

Members of the jury, you have seen and heard all of the evidence and the arguments of the attorneys. Now I will instruct you on the law that applies to this case.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in this case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

You must perform your duties fairly and impartially. In deciding your verdict, you must not allow sympathy, bias, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex. The parties to this case and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law that I give you, and reach a just verdict regardless of the consequences.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be. It is not my function to determine the facts in this case. That function belongs to you.

You should consider and decide this case as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair consideration. A corporation is entitled to the same fair consideration as a private individual. All persons and corporations stand equal before the law and are to be dealt with as equals in a court of justice.

As I stated earlier, it is your duty to determine the facts. In determining the facts, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses, testimony that was read to you from depositions, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that certain facts are true or that a person would have given certain testimony.

Certain things are not evidence. I will list them for you.

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, television, or Internet reports that you may have seen or heard. Such reports are not evidence, and your verdict must not be influenced in any way by such publicity.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements and arguments to you are not evidence. The purposes of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember it is different from what the lawyers said, your memory is what counts.

Some of you may have heard the phrases “direct evidence” and “circumstantial evidence.” Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, in other words it is proof of one or more facts that point to the existence or non-existence of another fact. You are to consider both direct and circumstantial evidence. The law allows you to give equal weight to both types of evidence, but it is up to you to decide how much weight to give to any evidence in the case.

You are to consider all of the evidence in determining your verdict. However, that does not mean that you must accept all of the evidence as true or accurate.

You should use common sense in considering the evidence, and you should consider the evidence in light of your own observations in life.

In our lives, we sometimes look at one fact and conclude from that fact that another fact exists. In law we call this an “inference.” You are allowed to make reasonable inferences. Any inferences that you make must be reasonable and must be based on the evidence in the case.

In determining the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. You will also have to decide what weight, if any, to give to the testimony of each witness.

In considering the testimony of any witness, you may take into account:

- the opportunity and ability of the witness to see or hear or know the things that the witness testified about;
- the witness's age;
- the witness's memory;
- the witness's intelligence;
- any interest the witness may have in the outcome of the case, and any bias or prejudice the witness may have;
- the witness's manner while testifying;
- the reasonableness of the witness's testimony in light of all the evidence in the case; and
- any other factors that bear on believability.

The weight of the evidence as to a particular fact does not necessarily depend on the number of witnesses who testify. You may find the testimony of a smaller number of witnesses to be more persuasive than that of a greater number.

A witness may be discredited or “impeached” by contradictory evidence, by, among other things, a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something that is inconsistent with the witness’s testimony.

If you believe that any witness has been impeached, then you must determine whether to believe the witness’s testimony in whole, in part, or not at all, and how much weight to give to that testimony.

It is proper for an attorney to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney does not, by itself, reflect negatively on the truth of the witness's testimony.

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

In a civil lawsuit like this one, the burden is on each particular plaintiff to prove every essential element of his claim by a “preponderance of the evidence.”

A preponderance of the evidence simply means evidence that persuades you that the particular plaintiff’s claim is more likely true than not true.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If the proof establishes each essential element of the particular plaintiff’s claim by a preponderance of the evidence, then you should find for that plaintiff as to that claim.

If the proof fails to establish any essential element of the particular plaintiff’s claim by a preponderance of the evidence as to any particular defendant, then you should find for that defendant as to that claim.

Elements of Plaintiff Pease's Claims

Pease Claim One

Plaintiff Pease claims that defendant Randall Industries terminated him without just cause in violation of the collective bargaining agreement and that Local 707 breached its duty of fair representation. To prevail on this claim against defendants, plaintiff Pease must prove two things by a preponderance of the evidence:

- (1) that Randall's action was contrary to the collective bargaining agreement between Local 707 and Randall, and
- (2) that Local 707 breached its duty of fair representation with respect to this claim.

