



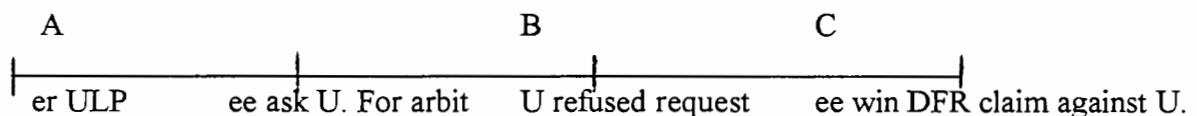
Labor Law Final Examination
December 17, 1996
Sample Student Answer - Question I

I.

1. First issue is whether this discharge is governed by the NLRA. If Cratchit (C) in an employee at will then he can be fired for any reason or no reason (*Miller v. Sevamp*). If this is the case then there may be no issue before the NLRB. However, assuming that this is within the NLRB's jurisdiction the next issue is whether C is an employee with rights under §7. An employee, as defined by §2(3) and in *Health Care and Retirement Corp* is a person not a supervisor exercising 1) a number of listed activities, 2) the exercise of the listed activities calls for the ee's used independent judgement and 3) the ee exercises this activity in the interest of the er. It is likely that as an associate, C has responsibilities including secretarial supervisory responsibilities which might take him out the employee context and into the supervisor context. If C is considered an employee with §7 rights, has Scrooge(S) violated any of his rights? First issue is whether under the Interboro doctrine C was exercising a protected right. Since he is not unionized with a CBA he must exercise his rights with another ee to have concerted activity (Myers Industries) and consequently §7 protections. There is a factual issue as to whether it was concerted activity. It seems like it probably was not since B did not take part in the protest with C, but rather dismissed his claim. If C based his claim on an employee handbook, that would not be concerted action. Finally, if it was concerted activity, the issue is whether it was protected activity, like in Washington Aluminum, or whether it was too strong and disloyal, as in *Dobbs House*. Since it related to a labor relations issue (hours) and did not include external disparagement or disloyalty, it would seem to be protected (See also Jefferson Standard). A complaint should probably not be issued b/c C is probably not an ee with §7 rights.

2. This issue is whether S&M is under a duty to bargain with the U over the relocation. If it has a duty it doesn't live up to it, then it commits an 8a5 violation. There may also be 8a1 violations, if there is no legitimate business reason for the move and an 8a3 violation if the move was motivated by anti union animous. To determine whether S&M was under a duty to bargain with the U., the terms of theCBA should first be looked at. If not, is the move a permissive, mandatory or illegal subpart of bargaining? If not addressed and mandatory, then S&M and the U have a duty to bargain. To determine if mandatory, use the current board analysis Dubuque Packing: (a) General Counsel must show that the move is not a basic change in the nature the ER's operations. (B) the ER can turn defend: (1) the work at the new facility "varies significantly" from the work done at the old location. (2) it represents a change in the scope and direction of the employer's business or (3) (a) labor costs were not an issue/factor in the decision or (b) that even if it was a factor, the U couldn't lower wages enough to make a difference to the ER. Analyzing factor B2, the Fiberboard (outside subcontract of work) vs. 1st Nat'l Maintenance (decision to get out of business) distinction seems to lend support to their decision being in managements exclusive decision making control. Therefore permissive (no duty to bargain). Does the employers stated reason for the relocation, costs, give rise to Traits duty to produce evidence to support the claim? Milwaukee Spring, held that relocation was a the core of enterprise control and therefore did not give rise to the duty to bargain. If the ER makes unilateral change regarding a subject in its exclusive control, it does not have a duty to bargain over it. Applying the Dubuque Test, it seems that moving states in a legal practice, where the substantive law is different, er's clients maybe different and require different type of work, and the criteria for practice are different, indicates that it is probably a decision in exclusive managerial control.

3. According to J. Weingarden, an ee has a right to U. Steward representation under § 7 mutual aid and protection. To exercise this right, the ee must make his request clearly known to the er, must reasonably believe that the meeting/investigation will lead to discipline, and must recognize the er's legitimate business interest in quick resolution of the problem. It does not include the right to representation at "shop floor discussions" related to the production process, does not give the Uee a right to the steward his choice, allows the er to opt out the process by interviewing others, and recognizes the er's choice in how to limit the role of the steward. Since the action my M leads to discipline and TT made his demand known, and there was no legitimate business need for immediate resolution, TT's right probably was violated. This gives rise to a claim for TT to have his U. arbitrate. Under Vaca vs Sipes, the U. has much discretion to decide whether to pursue the claim, unless it is not done because of arbitrariness, discrimination or bad faith. Here there is clear evidence of discrimination against the non-U member who is a part of the bargaining unit b/c he doesn't pay fees, which he is not required to do by law. (Steele). This seems to breach the DRF (duty of fair representation). DRF applies to the decision to arbitrate and to bargain (ALPA vs O'Neill). The remedies for a situation where the initial ULP of an ER is not remedied by arbitration because the u refused to pursue the claim is as follows:



The ER will be liable for back pay and reinstatement and interest for times A&B. The U. Will be liable for time C since its decision not to proceed extended the ER's damages, even though the ER was the only entity that could remedy the ULP.

