Labor Law
Exam Answers
December 2ooo Examination
Professor Shanor

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

Exam Number_____

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 NLRA protection purposes, be considered an 'ee as seasonal help; also since he is only seasonal & was the first worker to assist NOEL, 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/ NOEL and not their co. 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, Scrooge must have acted in terms 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, Scrooge will defend saying that Tim broke a valid work rule (re solicitation during work time) that the t-shirt was a form of solicitation & that the discharge was for just cause. But, has Scrooge enforced this policy even handedly and consistent? Scrooge had just 'reminded' the ee's what the rule is/was, which leads me to think it was a rule often unenforced. If this 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 Scrooge fire these people? If he claims that t-shirts are a form of solicitation - weak claim, maybe it tells a story of anti-union animus - then he must enforce it evenly against all such t-shirt wearers, union & non-union alike).
Should facts arise that Scrooge not being even handed, he could assert a same decision affirmative defense (Transportation mngt), that Tim despite Scrooge's anti-union animus, had been (lousy 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 only) union organizer, his firing might have a chilling effect on the other help → they will think if they support the union, they too will get fired (a big deterrence of §7 rights of ees to organize). But, the §7 rights here would have to be balanced against Scrooges legitimate business reasons. It will claim that his right to fire Tim for insubordination (violation work rule) outweighs incidental effects 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 (Republic); this rule, as enforced by Scrooge, seems broader than that since t-shirt wearing might not really be considered soliciting. Scrooge might have to defend the broader rule by claiming that such t-shirt wearing, of messages & the like, interfere greatly w/ other ees production levels, since all the ee's might gawk over it and whisper etc. Since the co. at X-mas time is likely on a tight schedule such enforcement of the rule to [redacted] purposes might be okay. But 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 2nd-ary boycott, since it might be NOEL placing economic pressure on Mr. Potter/Bank to not do business anymore w/ S&M (the primary employer w/ whom NOEL has the dispute, is trying to organize). NOEL may also be trying to pressure Bank to not take deposits from S&M or for Potter to leave the Board at S&M. NOEL would argue that the Bank & S&M are allies, so that activity at the bank is not 2ndary. Not a great argument since S&M 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 S&M that S&M puts all of its dough in the same bank. No real (explicit arrangement) is evident, unless the Bd. relationship of Potter & S&M could be so considered. (≈ slave of status quo/historical arrangement) Probably not a strong ally argument under Douds or Royal Typewriter. NOEL might claim that the Bank & S&M are in integrated enterprise, as evinced by the common ownership & control of operations (Potter is president of bank & on the Bd at S&M) would need more facts here, specifically whether labor relations were under common control between S&M and the bank, then probably an integrated enterprise and NOEL's activity would be ok 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 blocking entrances of bank (if any of these, likely to be considered picketing), but if handbilling NOEL will say it is simply an appeal to consumers, 'don't use this bank.' These handbills probably ok unless they have effect of a bank worker not to do her job but in fact that does not appear to be a problem. If the handouts is deemed to be picketing, it doesn't seem protected - it is not advising the public that the bank distributes a product made by S&M; it is advising them that Mr. Potter is on Bd at S&M. Could say that $ is what S&M produces and that the Bank does distribute that, but since $ is the major source of a Bank's revenue, such 2ndary 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 S&M by funds. Potter has some options, considering very well a 2ndary boycott he could file ULP charges against NOEL and then Bd. must (if they think 2nd. boycott) seek a 10(l) injunction → this will help Potter get relief very quick. Under §303 he can also pursue actual damages in fed ct. for any $ he may have lost as a result of the 2ndary boycott. While state remedies for 2nd. boycotts preempted by 303, he still might have a state claim for trespass (on his parking lot - but possible preemption problems) and maybe a defamation claim against Bailey (again, preemption problems since Bailey engaging in arguably protected activity). Back to trespass, Potter might face a ULP charge himself if he claims "trespass on my lot" but in the past had let other groups solicit on his property → would show anti-union animus.

Very good

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★ Also, maybe Potter could agree to NOEL demands (given the boycott) - stopping business w/ S&M, and then bring antitrust violation against NOEL. (illegal conduct + outside CBA context, may be antitrust scrutiny)

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3.

8(b)(3) charge: I wouldn't 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. Weak argument, however, since Bob only threatened a strike, which does not suspend duty to bargain, and Bob likely willing to continue meeting through the strike. The union's words, while forceful, do indicate a "sincere desire to reach an agreement" "by tomorrow", sounds like Bob was ready to really get down to business that night. But Scrooge would argue that Bob's tactics & procedures (threats etc) evince bad faith and no real intention to actually bargain; Scrooge would say that the proposal to get a K done that night was so predicatably 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 "tonight or a strike". And since the union is likely very strong here (they run wall to wall) Bob's hard stance wouldn't be bad faith, if Bob reasonably believes that NOEL is powerful enough to make such demands then no bad faith. If one party is that strong, ok to put the threat at "gunpoint". Also economic pressure (like here the threatened strike) is not inconsistent w/ the duty to bargain in good faith (see Insurance Agents) Bottom line no breach of duty by NOEL. If they do strike Scrooge best not is to fire workers because maybe the strike would not be considered "protected" since it is deliberately timed to ruin S&M (Christmas approaching, when S&M makes its 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 "it's blackmail" & then stormed out. Duty to bargain in good faith probably requires more of an attempt to deal w/ Bob since Bob really was only threatening economic pressure that he was entitled to do. Scrooge should have to talk at the "gunpoint" of threat of economic weapons, that's what this business is 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 ever bargain over any mandatory terms yet!

