XI. Labor Law

EDWARD P. ARCHER*

The Indiana Supreme Court took the period covered by this year's survey off from labor law cases. However, significant discussions from the courts of appeals abound.

A. Teacher Bargaining

In *Anderson Federation of Teachers v. Alexander*,[1] the court of appeals addressed the question of the legality of an agency shop clause under the Indiana teacher bargaining statute. The collective bargaining agreement between the American Federation of Teachers (AFT) and the Anderson Community School Corporation provided that all "members of the bargaining unit who are not also members of the AFT *have an obligation, as a condition of employment, to pay a representation fee to the AFT*, in an amount equal to the membership dues of the AFT less the cost of benefit [*sic*] provided solely for AFT members."[2]

This action was filed by Edna Alexander and 114 other Anderson Community School teachers seeking a declaratory judgment that the agency shop agreement was invalid and asking for an injunction against its enforcement.[3] The trial court held that this agency shop agreement exceeded the Anderson schools' authority as it could find no express statutory authority for the school corporation to enter into an agency shop agreement.[4]

The parties were in agreement that the Teacher Tenure Act[5] established the sole grounds for termination of a tenured Indiana teacher. However, they and the amicus participants (Indiana State Teachers Association (ISTA) and the Indiana School Boards Association (ISBA)) differed as to whether under the agency shop agreement, failure to pay the representation fee would constitute a basis for termination of a tenured teacher. The AFT argued that such a conclusion would be premature.[6] The ISTA argued that failure to pay the representation fee would constitute "good and just cause"

---

*Professor of Law, Indiana University School of Law—Indianapolis. B.M.E., Rensselaer Polytechnic Institute, 1958; J.D., Georgetown University, 1962; LL.M., 1964. The author wishes to extend his appreciation to S. Andrew Bowman for his assistance in the preparation of this Article.

[1] 416 N.E.2d 1327 (Ind. Ct. App. 1981).

[2] *Id.* at 1329 (emphasis in original).

[3] *Id.* at 1328.

[4] *Id.* at 1329.

[5] IND. CODE §§ 20-6.1-4-10 to -14 (1976).

[6] 416 N.E.2d at 1330.

for dismissal of a tenured teacher under the Tenure Act.[7] Alexander and the ISBA argued that the phrase "condition of employment" could only mean that the failure to pay the representation fee would constitute an additional ground for discharging teachers.[8]

The court of appeals first held that the phrase "as a condition of employment" in this context was unambiguous and called for the discharge of teachers not meeting this condition.[9] To determine the validity of the agency shop clause, the court of appeals turned to the 1973 Certified Educational Employee Bargaining Act (CEEBA).[10] The court found that the first section of CEEBA,[11] which notes differences between school-teacher and private employer-employee relationships, coupled with the more concrete sections 3 through 6 of the CEEBA, limited the range of collective bargaining between teachers and school corporations.[12] In particular, the court noted the

---

[7] *Id.* (referring to IND. CODE § 20-6.1-4-10(a)(6) (1976)).

[8] 416 N.E.2d at 1330.

[9] *Id.*

[10] IND. CODE §§ 20-7.5-1-1 to -14 (1976).

[11] *Id.* § 20-7.5-1-1(d). The first section of the CEEBA provides in part:

> The relationship between school corporation employers and certificated school employees is not comparable to the relation between private employers and employees among others for the following reasons: (i) a public school corporation is not operated for profit but to insure the citizens of the State rights guaranteed them by the Indiana State Constitution; (ii) the obligation to educate children and the methods by which such education is effected will change rapidly with increasing technology, the needs of an advancing civilization and requirements for substantial educational innovation; (iii) the Indiana General Assembly has delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of school corporations, composed of citizens elected or appointed under applicable law, a delegation which these bodies may not and should not bargain away; and (iv) public school corporations have different obligations with respect to certificated school employees under constitutional and statutory requirements than private employers have to their employees.

[12] *Id.* § 20-7.5-1-3 provides in part:

> [S]chool employers and school employees shall have the obligation and the right to bargain collectively the items set forth in Section 4, the right and obligation to discuss any item set forth in Section 5 and shall enter into a contract embodying any of the matters on which they have bargained collectively. No contract may include provisions in conflict with (a) any right or benefit established by federal or state law, (b) school employee rights as defined in Section 6(a) of this chapter, or (c) school employer rights as defined in Section 6(b) of this chapter. It shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent.