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Sample Student Answer - Question II

On the question of preemption, the law has been quite varied and not particularly consistent. It is well established that state criminal laws of generally applicability won't be preempted by federal labor law. The question is whether the action is expressly preempted. Whether it is expressly not preempted, whether the federal labor law exhibits an intent to occupy the field, or whether the action may be said to arguably be preempted to arguably not. This raises the question of the nature of the city's action. First, this resolution is specific rather than general, which cuts in favor of preemption. On the other hand, the city's action here is not a statute as such, but merely a resolution expressing the action that the city is taking and recommending similar action to others. It is not a law with binding effect on a party other than the city itself. In that vein, this action may be seen as merely the unilateral action of an outside party which merely happens to be a state government. The action of withdrawing subscription and advertising support is akin to an action by a private actor. This cuts against preemption. The effect of official rebuke, however, may be of sufficient weight to merit treating this an action at least subject to preemption. However, the city will likely argue that a decision of Microsoft or another influential private actor might have a like effect.

This action does not appear to be either expressly prohibited or expressly permitted (no other law is given express approval). The question of intent to occupy the field is a difficult one. No express intent to occupy the field with respect to unfair labor practice practices is evident. In fact §10(a) expressly authorizes the NLRB to cede power to prevent ULPs by agreement with any state agency. Arguably, the city council might fall under such exception. The limitations on ceding such authority are that the state statute applicable not be inconsistent with federal labor law. However, here no evidence exists that NLRB has expressly ceded such authority.

Nevertheless, the ambiguity of categorization of the city's resolution likely pushes it into the category of arguably prohibited and arguably permitted. In such cases, courts are to balance the federal interest in exclusivity, consistency and finality against the state interest in regulation. With ULPs, the federal interest is generally strong. Here, the state and local police power, a strong interest, is not clearly implicated. Absent criminal enforcement or intentional/reckless tort liability, state and local actions have been subject to considerably more scrutiny. Nevertheless, some state actions have survived outside the police power context where in the arguable context and consistent (or at least not inconsistent) with federal statutes. This action may be regarded as at least not inconsistent because it supports federal condemnation of ULPs. However, it may well be inconsistent as NLRA lodges tremendous enforcement discretions in the General Counsel and the Board. Creating a new type of "remedy" for labor violations may hinder that discretion. Nevertheless, Board policy has been (under Collyer & Spielberg) to allow arbitration processes to run their course and then affirm those decisions unless clearly erroneous. Although not directly analogous, these provisions indicate further the Board's willingness to cede some of its statutory authority over labor relations. Here, the city's resolution does not take away the Board's ability to find a ULP or "punish" the purported offender. The city merely expresses its disapproval based on a number of factors NOT limited to labor issues. The city is concerned with its economic stake in its hometown newspaper and is acting partly in that interest. This may arguably disturb the balance of labor and management power, thus violating labor policy. Nevertheless, it seems likely to survive preemption attack in light of the board's and the courts' relaxation of preemption in recent years especially because its effect is limited and arguably not inconsistent with federal labor policy. It is a general policy statement by the city which should be ok.

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Sample Student Answer - Question III

The Union is not entitled to statutory immunity from AT liability under *Hutchison*, since it acted in concert w/ ERs (by signing agreement w/ ER). For the non-statutory exemption to apply to the U, there must be no conduct on V's part violative of federal labor law, which would cause loss of the exemption under *Connell* and *Brown v. Pro Football*. 1) W/ regard to the U agreement to lower wage rates and a wage freeze, this agreement itself contained in CBA's properly signed w/ ERs does not violate any labor law. The union is free to concede whatever terms it chooses. 2) W/ respect to clause 1, there is an issue of whether this is prohibited by 8(b)(4)(A) and 8(c) as a hot cargo clause or secondary pressure. The first sentence, while it purports to apply to all subs on a *job site* (implicitly requiring generals to require all subs on job to be union) is not violative of 8(e) because it fits within the construction industry proviso to 8(e) (job site only). The second sentence does violate 8(e), because it requires generals to use union subs regardless of whether the work is being done on *site*. However, the union might argue that Clause 1 is merely a union standards clause rather than union signatory, because it only requires the subs to live up to the standards imposed by the agreement (not to sign it). This seems irrelevant because the union is not trying to protect workers by promoting U standards, but exert pressure on other subs to make concessions that would be economically damaging to them. 2) Clause 2 is probably outside the AT exemption as well. It attempts to override the power of the ER to form a double-breasted operation, and tramples rights protected in the Act in the process. Forcing the ER to follow the U K in a separate 2d operation is an unlawful encroachment on 8(b)(1), since it removes EEs right to choose whether to be represented by a union, protected in § 7 (provided the ER respected formalities to properly open a completely separate 2nd company or entity). Additionally, even if

the 2nd operation is not a completely separate employer, it is possible that the Bd. would find that EEs in a new operation should be in a separate unit than those already organized. In that case, this agreement would unlawfully tie the hands of the Bd. in determining unit appropriateness under 9(b). 3) Clause 3 is probably lawful, and thus entitled to a non-statutory exemption from AT liability because it appears to be a properly bargained for K term. However, courts following *Steelworkers* doctrine might hold the clause invalid if it removes the consideration for a valid arbitration clause.

