XII. Labor Law

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Significant cases decided by Indiana courts in the 1975 term indicate that the body of labor law cases can be expected to expand significantly in oncoming years, especially in the uncharted public sector.

The most significant Indiana decision in the field of labor law during the survey period was that of the Benton Circuit Court in *Benton Community School Corp. v. Indiana Education Employment Relations Board*,[1] in which the court held the Indiana Public Employee Bargaining Act[2] unconstitutional and enjoined the Indiana Education Employment Relations Board from further proceedings under that Act. The decision has completely halted the Board's application of both election and unfair labor practice procedures to public employee bargaining in Indiana.[3] The court held the entire Act to be void as a violation of article 1, section 12 of the Indiana Constitution,[4] in that section 7 of the Act, prohibiting judicial review of Board determinations made in representation proceedings, is unconstitutional and not severable from the remaining portions of the Act. At this writing briefs have been filed with the Indiana Supreme Court appealing the circuit court's decision; therefore, a determination of the constitutionality of the Bargaining Act should be made within the next year.

A beginning of case-by-case development of public sector labor relations law appeared in *County Department of Public Welfare v. City-County Council*.[5] This was an action by the Marion

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[1]No. C75-141 (Benton Cir. Ct. Feb. 4, 1976).

[2]IND. CODE §§ 22-6-4-1 to -13 (Burns Supp. 1976).

[3]Teachers are covered by an entirely different statute [IND. CODE §§ 20-7.5-1-1 to -14 (Burns 1975)] and so teacher bargaining has not been affected by this decision.

[4]IND. CONST. art. 1, § 12, provides:

> All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[5]338 N.E.2d 656 (Ind. Ct. App. 1975).

County Welfare Department to mandate the City-County Council to effectuate a salary increase for department employees. The applicable Indiana statute provides that "the county council shall establish the compensation of the [department employees] within the salary ranges of the pay plan adopted by the Indiana personnel board and approved by the state budget committee . . . ."[6]

On April 19, 1974, the Indiana personnel board and the state budget agency approved a seven and one-half percent increase in the pay of department employees. Two months later the Marion County Welfare Director appeared before the council and requested adoption of this increase. The council refused to effect the increase for the remainder of 1974 but, at its regular budget meeting in September 1974, approved the increase for 1975. This suit was filed by the Welfare Department to compel the council to establish the increase for the remainder of 1974.

The court held that the council was under a statutory duty to effectuate the increase, but that the statute did not state when the council must take action. Under Indiana Code section 17-1-24-18.3 the "council shall, at its prescribed annual meeting beginning on the first Tuesday after the first Monday in September of each year . . . adopt a separate ordinance fixing the salaries of all [employees]."[7] The court concluded that the council was under no statutory duty to conform to state-adopted pay plans at any time other than the regular date for adoption of all county salary schedules. The court also noted statutory language which provided that employee salaries "may be changed at any time"[8] and concluded that the council had discretion to implement the increases in mid-budget year. Further, the court noted that the state personnel director, in announcing the increase, had stated: "These salary increases may be effective on May 1, 1974, July 1, 1974, October 1, 1974, or January 1, 1975, as funds become available and as you receive approval from your County Welfare Board and County Council."[9]

In this case the statutory language was clear and the court was not confronted with the perplexing problem of division of power between the judicial and legislative branches. Implicit in the court's opinion was the conclusion that the legislature has authority to compel county councils to adopt and appropriate

[6] IND. CODE § 17-1-24-18.1 (Burns 1974).

[7] *Id.* § 17-1-24-18.3 (Burns Supp. 1976).

[8] *Id.*

[9] 338 N.E.2d at 659.

funds for budgets adopted by the state personnel board and approved by the state budget committee. In effect, the court approved delegation of budget-making decisions to these nonlegislative bodies and noted its authority to compel the councils to adopt and fund those decisions. This may be of some significance if the county councils fail to appropriate funds for collective bargaining agreements negotiated between public employees and public employers. If the legislature clearly directs the councils to appropriate such funds, the decision indicates that the courts could compel the appropriation. Complications could arise if such appropriations would exceed other statutory limitations on funding sources (such as the current property tax freeze) or if they would require the councils to increase tax rates even within limits open to them. This decision is far too indirectly pointed to these issues to be relied on in resolving the complicated problems in this area, but it does illustrate an introductory step in a process that will clearly involve more litigation in the future.