Id. § 20-7.5-1-4 commands that:

> A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related

section 3 prohibition against the parties agreeing to any provision in conflict with the parties' section 6 rights and held that the school corporation's section 6(b) duties to "suspend or discharge its employees in accordance with applicable law" and to "relieve its employees from duties because of lack of work or other legitimate reason" in the sole discretion of the school corporation, may not be restricted by a collective bargaining agreement.[13]

In this regard the court concluded that:

> The decision, then, of whether to retain or dismiss a teacher has been designated by the legislature as being the

---

fringe benefits. A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitration shall have no power to amend, add to, subtract from or supplement provisions of the contract.

Id. § 20-7.5-1-5 provides as follows:

(a) A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters: working conditions, other than those provided in Section 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations: Provided, however, That any items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable.

(b) Nothing shall prevent a superintendent or his designee from making recommendations to the school employer.

Id. § 20-7.5-1-6 provides in part:

(a) School employees shall have the right to form, join or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits and other matters as defined in Sections 4 and 5.

(b) School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to:

(1) direct the work of its employees;
(2) establish policy;
(3) hire, promote, demote, transfer, assign and retain employees;
(4) suspend or discharge its employees in accordance with applicable law;
(5) maintain the efficiency of school operations;
(6) relieve its employees from duties because of lack of work or other legitimate reason;
(7) take actions necessary to carry out the mission of the public schools as provided by law.

[13] 416 N.E.2d at 1332 (quoting IND. CODE § 20-7.5-1-6(b) (1976)).

> sole province of school corporations. School corporations are forbidden to encumber their discretion in this area, and in particular, they may not make collective bargaining agreements in which they undertake to fire an entire class of teachers.
>
> Thus, section 3(c) and 6(b) of the CEEBA plainly remove the firing of teachers from the scope of collective bargaining. The legislative intent found in section 1(d) takes on the substance of unambiguous command in sections 3 and 6.[14]

The court rejected the AFT's assertion that its intent was to collect such fees by bringing suit and not by insisting upon dismissal of non-paying teachers, reasoning that the essence of the agency shop agreement required the Anderson schools to discharge non-paying teachers and that this requirement could not be severed from the clause without rendering the clause meaningless.[15]

The court concluded its opinion by highlighting its limitations as follows:

> Our conclusion that the entire agency shop provision must fail is not to be taken as a criticism of prior decisions as to the validity of union security agreements outside of a school context. Nor do we suggest that such agreements between schools and teachers are invalid *per se*. We say only that construing the provisions of the CEEBA *in toto*, they forbid school corporations to make *any* collective bargaining agreement—for union security purposes or otherwise—in which the schools undertake the mandatory discharge of a given class of teachers.[16]

The court thus sustained the trial court's grant of summary judgment to Alexander. Judge Buchanan wrote the opinion, and Judges Sullivan and Shields concurred in the result without any explanatory comment.

This is an important case because it clearly holds that under the CEEBA teacher unions cannot negotiate agency shop agreements in which teachers must pay the equivalent of union dues under penalty of discharge. The discharge penalty is obviously important to the efficient collection of such payments from recalcitrant teachers. The decision in this case leaves open the possibility of a less efficient collection system under which the union could use court actions to compel recalcitrant teachers to make payments. Such an agency shop

---

[14]416 N.E.2d at 1332.

[15]*Id.* at 1333.

[16]*Id.* (emphasis in original).

clause would not be barred under the Teacher Tenure Act but could possibly be found to be illegal under sections 7(1) or 7(3) of the CEEBA.[17] These issues await future litigation.

B. Bargaining for Other Public Employees

The courts of appeals addressed two significant cases relating to collective bargaining for non-teacher public employees in Indiana. Since *Indiana Education Employment Relations Board v. Benton Community School*,[18] in which the supreme court declared the Indiana Public Employees Bargaining Act[19] unconstitutional, there has been no statutory authorization for bargaining for Indiana public employees other than teachers. If the courts of appeals cases for the past survey term set the trend, the need for a public employees' bargaining bill is great if any meaningful bargaining is to occur.

In *County Department of Public Welfare v. AFSCME*,[20] the County Welfare Department and the AFSCME entered into a consent election agreement on May 21, 1975, just prior to the effective date of the Public Employees Bargaining Act, which stated that if the union won the election the employer would recognize it as the exclusive bargaining agent and would begin negotiations on a contract within fifteen days.

