad faith, if Bob reasonably believes that NLR is powerful enough to make such demands true as bad faith. If one party is that strong, it to put the other at "gunpoint". Also economic pressure (like here the threatened strike) is not insurmountable in duty to bargain good faith (see Enterprise again) But there is insurmountable duty by NLR, if they do strike Scrooge best bet is to fire workers because maybe the strike would not be considered "justified" since it is deliberately timed to ruin 5th floor (Christmas approaching, new S.C.M. makes it, threat to shut down at busiest time of year!).

8(a)(5): I would probably go to complaint against ~~Bob~~ Scrooge, since his words immediately show that he was not trying to bargain. His only response was "oh blackmail" then stormed out. Duty to bargain is a good faith probably requires more of an attempt to deal w/ Bob since Bob really was only threatened by economic pressure that she was entitled to do. Scrooge should have talked at the "gunpoint" of threat of economic weapons, that's what the business was all about. Scrooge might argue that an impasse had been reached since due to the harsh words etc no chance that they could come to an agreement at that point. Probably not enough to show impasse since they didn't even bargain over any mandatory terms yet!

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4.

NDEL could go to Fed/state ct. and compel SS, m to arbitrate over whether contract was fixed to just cause or whether SS, m's unilateral act in changing the drug policy was a violation of the CBA (i.e. should have bargained to impose one if). Even though there is not a maintenance of benefit clause, the change in drug test is likely a claim that arises under the CBA. Really the only way out of such a finding would be if the CBA expressly excluded 'changes in drug policies' from the arbitration provision through an exclusion clause. Since arb. presumption is so strong, Fed ct. likely to compel it in this case. NDEL could also file ULP charges w/ the Bd. that SS, m's unilateral change of the drug policy was a breach of duty to bargain. Drug testing is a condition of employment that is germane to work environment so it is a mandatory type of bargaining. SS, m did discuss it w/ NDEL, but not to impose so a unilateral change is a breach of duty UNLESS, in their initial negotiating SS, m and NDEL had fully discussed & explored drug testing provisions → then the "discussing" of NDEL was purely gratuitous; SS, m has no duty to bargain; the unilateral change ok. But if not in CBA, not clear facts, and not discussed during negotiations, then duty to bargain exists since drug is mandatory. NDEL would probably bring both actions (compel arb? ULP) concurrently, so "SOL" does not expire, and the Bd. likely to defer to the arb. process here. Bd. could reasonably believe that the arbitrator could decide based on CBA w/ all relevant facts whether SS, m breached any duty to Bob (by firing) or breach any duty in making unilateral change. If NDEL lost in arb.; could then argue to Bd. which stayed its hand, that the procedure was not fair to some reason or fraud etc, so that they could try to get a second chance (not likely, Bd. probably would uphold arb. & Q's decision). NDEL could also challenge state law, if it precludes them from victory, as preempted by the NLRA. They could claim that SS, m's activity in firing/ or changing policy unilaterally was "arguably prohibited" under § 8B of NLRA, as discussed above, and that the state has no right to permit such activity (by passing a ^{law} statute that says "not liable" → the Expt Bd. should decide whether liable). Also could argue that activity to bargain for fairer drug policies through a rep. is protected activity under § 7 and that the state has impinged on this right to bargain over mandatory policies that they want. State could argue against preemption, since they are allowed to set base levels or certain things (met. life); that the policy does not affect NDEL's bargaining power (so no machinist) to bargain from this floor of drug testing policy up to SS, m's same goal. Also a state has a compelling interest in exercising police power to regulate drug activity (affect safety & well-being of its citizens). Also could argue scars, that Fed. law says nothing about how to drug test so no preemption. (probably weak, but must work).

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5.

Tim has a few options. One, he could file ULP charges against the Co.'s NLEL. Against the Co., Tim could claim that the CBA provision which says 5's will fire anyone who doesn't stay in union is an 8(a)(2) violation, since 5's is discriminating/interfering w/ the NLEL. 5's could make Tim pay agency fees, but treats it, not allowed to ~~make~~ ^{make} him join the union or face discharge (illegal punishment - Tim can get struck). If actually fired by Co. Tim can also tack on an 8(a)(3) violat., since he will be discriminated against (fired) for refraining (leaving the union) in protected 5's rights. (Tim has the right to refrain.) Also, 8(a)(1) since these actions likely to affect other 5's members from exercising their 5's privilege to refrain from union activity (to afraid they will face discharge.) Tim also can charge Union w/ ULP's. He could say that the union was restrained him in exercise of 5's rights (violat. of 8(b)(1)); since he was disciplined by a rule "interlocking of a ~~union~~ ^{union} member", that ~~that~~ doesn't clearly reflect a legitimate ~~business~~ ^{union} interest (seems to broad) and also Tim has no way to escape this rule (w/ any for that matter) since if he left union he would be (as he is now) subject to discharge. 'No escape' violates Seefeld and Colwell of the NLRBA's scheme of voluntary unionism. Also, can charge the union w/ 8(b)(2) violation since ~~charging~~ ^{charging} him, in light of the CBA provision, is like asking the 'er to fire him for not being in union. Also could claim a violation of duty of fair representation either w/ Bd. or ULP, or also a 301 claim in federal or state ct. 2 basis for the DFR claim. One, the 'you want to be in union rule' violates duty, NLEL says to people who choose not to be in union; can't make them demand from pay fees. Also, Tim could claim that the union official preferences violated his duty, and was discriminatory in favor of union officials. Not likely to Union (after DFR claim, since it has been upheld that preference be given union officials in many way (continuity in grievance process etc) ^{so not violation}). Also, Tim can bring a fed ct. action claiming that his LMRA rights had been violated when the union disciplined him. Via 5609 you cannot discipline a union member for exercising rights guaranteed under LMRA, free speech is one of these rights 5101. Tim was disciplined for speaking up about union official preferences (protected free speech since not imputable to union or interference w/ union's legal/contract obligations) and since protected free speech his expulsion from union for it violates 609. Also maybe claim 101(a)(5) violat., it clear on these facts, but maybe Tim was not given a "full, fair hearing" before being expelled from the union.

very good
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