In two other cases, the courts established a marked distinction between the availability of injunctive relief to halt strike conduct in the public, as opposed to the private, sector.

The private sector case was *Machinists Local 1227 v. McGill Manufacturing Co.*,[10] in which McGill sought to enjoin alleged mass picketing and use of force and intimidation to block the plant's main gate. The trial court had granted an *ex parte* temporary restraining order and, in a hearing which followed, rejected a union motion to dismiss for want of subject matter jurisdiction and entered a "temporary injunction."

The union appealed this interlocutory order. The court noted application of the Indiana Anti-Injunction Act[11] to this proceeding and held that under section 7 of that Act a plaintiff must invoke the court's jurisdiction "by a verified complaint which alleges all of the factual assertions enumerated by the statute."[12] The court also held:

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[10]328 N.E.2d 761 (Ind. Ct. App. 1975).

[11]IND. CODE §§ 22-6-1-1 to -12 (Burns 1974).

[12]328 N.E.2d at 765. The pertinent language in section 7 provides:

> No court of the state of Indiana shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect;
>
> (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued

> [T]he trial judge is mandated to require the party seeking an injunction to adduce testimony in open court, in support of each material allegation in his complaint. The trial court must also enter specific findings of fact which clearly disclose the existence of each of the factual elements enumerated in section 7. In addition, section 9 of the Act requires the trial court to enter its written findings into the record of the proceedings prior to the issuance of any injunctive order.[13]

The court concluded that, because McGill's complaint failed to allege that the police were unable or unwilling to protect its property, the trial court lacked jurisdiction from the outset to grant injunctive relief. Alternatively, the court held that the trial court's failure to enter an affirmative finding on this issue prior to issuance of the temporary restraining order constituted an additional jurisdictional defect.

The court's conclusion that the trial court erred in not entering specific findings of fact on the issues required under section 7 of the Act prior to issuance of the temporary restraining order seems sound and well supported by prior Indiana authority.[14] However, its alternative pleading requirement, set forth as an

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unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted [more] injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; and

(d) That complainant has no adequate remedy at law;

(e) That the public officer charged with the duty to protect complainant's property are [is] unable or unwilling to furnish adequate protection.

IND. CODE § 22-6-1-6 (Burns 1974).

[13]328 N.E.2d at 765-66. Section 9 of the Act provides in part:

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction . . . .

IND. CODE § 22-6-1-8 (Burns 1974).

[14]The court properly cited the prior cases of Peters v. Poor Sisters of Saint Francis Seraph of the Perpetual Adoration, Inc., 148 Ind. App. 453, 267 N.E.2d 558 (1971) and Teamsters Local 297 v. Air-Flow Sheet Metal, Inc., 143 Ind. App. 322, 240 N.E.2d 830 (1968), in support of this conclusion.

independent ground for holding that the trial court lacked jurisdiction, could present an unreasonable precedent. The court concluded that "[t]he particularized pleading requirements of special statutory proceedings constitute a recognized exception to the liberal 'notice pleading' standard of Indiana Rule of Procedure, Trial Rule 8(A)."[15] Such an exception, if the court means that it would not readily allow amendments to correct erroneous pleadings, could needlessly reestablish procedural pitfalls which were believed eliminated by adoption of the new Indiana Rules of Civil Procedure. Moreover, the authority cited by the court in support of this exception is far from convincing.

The inital case the court cites is *State ex rel. Taylor v. Circuit Court.*[16] In *Taylor*, the supreme court mandated the Marion County Circuit Court to vacate a temporary restraining order afforded a plaintiff, enjoining a union from organizational picketing. Although the plaintiff had attempted to plead around the Indiana Anti-Injunction Act[17] by ignoring the fact that a labor dispute existed, the court concluded that the Act was applicable. The court noted that jurisdiction is acquired under the Act if there is a verified allegation in the complaint that substantial and irreparable injury to complainant's property will be unavoidable unless a temporary restraining order is issued and concluded that the complaint in the case at hand was sufficient to invoke the provisions of the Act. The court issued the mandate to vacate the temporary restraining order, not because the complaint was inadequate, but because the record failed to disclose that testimony was heard as required by the Act.[18] The Act requires that before such an order can issue the court must hear sworn testimony which would be sufficient, if sustained, to justify issuance of a temporary injunction at a hearing held after proper notice. Viewed in this perspective, *Taylor* is support for liberalized pleading, rather than for rigid pleading rules, if evidence in the record supports a finding that the requirements of the Act have been followed.