The union won the election, and the parties began negotiating in early August and continued to bargain until January, 1976, at which time the employer refused to bargain further pursuant to a request from the State Welfare Director and the Director of Labor Relations for the State Personnel Division who maintained that the employees were state rather than county employees. Thereafter, in *Benton Community School* the Indiana Supreme Court declared the Public Employees Bargaining Act unconstitutional,[21] and the employer declined to negotiate further. The union instituted this action to compel the employer to bargain under principles of general contract law.[22]

---

[17]IND. CODE § 20-7.5-1-7(a) (1976) provides:

> It shall be an unfair practice for a school employer to:
>
> (1) interfere with, restrain or coerce school employees in the exercise of the rights guaranteed in Section 6 of this chapter.
>
> . . . .
>
> (3) encourage or discourage membership in any school employee organization through discrimination in regard to hiring or tenure of employment or any term or condition of employment;
>
> . . . .

[18]266 Ind. 491, 365 N.E.2d 752 (1977).

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

[20]416 N.E.2d 153 (Ind. Ct. App. 1981).

[21]266 Ind. at 507, 510, 365 N.E.2d at 760, 761.

[22]416 N.E.2d at 154.

The court of appeals distinguished *Gary Teachers Union Local 4 v. School City of Gary*[23] and *East Chicago Teachers Union Local 511 v. Board of Trustees*[24] in which the court had enforced a teacher collective bargaining agreement, which predated CEEBA, by noting that both of these teacher cases involved enforceability of collective bargaining contracts as opposed to mere agreements to bargain and that neither of these teacher cases presented a question as to the effect of the agreement upon employees who did not desire to have the union as their agent.[25] Regarding this latter distinction, the court stated that "[t]he common law of this state does not, of course, grant to one group of individuals the right to impose their will upon another group merely because the whole number work for the same employer and the former group constitute something more than 50% of the total."[26]

The court went on to assume, arguendo, that the board could enter into an agreement for the employees who wanted the union to speak for them. The court then questioned the effect of the election agreement as an independent contract. The court's reasoning becomes confusing at this point. First, the court noted that the consent election agreement only required the parties to "begin negotiations on a contract within 15 days" and concluded that the parties' negotiations for several months fulfilled that requirement. The court then stated that this conclusion was not altered by the consent agreement language which called for recognition of the union as the exclusive bargaining agent "in compliance with existing state and federal laws" because "[w]ith the state statute declared unconstitutional, there simply were no state or federal laws which applied to permit the status referred to."[27]

Judge Staton wrote a lengthy concurring opinion in which he rejected "[t]he majority's cursory (and perhaps inaccurate) contractual analysis of the consent election agreement."[28] Judge Staton viewed the issue "as being whether county-level welfare employees may impose a collective bargaining requirement upon an employment structure which is comprehensively regulated by an existing state merit system."[29] Judge Staton noted that the State Personnel Act and the merit system placed terms of employment essential to bargaining within the control of the State Personnel Board and concluded that

---

[23]152 Ind. App. 591, 284 N.E.2d 108 (1972).
[24]153 Ind. App. 463, 287 N.E.2d 891 (1972).
[25]416 N.E.2d at 155.
[26]*Id.*
[27]*Id.* at 156.
[28]*Id.* at 156-57 (Staton, J., concurring).
[29]*Id.* at 157.

the county departments and the State Personnel Board functioned as an integrated enterprise for purposes of negotiating a collective bargaining agreement.[30] Referring to *Fort Wayne Patrolman's Benevolent Association, Inc. v. City of Fort Wayne*,[31] Judge Staton pointed out that the county department lacked managerial authority over the terms of employment which were the intended subjects of union negotiations and concluded, based upon conflicts he found between union proposals and the state merit system, that the union was not entitled to specific performance of the consent election agreement.[32] Judge Staton went on to emphasize:

> My interpretation of the legal issues in this case should not be construed as precluding any future bargaining between the Lake County Welfare Department and its employees should they decide to voluntarily negotiate again without state participation. The county welfare department may negotiate terms of employment over which they exercise managerial control, i.e., working conditions. However, if the county welfare department and its employees enter into such negotiations, then they must manifest an intent to comply with the state merit system guidelines established by statute and administrative regulation. This latter prerequisite did not occur in the present case.[33]

According to Judge Staton, an agreement to make an agreement is enforceable if all the conditions of the contemplated agreement are specified:

> If the employees of the Lake County Welfare Department intend to seek a consent election agreement which contains the specific requirements of an enforceable contract, then they must identify the proper governmental entity with which to negotiate. Without the proper party, any collective bargaining agreement negotiated by the parties would be rendered a nullity.[34]

The majority opinion is far more sweeping in its impact. The court apparently concluded that absent statutory authority no union can serve as an exclusive representative of public employees in Indiana. Judge Staton dealt with this position in footnote two in which

---

[30]*Id.*

[31]Fort Wayne Patrolman's Benevolent Ass'n, Inc. v. City of Fort Wayne, 408 N.E.2d 1295, *reh. denied with add't'l opinion*, 411 N.E.2d 630 (Ind. Ct. App. 1980).

[32]416 N.E.2d at 160.

[33]*Id.*

[34]*Id.* at 161.

he cited persuasive Indiana authority for the proposition that even absent statutory authority a public employer may enter into a collective bargaining agreement providing for exclusive representation of all employees by their majority representative.[35]

The majority opinion could simply have been that the consent election agreement was in fact complied with because the agreement required only that the board begin negotiations with the union. The parties did in fact negotiate for several months, apparently without agreement, before the board refused to bargain further. The court recognized that "[w]hat is critical is that the agreement required no more."[36]

The court then, however, concluded that the language in the instrument was "at most an agreement to make an agreement."[37] Judge Staton, in his concurring opinion, accepted this analysis.[38] This analysis, however, is contrary to customary labor relations experience. The consent agreement in this case was an agreement to bargain, not to agree. Even under the National Labor Relations Act,[39] parties are only required to bargain in good faith, not to agree to a proposal or to make a concession.[40] Such is the common understanding in labor relations.

The Indiana Supreme Court acknowledged in *Benton Community Schools* that the Indiana Public Employee Bargaining Act (IPEBA) was largely patterned after the NLRA.[41] Because the consent election agreement in this case was entered into with the expectation that the IPEBA would apply to the continuing relationship between the parties, it is likely that the agreed intent of the parties was that they bargain to seek to reach an agreement, not that they agree to make an agreement. If this analysis is correct, this portion of the reasoning of both the majority and concurring opinion fails.

Judge Staton's concern that the union was seeking to bargain matters which were not within the control of the county board is valid. Clearly, the county board would have no authority to negotiate changes in the terms and conditions of employment dictated under state statutory authority. However, Judge Staton concluded

---

[35]*Id.* at 158 n.2. In addition to *Gary Teachers* and *East Chicago Teachers*, Judge Staton cited Weest v. Board of School Commissioners, 162 Ind. App. 614, 320 N.E.2d 748 (1974) for the proposition that a public employee may enter into a collective bargaining agreement providing for exclusive representation of all employees by their majority-elected representative.

[36]416 N.E.2d at 156.

[37]*Id.*

[38]*Id.* at 160 (Staton, J., concurring).

[39]29 U.S.C. §§ 151-169 (1976 & Supp. III 1979).

[40]*Id.* at § 158(d) (1976).

[41]266 Ind. at 500, 365 N.E.2d at 756.

that the county board could negotiate terms of employment over which it had managerial control.[42] If this is true, the agreement in this case to bargain should have been enforced to compel bargaining for a reasonable period of time with regard only to the terms and conditions of employment within the managerial control of the county board.

In *Fort Wayne Patrolman's Benevolent Association, Inc. v. City of Fort Wayne*,[43] the city disavowed a bargaining agreement negotiated and executed by the mayor. The Patrolman's Benevolent Association (PBA) brought this action to enforce the agreement. In this case, the mayor had entered into an agreement which recognized the PBA as the bargaining representative of all city patrolmen. Two months later, the Fort Wayne Common Council passed a resolution approving the recognition agreement. Thereafter, in November, 1975, the mayor and the PBA bargained to an agreement which was executed by two city negotiators and approved by the mayor. In January, 1976, a new mayor assumed office and disaffirmed the collective bargaining agreement.[44]

Both the PBA and the city sought summary judgment. The PBA argued that governmental entities have implicit authority to recognize exclusive bargaining representatives of public employees, to bargain collectively, and to enter into binding collective bargaining agreements with such representatives.[45]

The trial court held that the exclusion of police from the Public Employee Bargaining Act evidenced the legislature's intent to prohibit police collective bargaining.[46] After the trial court had issued its opinion, the Indiana Supreme Court declared this Act unconstitutional.[47] The court of appeals considered the effect of this supreme court ruling over the city's objection but affirmed the trial court's summary judgment for the city on the grounds that the mayor had acted beyond the authority of his office when he approved this agreement.[48]

The court assumed arguendo that the police could select a bargaining representative to enter into a valid and binding collective bargaining agreement but rejected the PBA's contention that the mayor had the authority to bind the city and held that the failure of the Common Council precisely to ratify the agreement and

---

[42]416 N.E.2d at 160.