The above discussed violations of 8(b)(4) contained in the agreement terms may in fact be immune from AT liability, as there is some suggestion in Congress' legislative history that proceedings under 8(b)(4) were intended to be the sole remedy for such violations.

The union's insistence on the terms of the agreement all the way to impasse will be violative of their duty to bargain in good faith under 8(b)(3) to the extent that the terms of the agreement are permissive subjects of bargaining not included in 8(d). It appears that the subcontracting clauses are not encompassed in terms and conditions of employment under 8(d), thus that failure to bargain may also signal AT liability.

Exam Number _____

FINAL EXAMINATION

in

LABOR LAW

December 17, 1996

Mr. Shanor

Instructions

This two and one-half hour exam contains three parts. Part I (75 minutes) consists of three questions which concern the same place of employment. Part II (30 minutes) is one essay question. Part III (45 minutes) is one essay question.

This exam is closed book, except that you may refer to the photocopied statutory materials handed out with the exam. You may not use your casebook, statutory and photocopied supplements, class notes, hornbook or nutshell; the library, other persons and computer facilities are off limits. This exam may be taken only in this room or the typing room.

Read, think and organize before you write.

All answers should be written or typed in the space provided.

Write your exam number on each page of the exam in the space provided and return your entire exam at the end of three hours.

GOOD LUCK!

II.
(30 minutes)

In the Fall of 1995, Alameda Newspapers purchased the Oakland Tribune, terminated the paper's contracts with nine unions, dismissed more than 400 of the Tribune's 600 employees, installed high-tech typesetting and other equipment, and completely revamped the paper's format, business operations, and news operations. It also moved the printing operations out of Oakland to suburban Hayward. Shortly thereafter, the Conference of Newspaper Unions launched a boycott of the Tribune and other Alameda Newspaper publications. As part of its boycott, the Conference asked the Oakland City Council to terminate the City's relationship with the Tribune.

The City Council soon passed a resolution which stated:

WHEREAS, a Texas-based publisher has purchased the Oakland Tribune, which has been the newspaper of record in this city for over 100 years, and moved it out of Oakland; and

WHEREAS, the new owners of the Oakland Tribune have embarked on a course of anti-union conduct including elimination of over 400 jobs, regressive bargaining tactics such as offering less than one-half the union scale pay for experienced editorial employees and refusing to provide satisfactory health benefits; and

WHEREAS, the Conference of Newspaper Unions has initiated a boycott of the Oakland Tribune; now, therefore, be it

RESOLVED, that the Oakland City Council endorses the boycott of the Oakland Tribune, immediately cancels all City of Oakland subscriptions of the Oakland Tribune, immediately cancels all advertisements in the Oakland Tribune, urges all citizens of Oakland to stop purchasing and advertising in the Oakland Tribune, and requires of all contractors doing business with the City of Oakland that they not advertise in the Oakland Tribune during the term of such contract.

Alameda Newspapers has filed suit against the City of Oakland, alleging that the City's resolution is preempted by the National Labor Relations Act and seeking injunctive, declaratory, and monetary relief. Write a short opinion discussing whether the resolution is preempted.

III.
(45 minutes)

Faced with increased nonunion competition, the Carpenters Union proposed a Market Recovery Program for private sector work which included a one year wage freeze, lower rates than the normal union schedule on certain jobs, and the following subcontractor clauses:

1. This Agreement shall bind all subcontractors while working for a contractor on the job site upon whom this Agreement is binding. Any contractor who sublets any of his work must sublet such work subject to this Agreement.

2. In the event that the partners, stockholders, or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of this Union and employs or will employ the same or similar classifications of employee covered- by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract.

3. In the event of breach of this Agreement by contractor, the Union shall be authorized to strike the contractor or seek damages f or breach of this agreement in any court having appropriate jurisdiction over such a suit for damages.

Many local area contractors signed onto the Market Recovery Program in collective bargaining agreements with the Carpenters Union. Ajax contractors, however, refused to sign when it bargained with the Union for a new agreement. While Ajax has never been affiliated with a nonunion construction company, Ajax' President, Vinny Alexander, took a firm stand that "we want to be free to use whomever we want to, whenever we want to." The Union, for its part, took the position that these clauses were a condition precedent to its acceptance of the wage freezes and reduced rates for certain jobs. When impasse was reached, the Union picketed the Ajax office and all its job sites. Ajax, facing massive revenue losses, signed the agreement under protest and filed an antitrust suit against the Carpenters Union in federal court.

As the District Court Judge assigned this case, rule on the Union's motion to dismiss Ajax' complaint.