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[15]328 N.E.2d at 765.

[16]240 Ind. 94, 162 N.E.2d 90 (1959).

[17]IND. CODE §§ 22-6-1-1 to -12 (Burns 1974).

[18]IND. CODE § 22-6-1-6(e) (Burns 1974) provides:

> [I]f a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five [5] days and shall become void at the expiration of said five [5] days.

The court also cited *Bartenders Local 103 v. Clark Restaurants*[19] and referred to *Squarcy v. Van Horne*.[20] *Clark Restaurants* is a 1951 case which substantially predates the new Indiana Rules of Civil Procedure and therefore cannot be viewed as authority to support the court's contention that the Anti-Injunction Act provides an exception to those rules. Moreover, the court in *Clark Restaurants* found that the complaint, which did not use the specific statutory language alleging "a substantial and irreparable injury to the plaintiff," was in substantial compliance in that it alleged that the act complained of "is now causing substantial and irreparable injury to the plaintiff and plaintiff's business."[21] Patently, *Clark Restaurants* is authority permitting inexact pleading to establish the court's jurisdiction. Finally, *Squarcy* does not even relate to a labor dispute. Rather, it involves a will contest and has no apparent relevance to the question of whether this Anti-Injunction Act constitutes an exception to the liberalized pleading authorized by the Indiana Rules of Civil Procedure.

Interestingly, in another case cited by the court for another point, *Weist v. Dirks*,[22] the Indiana Supreme Court noted that "in appeals of this character [appeal from an interlocutory judgment enjoining appellants from picketing the retail grocery and food store of the appellee] the court is not concerned with the pleadings and will consider only the evidence which tends to support the judgment."[23] *Weist* also substantially predates the current Indiana Rules; thus the supreme court stated even prior to those rules that it would not concern itself with reviewing the pleadings.

Whether or not *Weist* is regarded as substantial authority to support this point, absent the most compelling authority to the contrary it is undesirable for the courts to resurrect pleading problems believed disposed of by the Indiana Rules of Civil Procedure in order to deny jurisdiction.

The public sector injunction case is *Elder v. City of Jeffersonville*,[24] presenting a startling contrast to *McGill*. In *Elder*, Jeffersonville firemen sought review of a trial court's permanent injunction prohibiting them from striking. The firemen argued (1) that the strike—if there was a strike—was over before the permanent injunction issued and (2) that the lower court erred in

[19]122 Ind. App. 165, 102 N.E.2d 220 (1951).
[20]321 N.E.2d 858 (Ind. Ct. App. 1975).
[21]122 Ind. App. at 169, 102 N.E.2d at 222.
[22]215 Ind. 568, 20 N.E.2d 969 (1939).
[23]*Id.* at 569, 20 N.E.2d at 969.
[24]329 N.E.2d 654 (Ind. Ct. App. 1975).

not considering evidence that the city had failed to negotiate in good faith. The court found some evidence that a strike was in progress and might continue and that even if the strike had subsided when the permanent injunction issued, no evidence was offered that the disputes which prompted the initial strike had been resolved. This latter observation was held sufficient to support the lower court's issuance of a permanent injunction. Regarding the second issue, the court cited *Anderson Federation of Teachers v. School City*[25] and noted that: "[T]he course of labor negotiations before or after the alleged strike would be of little significance. The question to be decided is whether (1) public employees are involved, and (2) whether there is in fact a strike or 'job action.' "[26] The court finally noted that no exception is granted under *Anderson Teachers* because the public employer has failed or refused to negotiate.

The contrast with *McGill* is marked. In the private sector, *McGill* establishes that in order to obtain an injunction under the Anti-Injunction Act the plaintiff must conform his pleadings exactly to the requirements of the Act. The trial court must make each of the fact findings required under the Act *before* issuing any relief, or the court order will be found to be void *ab initio*. Under *Elder*, if public employees are involved, any strike can be enjoined—regardless of the "clean hands" of the plaintiff. Rejection of the "clean hands" defense is based on the court's observation that no exception was made by the Indiana Supreme Court in *Anderson Teachers* based on conduct of the plaintiff during negotiations. This reliance is unwarranted, as there is no indication in either of the *Anderson* opinions that the supreme court confronted the question of whether the "clean hands" doctrine could be considered as a possible defense to the equitable injunctive remedy. In *Anderson Teachers* the court decided only that a strike by public employees is illegal under Indiana common law and that the Anti-Injunction Act does not apply to public employee conduct. The court did not specifically address the question of whether the trial court retains discretion in the case of a public employee strike to consider the impact of the strike on the public, the manner in which the strike is conducted, or the provocation for the strike, in determining whether to grant the requested injunctive relief.

