

CHICAGO-KENT COLLEGE OF LAW  
ILLINOIS INSTITUTE OF TECHNOLOGY

Professor Martin H. Malin  
Saturday, December 13, 2008 1:15 p.m.

Labor Law

FINAL EXAMINATION  
(3 Hours)

Directions

This examination is open book. You may use any or all of the following: the Dau-Schmidt, Malin, Corrada, Cameron & Fiske casebook manuscript, printouts of the National Labor Relations Act, Railway Labor Act, Labor Management Relations Act and Norris-LaGuardia Act, and any materials personally prepared by you or prepared jointly with other students in the class, as long as they are handwritten or typed on regular paper. You may not have any other materials at your desk during the exam. If you have brought any other materials into the room, you must place them at the front of the room. You may not share materials during the exam. You may not tear pages out of your bluebooks. You are not to identify yourself in any manner, other than exam number, on your blue books, question sheets or anything else turned in that will be submitted to the professor. Any violation of these rules will be treated as a violation of the Code of Conduct. Questions are weighted as follows:

1. 30 points
2. 50 points
3. 20 points

Good Luck!

Have a great holiday!

**Question 1 (30 points)**

You are an administrative law judge with the National Labor Relations Board. You have presided over charges filed by August A. Busch & Company of North Dakota, Inc. (ABC), that Teamsters Local 11234 violated sections 8(b)(3) and 8(b)(4)(B) of the NLRA. The Regional Director issued a complaint against Local 11234.

Evidence developed at the hearing showed that ABC is a subsidiary of Anheuser-Busch, Inc., and operates a distributorship, distributing Busch products throughout North Dakota to retail outlets, restaurants, bars and other customers. Local 11234 represents a bargaining unit of truck drivers, helpers and warehouse workers. Local 11234 represents a similar bargaining unit at Statewide Beverage Distributors, which distributes, among other brands, products of Miller Brewing Company, Busch's principal competitor in North Dakota.

During negotiations, a key issue dividing the parties concerned Article 2(1)(a) of the existing collective bargaining agreement, which provided, "The Employer shall call the Union whenever additional help is needed. However, in the event the Union is unable to provide needed help, the Employer may hire on a temporary basis from other sources." The record reflects that ABC employs about 100 regular drivers, helpers and warehouse workers but, because the demand for its products and, correspondingly, the number of truckloads to be delivered varies greatly from day-to-day, it also averages employing 25 "spares," primarily extra drivers, per day. The number of spares needed on a given day varies considerably. It is usually very high immediately before a summer holiday weekend, i.e., Memorial Day, July 4<sup>th</sup>, and Labor Day. During slow periods, ABC may only need a few spares, largely to fill in for regular employees who are absent. The parties have agreed that spares referred as drivers must be at

least 21 years old and must have the appropriate Commercial Driver's License.

To meet the needs of ABC and Statewide for spares, Local 11234 operates a hiring hall. Generally, the loads and routes for a given day are developed by ABC's chief router sometime during the night before. The number of routes, and hence the number of drivers and helpers needed, is determined by the quantity of product to be delivered, the number of delivery stops, the number of stops to pick up empty returnables and the time specified by customers that they want their deliveries. (Customers generally specify a two hour window for deliveries.) The chief dispatcher then advises the Local 11234 hiring hall of its needs for the following morning. Spare drivers and helpers arrive at 6:00 a.m. Although ABC has the right to reject anyone referred by the hiring hall, as a practical matter it must accept all referrals because there is no time to get other workers if it is to make its deliveries in a timely manner. For similar reasons, when Local 11234 has not referred enough workers to meet ABC's needs, ABC has been unable to hire temporaries from other sources.

During negotiations, ABC proposed deleting Article 2(1)(a). It urged that the Local 11234 hiring hall frequently failed to provide enough spares to it and often provided it with spares who it knew ABC did not want because of complaints ABC registered with the hiring hall about the prior performance of specific individuals. ABC accused Local 11234 of favoring Statewide in its referral of spares from the hiring hall. It also expressed concern that virtually every spare referred by the hiring hall was a white male of Scandinavian descent, even though the Hispanic population in the Fargo area has increased dramatically in the last five years. ABC requested Local 11234 provide it with copies of the daily records of hiring hall registrants and referrals, not only to ABC but also to Statewide, a statement and any available documentation

that Local 11234 had about its efforts to publicize the availability of its hiring hall service to CDL holders, whether Local 11234 made any efforts to publicize its hiring hall services within the Hispanic community, and all records of fees charged to workers using its hiring hall services both for registration and for receipt of referrals. Local 11234 denied the request, contending that it was irrelevant, privileged and overly burdensome.

After the existing collective bargaining agreement expired, Local 11234 did not engage in a strike. Instead, it called for a consumer boycott of Busch products, particularly Budweiser Beer and Bud Lite. It took out ads in the Fargo newspaper and on local radio stations. Its ads featured an evil looking character it called "Bud Weasel." Local 11234 also picketed Downtown Liquors (DL), a retailer in downtown Fargo. DL has a large store that fronts on a public sidewalk and has a large customer parking lot in the rear. Many customers are people who work in Downtown Fargo and walk over from their offices to make purchases. Others drive over and park in the lot. Entrance to the parking lot is around the corner from the entrance to the store. Customers who park in the lot enter the store directly from the lot using a rear door.