An employer may not discharge an employee governed by a collective bargaining agreement, such as the one involved in this case, unless "just cause" exists for the employee's termination. The term "just cause" means a real cause or basis for the termination as distinguished from an arbitrary whim or caprice. "Just cause" is the cause or ground, including economic factors as well as other appropriate factors, that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

The notion of just cause provides that a penalty such as termination must be consistent with the seriousness of the offense taking into account all the circumstances relating to the termination.

The verdict form that relates to this claim contains questions for you to answer that will allow you to unanimously report your verdict on this claim.

Pease Claim Two

Plaintiff Pease claims that defendant Randall Industries violated the seniority provisions of the collective bargaining agreement by terminating him and replacing him with an employee with less job classification seniority and that Local 707 breached its duty of fair representation. To prevail on this claim against defendants, plaintiff Pease must prove two things by a preponderance of the evidence:

- (1) that Randall's action was contrary to the collective bargaining agreement between Local 707 and Randall, and
- (2) that Local 707 breached its duty of fair representation with respect to this claim.

The verdict form that relates to this claim contains questions for you to answer that will allow you to unanimously report your verdict on this claim.

Pease Claim Three

Plaintiff Pease claims that defendant Randall Industries terminated its employment of him because of his support for Local 150 in violation of the collective bargaining agreement and that Local 707 breached its duty of fair representation. To prevail on this claim, plaintiff Pease must prove two things by a preponderance of the evidence:

- (1) that Randall's action was contrary to the collective bargaining agreement between Local 707 and Randall, and
- (2) that Local 707 breached its duty of fair representation with respect to this claim.

With respect to this claim, to show a violation of the collective bargaining agreement, plaintiff Pease must prove that Randall's opposition to Local 150 was a substantial or motivating factor in Randall's decision to terminate Pease. Plaintiff Pease must prove the following three things by a preponderance of the evidence:

- (1) prior to his termination, he was engaged in activities in support of Local 150,
- (2) Randall knew of and opposed Pease's activities in support of Local 150, and
- (3) Pease's support of Local 150 was the reason Randall terminated him.

If Pease proves the elements of Claim Three which are numbered in the previous paragraph, Randall may avoid liability by proving by a preponderance of the evidence that it would have terminated Pease regardless of his support for Local 150 because he was the employee with the least seniority in his job classification at the time he was terminated.

If you find that Pease proved that Randall terminated him because of his support of Local 150 and that either Randall's reason did not exist or that Randall did not actually rely on that reason, you must determine if Pease has proven by a preponderance of the evidence that Local 707 breached its duty of fair representation with respect to this claim.

The verdict form that relates to this claim contains questions for you to answer that will allow you to unanimously report your verdict on this claim.

Elements of Plaintiff Berge's Claims

Berge Claim One

Plaintiff Berge claims that defendant Randall Rents violated the seniority provisions of the collective bargaining agreement by terminating Berge instead of another employee with less job classification seniority and that Local 707 breached its duty of fair representation. To prevail on this claim against defendants, plaintiff Berge must prove two things by a preponderance of the evidence:

- (1) that Randall's action was contrary to the collective bargaining agreement between Local 707 and Randall, and
- (2) that Local 707 breached its duty of fair representation with respect to this claim.

The verdict form that relates to this claim contains questions for you to answer that will allow you to unanimously report your verdict on this claim.

Berge Claim Two

Plaintiff Berge claims that defendant Randall Rents terminated its employment of him because of his support for Local 150 in violation of the collective bargaining agreement and that Local 707 breached its duty of fair representation. To prevail on this claim, plaintiff Berge must prove two things by a preponderance of the evidence:

- (1) that Randall's action was contrary to the collective bargaining agreement between Local 707 and Randall, and
- (2) that Local 707 breached its duty of fair representation with respect to this claim.

With respect to this claim, to show a violation of the collective bargaining agreement, plaintiff Berge must prove that Randall's opposition to Local 150 was a substantial or motivating factor in Randall's decision to terminate Berge. Plaintiff Berge must prove the following three things by a preponderance of the evidence:

- (1) prior to his termination, he was engaged in activities in support of Local 150,
- (2) Randall knew of and opposed Berge's activities in support of Local 150, and
- (3) Berge's support of Local 150 was the reason Randall terminated him.