[43]408 N.E.2d 1295.

[44]*Id.* at 1298-99.

[45]*Id.* at 1299.

[46]*Id.*

[47]Indiana Educ. Employment Relations Bd. v. Benton Community School Corp., 266 Ind. 491, 365 N.E.2d 752 (1977).

appropriate funds for its implementation and the failure of the Board of Safety to ratify the agreement were fatal to the agreement. The court stated:

> Municipal corporations are creatures of the state. As such, every party dealing with a municipality is bound to take notice of the limitations on its powers and the laws governing the municipality in making contracts. In dealing with a city, you cannot plead ignorance of the laws and thereby make valid an otherwise invalid agreement.[49]

The court construed Indiana law as vesting the mayor with the power to fix salaries of all employees of the city except the police, whose salaries were to be fixed by the Common Council.[50] The court also held that the Common Council resolution approved recognition of the PBA but did not authorize the mayor to enter into a collective bargaining agreement. Thus, "[t]he Mayor had neither the statutory authority to bind the City to this agreement nor the authority of the Common Council to act in their behalf and enter into such an agreement" and "[a]s a result, the collective bargaining agreement was void."[51]

The PBA petitioned for a rehearing seeking a ruling from the court on numerous issues which the court did not address in its decision, including (as itemized by the court):

> (1) whether policemen have a right to (a) select a collective bargaining representative, (b) enter into collective bargaining with municipalities, and (c) enter into collective bargaining agreements; (2) whether the trial court was correct when it interpreted the Indiana Public Employee Labor Relations Act . . . as prohibiting policemen from engaging in collective bargaining, and (3) whether the trial court committed rever-

---

[48]408 N.E.2d at 1301.

[49]*Id.*

[50]*Id.* at 1301-02. The court relied on IND. CODE § 18-2-1-10(6) (1976) which provides that:

> The salaries of each and every appointive officer, employee, deputy, assistant and departmental and institutional head shall be fixed by the mayor subject to the approval of the common council: Provided, That the provisions of this subsection shall not apply to the manner of fixing and the amount of compensation paid by any city to the members of the police and fire departments.

The court also cited *id.* § 18-1-11-2 which provides in part: "The annual pay of all policemen . . . shall be fixed by ordinance of the common council; and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay, not only by rank, but by their length of service."

[51]408 N.E.2d at 1302.

> sible error when it entered summary judgment in favor of the City of Fort Wayne based upon its interpretation of the Public Employee Labor Relations Act.[52]

The court refused to address these issues because a determination of these issues would have no effect upon this litigation.[53]

The PBA also contended that even if the mayor had no authority to agree to police wages, the remainder of the agreement should be enforced. The court rejected this contention, holding that the mayor had no authority to manage the police because the Common Council had authority over police salaries and the Board of Public Safety had the power to manage other affairs of the police.[54] Finally, the PBA argued that the city should be estopped from denying the validity of the agreement because "the PBA should be able to rely upon the *City's* authority to enter into a collective bargaining agreement under these circumstances . . . ."[55] The court disposed of this argument, noting that "it was not the *City* who we held had no authority to enter into this agreement; it was the *Mayor*."[56]

This case illustrates the very substantial difficulties incurred in public sector bargaining without the benefit of an authorizing statute. The court held that the city could enter into a collective bargaining agreement regarding the terms and conditions of employment for police but that the mayor could not.[57] If the court is correct, to enter into a bargaining agreement covering both wage benefits and other terms and conditions of employment for police, the PBA would have to negotiate with the Common Council regarding wages and with the Board of Public Works regarding other conditions of employment. Clearly, bargaining for police could not take place directly with the Common Council or with the Board of Public Works. Each of these entities would have to authorize a representative to bargain on its behalf. Such authorization would apparently be permissible because the court's opinion is based upon its conclusion that the Common Council had not authorized the mayor to enter into a collective bargaining agreement. The Board of Public Works could also authorize the mayor to be its bargaining representative, or both the Common Council and the Board could designate some other individual to bargain as their representative.