Local 11234 members held two large banners that read, "Boycott Bud! Bud Workers Deserve a Fair Contract," one on the sidewalk adjacent to the front entrance and one on the sidewalk around the corner by the entrance to the parking lot. Other union members picketed in front of the store with signs that read, "Boycott Bud," or had large pictures of "Bud Weasel," and the words, "Don't let Bud Weasel You!" They also distributed literature asking consumers to boycott Busch products.

During the first week of the picketing, store traffic remained steady as did sales of Busch products. After a week, Local 11234's tactics changed. As consumers left the store, union

members stopped them, saying, “I hope you didn’t buy Bud,” and trying to look into their bags. When a union member would find a Busch product in a departing consumer’s bag, the member would say something like, “How could you do this to us!” When a consumer would show his or her bag containing Miller products, the union members would let out a cheer. After this activity began, store traffic dropped considerably and sales of Busch products also decreased considerably. Sales of Miller products remained steady. Sales of other items, such as chips, dip and other snack foods, decreased considerably.

ABC is one of largest advertisers on local radio station KFGO. ABC and KFGO sponsored a monthly “Bud & Bud Lite Night” at a downtown restaurant. A KFGO disc jockey played music and conducted trivia contests and a dance contest and awarded prizes, generally Busch merchandise. Budweiser and Bud Lite were offered to customers at a deep discount. After the boycott began, ABC and KFGO held a Bud & Bud Lite Night at the Fargo Pour House, a popular downtown restaurant and bar from 5:30 to 7:00 p.m. Local 11234 picketed the restaurant. In addition to the signs it used at DL, Local 11234 members held signs that read, “Boycott Bud & Bud Lite Night! Bud Workers Deserve a Fair Contract.” Some union members entered the Fargo Pour House but did not identify themselves as union members. They ordered Miller Lite and approached other patrons offering to treat them to a Miller if they would boycott Bud. One of the union members won one of the trivia contests. When awarded a Bud Lite T-shirt, the union member ripped it up and all of the members present chanted “Boycott Bud.” They were asked to leave the restaurant and refused. The restaurant manager threatened to call police, but the KFGO producer intervened saying she did not want that to occur while they were still on the air. The entire scene was broadcast on the air. After the incident, KFGO told ABC

that it would not cosponsor any further Bud & Bud Lite Nights until the labor dispute was resolved.

As ALJ, how will you decide the case? Explain.

**Question 2 (50 points)**

You are counsel to Clerical Workers International Union Local 111. Local 111 represents three different bargaining units of employees at Smith, Charles, Anderson & Brown, PC (SCAB), a large corporate law firm. One unit consists of 150 administrative assistants, paralegals and messengers employed at SCAB's Chicago Loop office (the Loop unit). A second unit consists of about 30 administrative assistants and paralegals employed in SCAB's Kane County office in Aurora, Illinois (the Aurora unit) and a third unit consists of about 25 administrative assistants and paralegals employed in SCAB's Lake County office in Waukegan, Illinois (the Waukegan unit). Each unit has its own collective bargaining agreement. The agreements covering the Aurora and Waukegan units expire January 1, 2009 and June 1, 2009 respectively. Both agreements provide, "The parties agree that there shall be no strike or other collective cessation of work during the term of this agreement or any mutually agreed-on extensions thereto. There shall also be no lockout of any employees during the term of this agreement or any mutually-agreed extension thereto." Both agreements require just cause for discipline and discharge. Both agreements contain grievance and arbitration procedures covering, "any claim by any employee, the union or the employer that there has been a breach, misapplication or misinterpretation of any provision of this agreement." The grievance procedures have three steps with Step 3 providing for discussion of the grievance between the law firm's managing partner and the union's business representative. Both provide that if resolution is not reached at Step 3, the grieving party may

demand arbitration and the parties will jointly request a list of five arbitrators from the FMCS with the grieving party striking one name and the parties then alternating strikes until one name remains.

The contract covering the Loop unit expired three months ago and three weeks after it expired Local 111 began a strike. Since SCAB is the only law firm in the Chicago Loop whose support staff are unionized, the strike has been front page news in the *Chicago Daily Law Bulletin*. Sara Smith, the firm's managing partner, told the *Law Bulletin* on the day the strike began that the firm would not be intimidated by the strike, that it would continue to service its clients and that if the strikers did not return to work by the following Monday, SCAB would begin taking applications for permanent replacements. Local 111 represents administrative support staff at several financial services and securities companies. Many of its members at those companies have been laid off in the past two months. When SCAB began taking applications for permanent replacements, Local 111 had about 25 of its unemployed members apply with the understanding that when the strike ended, they would quit rather than keep the jobs that would otherwise go to returning strikers. Of course, when they applied to SCAB, they did not reveal their Local 111 affiliation; they merely represented that they had been laid off from whatever firm they had formerly worked for. All 25 were hired as were another 75 permanent replacements. Local 111 demanded, as a condition of strike settlement, that all strikers be guaranteed their jobs back even if that required that replacements be bumped.