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4.

NOEL could go to Fed/State ct. and compel S's to arbitrate over whether Contrait was fired for just cause or whether Scrooge's unilateral act in changing the drug policy was a violation of the CBA (i.e. should have bargained to impasse over it). Even though there is not a maintenance of benefits 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. NOEL could also file ULP charges w/ the Bd. that S'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 workers environment so it is a mandatory topic of bargaining. S's can discuss it w/ NOEL, but not to impasse so a unilateral change is a breach of duty UNLESS, in their initial negotiating S's and NOEL had fully discussed & explored drug testing provisions → then the "discussing" w/ NOEL was purely gratuitous & S's has no duty to bargain & the unilateral change ok. But if not in CBA, not clear on facts, and not discussed during negotiations, then duty to bargain exists since drug is mandatory. NOEL could probably bring both actions (compel arb & ULP) concurrently, so 6 mo 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 & all relevant facts whether S's breached any duty to Beth (by firing) or breach any duty in making unilateral change. If NOEL lost in arb, could then argue to Bd, which stayed its hand, that the procedure was not fair to some reason or flawed etc, so that they could try & get a second chance (not likely, Bd probably would uphold arb & arb. decision). NOEL could also challenge state law, if it precludes them from acting, as preempted by the NLRA. They could claim that S's activity in firing / or changing policy unilaterally was "arguably prohibited" under §8 of NLRA, as discussed above, and that the State has no right to permit such activity (by passing a law that says "not liable" → the Expert Bd. should decide whether liable.) Also could argue that activity to bargain for their own drug policies through a rep. is protected activity under §7 and that the state has impinged on their right to bargain over mandatory policies that they want. State could argue against preemption, since they are allowed to set base levels on certain things (min test cite); that the policy does not affect NOEL's bargaining power (so no machinery) to bargain from this flavor of drug policy/policy type of S's was same gained. Also a state has a compelling interest in exercising police power to regulate drug activity (affects safety & wellbeing of its citizens). Also could argue stare, that Fed. law says nothing about how to drug test so no preemption. (probably weak, but might work).

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5.

Tim has a few options. One, he could file ULP charges against the Co.'s NOEL. Against the Co., Tim could claim that the CBA provision which says S's in will fire anyone who doesn't stay in union is an 8(a)(2) violation, since S's in is dominating/interfering w/ the NOEL. S's in could make Tim pay agency fees but treats it, not allowed to make him join the union or face discharge (illegal provision - Tim can get struck). If actually fired by Co. Tim can also file an 8(a)(3) violation, since he will be discriminated against (fired) for refraining (leaving the union) in protected § 7 rights. (Tim has the right to refrain.) Also, 8(a)(1) since these actions likely affect other S's in workers from exercising their § 7 privilege to refrain from union activity (b/c afraid they will face discharge.) Tim also can charge union w/ ULP's. He could say that the union has restrained him in exercise of § 7 rights (violation of 8(b)(1)); since he was disciplined by a rule "interfering w/ a union member", that doesn't clearly reflect a legitimate union interest (seems to exceed) and also Tim has no way to escape this rule (or any for that matter) since if he left union he would be (as he is now) subject to discharge. 'No escape' violates Scofield and conflicts w/ the NLRA's scheme of voluntary unionism. Also, can charge the union w/ 8(b)(2) violation since causing him, in light of the CBA provision, is like asking the Co. to fire him for not being in union. Also could claim a breach of duty of fair representation either w/ Bd. as ULP, or also a 301 claim in federal or state ct. 2 basis for the DFR claim. One, the 'you have to be in union' rule violates Duty NOEL owes to people who choose not to be in union; could make them do more than pay fees. Also, Tim could claim that the union officials preferences violated their Duty, and were discriminatory in favor of union officials. Not likely to win on latter DFR claim, since it has been upheld that preference be given union officials in layoffs (continuity in grievance process etc.) so not a violation. Also, Tim can bring a fed ct. action claiming that his LMRDA right had been violated when the union disciplined him. Via 609 you cannot discipline a union member for exercising ch guaranteed under LMRDA, free speech is one of these rights § 101. Tim was disciplined for speaking up about union officials preferences (protected free speech since not irresponsible to union or interfering w/ unions legal/contract obligations) and since protected free speech his expulsion from union for it violates 609. Also maybe claim 101(a)(5) violation, not 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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