---

[52]411 N.E.2d at 631 (citations omitted).

[53]*Id.*

[54]*Id.* at 631-32.

[55]*Id.* at 632.

[56]*Id.* (emphasis in original).

[57]The court distinguished police from other city employees and noted that the mayor has the authority to negotiate wages for city employees other than police. *Id.*

The court makes clear that a resolution merely extending recognition and endorsing a mayor's extension of recognition to a union will not be construed as authorization to negotiate a collective bargaining agreement. This holding of the court is strained, at least insofar as it relates to the Common Council. The Common Council resolution both extended recognition to the PBA and approved the mayor's recognition of the PBA. Recognition could only lead to bargaining. The Common Council must have been aware that the mayor was bargaining on behalf of the city, yet it neither moved to reject the mayor as its bargaining agent nor to appoint another agent to represent it in bargaining. There is merit to the PBA's position that implicit in the actions of the mayor and the Common Council in this case was the authority to enter into a collective bargaining agreement. Finally, the court's very restrictive interpretation of the authority of public employers to bargain leads to the further question of whether the court would require the Common Council to appropriate funds to meet collective bargaining agreement commitments if the agreement was negotiated by the proper city representatives.

The *Public Welfare* and *City of Fort Wayne* decisions both reflect a retrenchment from prior decisions which permitted public employee bargaining even absent statutory authorization.[58] Clearly, if bargaining is to take place under these decisions, the parties must be extremely careful to obtain approval of any agreement reached from all governmental bodies which control the public employees covered by the agreement: executive, administrative, and perhaps even legislative. An omission of approval from any of these sources of governmental control could be fatal to any agreement reached, particularly in public sector labor relations where agreements are vulnerable to changes in political administrations.

C. Arbitration Appeals

While public sector bargaining ran into judicial head winds during the survey period, the enforceability of arbitration awards received strong judicial endorsement. The courts of appeal decided numerous appeals from arbitration awards. The decisions generally supported the parties' agreement to have arbitration serve as a viable, relatively inexpensive means for final and binding resolution of employee-management disputes.

---

[58]*See, e.g.*, Weest v. Board of School Comm'rs, 162 Ind. App. 614, 320 N.E.2d 748 (1974); East Chicago Teachers Union Local 511 v. Board of Trustees, 153 Ind. App. 463, 287 N.E.2d 891 (1972); Gary Teachers Union Local 4 v. School City of Gary, 152 Ind. App. 591, 284 N.E.2d 108 (1972).

1. Public Employee Arbitration Cases.—Public employee cases should be considered as a separate category from private employee cases because the vast body of case law which has evolved over the years construing section 301 of the Labor Management Relations Act[59] has no direct application to public employee cases.

Wagner v. Kendall[60] involved a statutory state employee grievance procedure[61] which authorized the employee to elect to appeal the State Employee Appeal Board decision to arbitrate and provided that "[t]he arbitrator's findings and recommendations shall be binding on both parties and shall immediately be instituted by the commission."[62]

In *Wagner*, the arbitrator ruled for the employee, and the state filed this action under the Indiana Uniform Arbitration Act (UAA)[63] to set aside the arbitrator's award as having been in excess of his authority. The employee contended that review of an arbitrator's decision under the statutory procedure would be under the Administrative Adjudication Act (AAA).[64] The court recognized that the statutory grievance procedure was in the nature of an administrative adjudication and that all steps of the procedure up to arbitration were clearly reviewable under the AAA.[65] Relying upon Illinois case authority,[66] the court concluded first that arbitral resolution of public employee grievances did not involve an illegal delegation of administrative duties.[67] While the court acknowledged that judicial review of such arbitration proceedings could fall under the literal language of either the UAA or the AAA, the court held that the more specific UAA statute should prevail.[68]

---

[59]29 U.S.C. § 185 (1976).

[60]413 N.E.2d 302 (Ind. Ct. App. 1980).

[61]IND. CODE § 4-15-2-35 (1976) provides in relevant part that:

> If the recommendation of the commission is not agreeable to the employee, the employee, within fifteen (15) calendar days from receipt of the commission recommendation, may elect to submit the complaint to arbitration. The cost of arbitration shall be shared equally by the employee and the state of Indiana. The commissioner of labor shall prepare a list of three (3) impartial individuals trained in labor relations, and from this list each party shall strike one (1) name. The remaining arbitrator shall consider the issues which were presented to the commission and shall afford the parties a public hearing with the right to be represented and to present evidence. The arbitrator's findings and recommendations shall be binding on both parties and shall immediately be instituted by the commission.