The final significant case during the survey period involving

[25]252 Ind. 558, 251 N.E.2d 15 (1969), *rehearing denied*, 252 Ind. 581, 254 N.E.2d 329 (1970).

[26]329 N.E.2d at 660.

public sector labor relations was *Gary Teachers Union v. School City.*[27] In the *Gary Teachers* case, the court concluded that a collective bargaining provision which purported to apply Tenure Act restrictions to teachers who have completed only three years of service with a school and have entered into a contract for a fourth year was void as contrary to law. The Tenure Act provides tenure for teachers who have completed five years of teaching with one employer and have entered into a contract for a sixth year.[28] The court, in a split opinion, held that the purpose of the Tenure Act was to establish a uniform tenure system for all schools and to protect the educational interest of the state which "demands some reasonable period of time within which a school system may seek to improve the quality of its teachers even though those replaced may meet minimal standards of competence and behavior."[29] The court concluded that the Tenure Act prohibits awarding tenure status to teachers before the statutory standards are met. The General School Powers Act of 1965[30] was found not to alter the impact of the Tenure Act, since it refers only to general powers of a school corporation to employ, contract for and discharge teachers, and is specifically qualified by subsection 7, which provides that "compensation, terms of employment and discharge of teachers shall, however, be subject to and governed by the laws relating to employment, contracting, compensation and discharge of teachers."[31] The court also noted that the Teacher Bargaining Act[32] was not applicable because it excludes employment and discharge from subjects of bargaining.

In a strong dissenting opinion, Judge Staton observed that "the Teacher Tenure Act does not state a legislative intent to establish a uniform minimum trial period of employment . . . and should not be interpreted to bar a school corporation from contractually establishing more advantageous tenure arrangements which tend to further the Act's fundamental 'job security' purpose."[33] He further noted the broad power conferred upon public school authorities by the School Powers Act, and took issue with the court's conclusion that subsection 7 negates the power of school authorities to negotiate terms of employment for teachers which are more advantageous than those provided by statute. In support of this

[27] 332 N.E.2d 256 (Ind. Ct. App. 1975).

[28] IND. CODE §§ 20-6-12-1 to -6 (Burns 1975).

[29] 332 N.E.2d at 259.

[30] IND. CODE §§ 20-5-2-1 to -3 (Burns 1975).

[31] *Id.* § 20-5-2-2(7).

[32] *Id.* §§ 20-7.5-1-1 to -14.

[33] 332 N.E.2d at 264.

contention, he cited *Weist v. Board of School Commissioners.*[34] Judge Staton's reliance on *Weist,* though ignored by the majority, appears sound. In *Weist,* the issue before the court was whether a collective bargaining agreement could modify statutory provisions for teachers' sick leave. The court held that the agreement could not operate in derogation of laws governing compensation for teachers, but concluded that the contractual provision in question expanded, rather than limited, sick leave available to teachers and thus was not contrary to laws governing compensation of teachers within the meaning of the School Powers Act.

If the *Gary Teachers* case is construed to prohibit contractual agreements for benefits greater than those required by statute, this approach could significantly limit subjects of collective bargaining. It need not be so construed, however, since the court's conclusion that earlier tenure could not be contractually provided was based upon its interpretation of the intent of the Tenure Act. Even if the court is correct in its conclusion that one purpose of the Tenure Act is to require a specified time for a school system to seek improvement in the quality of its teachers, other statutory benefits for teachers could be construed, as in *Weist,* to establish only minimum levels of benefits. In addition, the Teacher Bargaining Act requires that statutory benefits which are subjects of bargaining under the Act must be construed as minimums, subject to bargaining for greater benefits. Any other construction would defeat the requirement to bargain on such subjects.

XIII. Products Liability

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A. Introduction

During the past year the Indiana decisions in the area of products liability have been few in number, but the issues in the cases have been extremely interesting and conceptually stimulating. In general, the recent cases have considered enterprise liability and the patent danger rule.

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[34]320 N.E.2d 748 (Ind. Ct. App. 1974).

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