At a bargaining session about four weeks ago, Sara Smith asked if all of the 150 members of the bargaining unit wanted to return to SCAB. Rosemary Rebel, Local 111's business representative and chief negotiator, replied that she thought that about 50 had found other jobs

and that most of them would not be interested in returning to SCAB. Rosemary also stated that Local 111 would be open to discussing SCAB's retaining the replacements as long as SCAB provided a job to every striker who wanted to return. Sara responded, "Well, we'll cross that bridge when we come to it. We remain far apart on wages and health insurance and we're not ready to discuss return to work arrangements until after we reach tentative agreements on the outstanding economic issues."

The 25 Local 111 members who are working as replacements for SCAB have reported to Local 111 that beginning right after the bargaining session at which the above exchange took place, SCAB supervisors and partners began talking to replacements in small groups telling them that Local 111 has been demanding that all strikers get their jobs back, that this means Local 111 wants the replacements terminated, and that as long as Local 111 is there, the replacements are vulnerable to termination. They have also been telling the replacements that the strikers are getting no wages and no unemployment compensation and that is what Local 111 brings – nothing but grief. Meanwhile, 20 Local 111 members who were part of the group that struck have resigned their membership and returned to work.

With the 100 replacements and 20 crossovers, the SCAB support staff is almost back to full strength and the 25 Local 111 members working as replacements have reported that SCAB's operations are running smoothly. They also reported that last week, five replacements lent their names to an e-mail sent by a sixth to all working administrative support staff inviting them to join an e-mail distribution list for a new organization they were forming, "Loyal SCAB Employees" (LSCABE). LSCABE was dedicated to "removing the Local 111 barrier to our direct interaction with SCAB management." LSCABE stated that membership was open to

anyone with a SCAB-Loop e-mail address, the e-mail address for all support staff, associates and partners at SCAB's Loop office. Sara Smith and the entire SCAB management committee are signed on to LSACBE and there are frequent discussions on LSACBE of terms and conditions of employment and of what management can do if Local 111 no longer represents the employees. Sara Smith also sent an e-mail to the LSACBE listserv entitled, "Set Yourselves Free," which truthfully described the NLRB decertification process. Several strikers attempted to sign up for the LSACBE listserv but found that their SCAB-Loop e-mail addresses had been disabled as have the SCAB-Loop e-mail addresses of every other striker.

Yesterday, Local 111 received notice from the NLRB regional office that a petition has been filed by a group of SCAB employees seeking to decertify Local 111 as exclusive representative of the Loop unit. To increase pressure on SCAB, Local 111 is considering picketing the Waukegan and Aurora offices and calling on Local 111 members in those units to respect the picket lines. The idea is to picket only for a day or two at a time and to do so at unpredictable intervals so as to cause chaos at those offices and make it difficult for SCAB to replace the employees who refuse to cross the picket lines because they would be back at work before they could be replaced.

As counsel for Local 111, advise your client how to proceed, both with respect to the decertification petition and the proposed intermittent picketing strategy at the Aurora and Waukegan offices.

**Question 3 (20 points)**

You are counsel to Sunshine Nursing Home, a skilled nursing facility in Naperville, Illinois. Sunshine's nurses are represented for purposes of collective bargaining by the National

Nurses Organizing Committee (NNOC). Recently NNOC attempted to organize a unit of Sunshine's nonprofessional staff, consisting of its certified nursing assistants, food service workers and laundry workers. NNOC filed a representation petition and Sunshine consented to an election. During the campaign, Sunshine urged its employees to vote no. Among other arguments Sunshine made was that the NNOC would have a conflict of interest and could not be counted on to protect the interests of the nonprofessional employees when its core constituency was the nurses. The election was held four months ago and NNOC lost 48% to 53%.

Several NNOC supporters spoke to their coworkers who had voted no and learned that the coworkers did not want to be represented by a nurses' union but were interested in unionizing. This group then contacted SEIU and began circulating authorization cards. They received signed authorization cards for SEIU from 55% of the nonprofessional employees, advised Sunshine management of this development and demanded recognition. Sunshine refused the demand. SEIU then began picketing Sunshine with signs stating, "Sunshine Unfair. Does Not Pay Area Standards. SEIU, the Union for Nursing Home Workers" Sunshine advises you that it believes it has kept its nonprofessional staff union free because it pays the same wage rate as unionized nursing homes pay, although its health insurance benefits are lower and it does not give workers paid sick leave, instead expecting them to use vacation days if they are ill. A sunshine manager confronted the pickets and asked them what they wanted. The pickets replied in unison, "We want a contract."

Sunshine's demand to you: "Do something to stop this picketing!" What will you advise Sunshine to do? Explain.