[62]*Id.*

[63]*Id.* §§ 34-4-2-1 to -19.

[64]*Id.* §§ 4-22-1-1 to -30.

[65]413 N.E.2d at 304.

[66]Board of Educ. v. Johnson, 21 Ill. App. 3d 482, 315 N.E.2d 634 (1974).

[67]413 N.E.2d at 304.

[68]*Id.* at 304-05 (citing County Council v. Department of Pub. Welfare, 400 N.E.2d 1187, 1190 (Ind. Ct. App. 1980)).

State Department of Administration v. Sightes[69] involved an arbitration award issued under the same state employee statutory grievance procedure[70] as was involved in *Wagner*. The grievants in *Sightes* were teachers employed at the Indiana State Prison. By statute, the prison was required to provide a salary schedule for teachers "equal to that of the largest school system in the county of location."[71] The arbitrator ruled that this statute required the state to compute teacher income on the basis of public school teachers' hourly rates rather than annual salaries and awarded back pay in accordance with this decision.[72]

Under the UAA, an action to vacate an arbitrator's award must be filed within ninety days after the award is mailed,[73] and an action to confirm an arbitrator's award can not be filed until after expiration of that ninety-day period.[74] After the state had waited longer than ninety days without complying with the award, the teachers brought this action to confirm and enforce the award. Moreover, after the ninety-day period had expired, two other arbitrators issued decisions addressing other grievances, the first involving teachers in the same prison who had not been parties to the *Sightes* arbitration and the second involving teachers in different systems. Both these arbitrators declined to follow the *Sightes* arbitration award, reasoning in the former case that the state's interpretation of the statute calling for equal daily salary was permissible and, in the latter, that "salary" was not synonymous with "hourly rate of pay."[75]

The state argued that: (1) the court had to consider these two arbitration decisions which were in conflict with the award in this case, and (2) enforcement of the award in this case would require the state to violate the statutory requirement that teachers be paid equally.[76]

The court ruled that:

> The role of an appellate court in reviewing an arbitration award is limited to determining whether the defendant has established any of the grounds for challenge permitted by the Uniform Arbitration Act—in this case, the grounds for vacating an award provided in IC 34-4-2-13 . . . . Further-

---

[69]416 N.E.2d 445 (Ind. Ct. App. 1981).
[70]IND. CODE § 4-15-2-35 (1976).
[71]*Id.* § 11-1-1.1-30 (repealed effective Oct. 1, 1980).
[72]416 N.E.2d at 447.
[73]IND. CODE § 34-4-2-13 (1976).
[74]*Id.* § 34-4-2-12.
[75]416 N.E.2d at 447.
[76]*Id.* at 449.

> more, a defendant who has a valid ground for challenging an award but who fails to raise that challenge within the 90 day time limit should not be permitted to raise that challenge when the plaintiff applies for confirmation of his award . . . . The state did not avail itself of its statutory remedies prior to the teachers' application for confirmation of the [arbitrator's] award.[77]

The court also held that the lower court was correct in not taking into account the later conflicting arbitration awards and that the state had failed to timely raise its defense of illegality in being bound by an arbitrator to pay the teachers in this case differently from other teachers. The court enforced the arbitrator's award.[78]

In short, the *Wagner* and *Sightes* cases establish the applicability of the UAA to public employer-employee disputes under statutory grievance procedures. *Wagner* holds that such statutory arbitration is not an unconstitutional delegation of legislative authority.[79] *Sightes* establishes that defenses to enforcement of such arbitration awards must be raised in court within ninety days after the mailing of the award or they can not be considered by the court.[80] Interestingly, in *Sightes* the court applied this rule even to defenses which could not have been raised within the ninety-day period because the conflicting arbitration awards did not issue until that period had expired. These two cases solidly establish the UAA as the sole source of appeal from an enforcement of such arbitrators' awards.