If Berge proves the elements of Claim Two which are numbered in the previous paragraph, Randall may avoid liability by proving by a preponderance of the evidence that it would have terminated Berge regardless of his support for Local 150 because he was the employee with the least seniority in his job classification at the time he was terminated.

If you find that Berge proved that Randall terminated him because of his support of Local 150 and that either Randall's reason did not exist or that Randall did not actually rely on that reason, you must determine if Berge has proven by a preponderance of the evidence that Local 707 breached its duty of fair representation with respect to this claim.

The verdict form that relates to this claim contains questions for you to answer that will allow you to unanimously report your verdict on this claim.

Elements of Plaintiff Gear's Claims

Gear Claim One

Plaintiff Gear claims that defendant Randall Rents failed to pay him for thirty-two hours of work for the week of April 1, 2002, in violation of the collective bargaining agreement and that Local 707 breached its duty of fair representation. To prevail on this claim against defendants, plaintiff Gear must prove two things by a preponderance of the evidence:

- (1) that Randall's action was contrary to the collective bargaining agreement between Local 707 and Randall, and
- (2) that Local 707 breached its duty of fair representation with respect to this claim.

The verdict form that relates to this claim contains questions for you to answer that will allow you to unanimously report your verdict on this claim.

Duty of Fair Representation

A union breaches the duty of fair representation only if its actions are arbitrary, discriminatory, or in bad faith. Each of these possibilities must be considered separately in determining whether or not a breach has been established.

Arbitrary

Whether a union's actions are arbitrary calls for an objective inquiry. A union's actions are arbitrary only if the union's behavior is so far outside a wide range of reasonableness as to be irrational. Mere negligence, even in the enforcement of a collective-bargaining agreement, does not constitute arbitrariness.

Insofar as grievances are concerned, a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory, automatic, or mechanical fashion. The union must provide some minimal investigation of employee grievances. However, the thoroughness of this investigation depends on the particular case, and only an egregious disregard for the union members' rights constitutes a breach of the union's duty. The union is not obliged to take all member grievances to arbitration. Rather, it has discretion to act in consideration of such factors as the wise allocation of its own resources, its relationship with other employees, and its relationship with the employer.

Discriminatory

Whether or not a union's actions are discriminatory calls for a subjective inquiry and requires proof that the union acted, or failed to act, due to an improper motive. A union must treat similarly situated employees in the same way. A union engages in unlawful discriminatory activity if its actions are based on forbidden reasons such as the age, race, or sex of the union member, or the union member's support of another union. Even where a member of a union supports a rival union or otherwise engages in conduct that is considered disloyal, a union must process the member's grievance properly.

Bad Faith

Whether or not a union's actions are in bad faith calls for a subjective inquiry and requires proof that the union acted, or failed to act, due to an improper motive. To show bad faith, plaintiffs must identify conduct by Local 707 union officials that would support a reasonable inference of bad faith on the part of Local 707. Conduct is in bad faith when it is designed to mislead someone by fraud, deceit, or dishonest action.

NLRB Decisions

During the trial, evidence has been presented of proceedings conducted before the National Labor Relations Board (“NLRB”). While decisions of the NLRB may be considered by you as evidence, they do not prevent the plaintiffs from presenting their claims in this court.

Determination of Damages

If, and only if, you find for plaintiff Pease or plaintiff Berge on any one of his claims, then you must determine the proper amount of money damages that that plaintiff is entitled to recover from each defendant.

Verdict forms have been prepared which you should follow to assist you in making the necessary calculations and reporting your verdict.

In determining the proper amount of damages a plaintiff is entitled to recover from each defendant, you must first decide what is the total amount of money, including all backpay, that plaintiff would have earned but did not earn at Randall because the defendants did the unlawful acts that you find to have been proven by a preponderance of the evidence.

