

# Hypotheticals for Review of Fact Determinations

## I. Statutory provisions - National Labor Relations Act (NLRA):

29 U.S.C. § 158(a)(3) states that it is an "unfair labor practice" for an employer by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization.

29 U.S.C. § 160 empowers the National Labor Relations Board (NLRB) to hold hearings to determine whether any person is engaged in unfair labor practices, and authorizes the NLRB to issue orders requiring persons to cease and desist from engaging in unfair labor practices. Assume, for purposes of this hypothetical, that the statute requires the hearings to comply with 5 U.S.C. §§ 556 and 557.

29 U.S.C. § 160(f) allows persons aggrieved by a final order of the NLRB to obtain review of the NLRB's order in the U.S. Courts of Appeals. Assume, for purposes of this hypothetical, that the NLRA **does not** explicitly state that factual determinations will be upheld if based on substantial evidence.

## II. Facts:

### A. ***The Dispute:***

Newman, a parcel delivery truck driver at American Parcel Service (APS), is fired by APS in July 2016, allegedly for incompetence and theft.

Newman files a complaint with the NLRB, alleging that he was actually discharged because he was attempting to unionize the parcel delivery drivers at APS and that APS, therefore, committed an "unfair labor practice."

### B. ***The Hearing:***

#### Newman's testimony:

At the hearing held by the NLRB, Newman testified that he organized two meetings of the parcel delivery drivers at APS in September 2015 in an attempt to create a union to represent the parcel delivery drivers. Newman also testified that, immediately following the two meetings, his employer threatened to fire him if he continued to attempt to unionize the parcel delivery drivers. Newman testified that he did not make any further attempts to unionize the workers after his employer's second warning in September 2015.

Newman's employer's testimony:

Newman's employer testified at the hearing that Newman was often late for work, and was insubordinate to his supervisors. Several supervisory employees corroborated the employer's testimony. Newman's employer also testified that from May 2016 until Newman was fired, several customers on Newman's route complained to APS that they did not receive parcels that had allegedly been mailed to them through APS. Newman's employer testified that he believed that Newman stole those packages. Newman's employer testified that he fired Newman for his incompetence and for the theft of the packages.

C. ***The Board's decision***

On the basis of the testimony received at the hearing, the NLRB determined that:

- (1) APS terminated Newman for attempting to unionize the parcel delivery drivers at APS, and
- (2) APS's actions constituted an unfair labor practice.

The Board ordered APS to reinstate Newman.

D. ***The challenge***

APS seeks review of the NLRB's order in court, challenging the NLRB's finding that APS terminated Newman for attempting to unionize the parcel delivery drivers.

- E. ***Questions to think about:*** What factual questions were resolved by the agency? What standard would a court use to review the agency's fact-finding? Would the court uphold the agency's fact-finding?

III. Variation I

- A. **Testimony** (in addition to the testimony described above): At the hearing before the NLRB, Newman's employer was unable to offer any proof, other than the employer's own testimony, that Newman stole any of the missing packages, or that the packages were ever received by APS. In addition, representatives of the companies that allegedly sent the missing packages testified that their shipping records for May - July, 1997 were destroyed in a fire, and that they could not confirm that they sent the missing packages through APS.
- B. **Board's decision:** On the basis of the testimony received at the hearing, the NLRB determined that
- (1) Newman did not steal any packages,
  - (2) APS terminated Newman for attempting to unionize the parcel delivery drivers at APS, and
  - (3) APS engaged in an "unfair labor practice."

The Board ordered APS to reinstate Newman.

- C. **Questions to think about:** Is there any additional fact-finding for the court to review? Under what standard? What result?