That total amount of money the plaintiff would have earned at Randall must then be reduced by two things to account for that plaintiff's duty to mitigate and minimize his damages after he was terminated at Randall. Those two things that you must subtract are:

- (1) the amount of money, if any, that plaintiff earned from other employment after he was terminated at Randall; and
- (2) the amount of money, if any, that plaintiff should have earned from other employment but did not earn because of any failure by that plaintiff to mitigate his damages.

After you have reduced the total amount of money that a plaintiff would have earned had he not been terminated at Randall by the amount of money, if any, which accounts for that plaintiff's duty to mitigate, you will have determined the proper amount of that plaintiff's money damages.

Allocation of Damages

After determining the proper amount of damages a plaintiff is entitled to recover, you must then apportion and allocate the amount of that plaintiff's money damages between defendant Randall and defendant Local 707 in accordance with these instructions and report these amounts on the appropriate verdict form.

Randall is liable for lost wages due solely to its breach of the collective bargaining agreement in terminating each plaintiff. However, any increase in lost wages caused by Local 707's failure to process that plaintiff's particular grievance should be charged to the union and not the employer.

What this means is that if you find that a plaintiff would have been reimbursed for lost wages and/or would have been reinstated to his position at Randall but for the breach of Local 707's duty to represent that plaintiff, then you should find that Randall must pay the amount of damages suffered up to Local 707's breach of its duty, and Local 707 is liable for the damages after that point.

In Pease's case, Randall is liable for those damages that occurred up to the date of Arbitrator Stoya's award on July 10, 2002, and Local 707 is liable for all damages occurring after this date.

In Berge's case, Randall is liable for those damages that occurred up to the date Local 707 decided not to pursue his grievance to arbitration, and Local 707 is liable for all damages occurring after this date.

Mitigation of Damages

Plaintiff Pease and plaintiff Berge must make every reasonable effort to minimize or reduce their damages for lost wages by seeking employment. This is referred to as “mitigation of damages.” If you determine that plaintiff Pease or plaintiff Berge is entitled to lost wages, you must reduce the loss by:

- (1) what each respective plaintiff earned, and
- (2) what each respective plaintiff could have earned by reasonable effort during the period from his termination until the date of trial.

Defendants must prove by a preponderance of the evidence that the respective plaintiff failed to mitigate his damages for lost wages.

Plaintiffs Pease and Berge must accept employment that is “of a like nature.” In determining whether employment is “of a like nature,” you may consider:

- (1) the type of work,
- (2) the hours worked,
- (3) the compensation,
- (4) the job security,
- (5) the working conditions, and
- (6) other conditions of employment.

You must decide whether the respective plaintiff acted reasonably in not seeking or accepting a particular job. If you determine that a respective plaintiff did not make reasonable efforts to obtain another similar job, you must decide whether any damages resulted from that respective plaintiff’s failure to do so.

You must not compensate the respective plaintiff for any portion of that plaintiff’s lost wages resulting from that plaintiff’s failure to make reasonable efforts to reduce his lost wages.

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

These forms will be brought to you in the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.

During the trial, some of you from time to time have made notes. Please remember in using your notes during your deliberations that your notes are not evidence. Your notes are merely an aid to you in remembering the evidence. You should not be unduly influenced by the notes of other jurors. A juror's notes are not entitled to any weight if the notes are inconsistent with the collective recollections of the members of the jury as to the evidence in the case. You as the jury should rely on your collective recollections of the evidence in reaching your verdict in this case.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the court security officer. I will photocopy your communication, give it to counsel, and allow counsel to meet with me here in open court, as required by the law, before I respond to your communication.

If any communication is made, it should not indicate your numerical division.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the views of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions or your fellow jurors or solely for the purpose of returning a unanimous verdict.

All of you should give fair consideration to all the evidence and deliberate with the goal of reaching a verdict which is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to determine the truth from the evidence in the case.