2. Private Employer Arbitration Cases.—Chauffeurs, Teamsters, Warehousemen and Helpers Local 135 v. Jefferson Trucking Co.[81] involved an action under section 301 of the LMRA to enforce an arbitration award under a collective bargaining agreement. The Seventh Circuit held, as did the *Sightes* court, that under the Indiana Uniform Arbitration Act, an unsuccessful party in arbitration must file a motion to vacate within the ninety-day period or be barred from prosecuting its claim to invalidate the award.[82] The court of appeals also held that the UAA statute of limitations was enforceable in derogation of the common law rule that statutes of limitations do not run against pure defenses.[83] In this regard the court reasoned that section 301 actions are statutory actions and because "the

---

[77]*Id.* at 450 (citations omitted).
[78]*Id.*
[79]413 N.E.2d at 304.
[80]416 N.E.2d at 450.
[81]628 F.2d 1023 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 942 (1981).
[82]*Id.* at 1026-27 (citing IND. CODE §§ 34-4-2-12 to -13 (1976)).
[83]628 F.2d at 1027.

statute giving the right fixes the time period within which the right may be enforced, the time so fixed becomes a limitation on such right."[84]

In *Indianapolis Public Transit Corp. v. Transit Local 1070*,[85] the court of appeals enforced an arbitrator's award and rejected the employer's defense that the neutral arbitrator of a tripartite arbitration board had refused to grant it a continuance and had proceeded with the hearing in the absence of the employer's arbitrator over the employer's objection.

The UAA provides as one ground for vacating an arbitrator's award the arbitrator's refusal to postpone the hearing upon sufficient cause being shown.[86] Despite this language of the UAA, the court found that the central issue in this case was whether the employer was prejudiced substantially by the arbitrator's decision to proceed with the hearing in the absence of the employer's arbitrator.[87] The court noted that only the employer presented evidence during the employer arbitrator's absence, that the employer's arbitrator was present for the presentation of critical evidence with which he was unfamiliar, that counsel represented the employer in presenting the case, and that the employer arbitrator had the transcript of the hearing and participated in all the subsequent negotiations and executive sessions. Under these facts the court stated it could not see how the employer had been substantially prejudiced by the neutral arbitrator's actions and thus upheld the trial court's decision granting summary judgment in favor of the union.[88]

Under this series of cases, it is clear that the UAA will establish the procedural rules for judicial review for both public and private employee arbitration cases. Defenses to arbitration awards under the UAA must be raised within ninety days of the mailing of the award or they will be barred.[89] Under *Indianapolis Public Transit*, procedural defenses which are within the stated grounds for vacating an arbitrator's award under the Act which are timely raised will serve as the basis to set aside the award only if the arbitrator's pro-

---

[84]*Id.* (citing Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting)).

[85]414 N.E.2d 966 (Ind. Ct. App. 1981).

[86]IND. CODE § 34-4-2-13(a)(4) (1976).

[87]414 N.E.2d at 969. The court noted that "the issue is not whether Chairman Loretz could have granted a continuance, nor simply whether he erred in failing to do so, but rather whether such error, if any, prejudiced substantially Transit's rights." *Id.*

[88]*Id.*

[89]Chauffeurs, Teamsters, Warehousemen, and Helpers Local 135 v. Jefferson Trucking Co., 628 F.2d 1023 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 942 (1981); Department of Admin. v. Sightes, 416 N.E.2d 445 (Ind. Ct. App. 1981); Wagner v. Kendall, 413 N.E.2d 302 (Ind. Ct. App. 1980).

cedural error substantially prejudiced the party seeking to set aside the award.[90]

D. Unemployment Compensation

In *Thomas v. Review Board*,[91] the United States Supreme Court overturned the Indiana Supreme Court's interpretation and application of the disqualifying provisions of the Indiana Employment Security Act.[92] The Court held that the Act could not constitutionally be construed to deny unemployment benefits to an employee who quits his employment because of his religious beliefs.[93]

The facts underlying this case are important to an understanding of its significance. Thomas was initially hired to work in a roll foundry fabricating steel for general industrial use. When the foundry closed, he was transferred to a department which fabricated turrets for tanks. Thomas, a Jehovah's Witness, was concerned about whether working on weapons was contrary to his religious beliefs. Despite a fellow employee Jehovah's Witness' opinion that working on weapons was not "unscriptural", Thomas concluded that he could not work on weapons without violating his religious beliefs and voluntarily terminated his employment. At the unemployment compensation hearing, Thomas explained that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms as he had in the roll foundry.[94]

The Indiana Supreme Court upheld the Security Division's denial of unemployment benefits to Thomas and concluded first that Thomas' belief was more a philosophical choice than a religious belief and, alternatively, that even if Thomas quit for religious reasons, he would not be entitled to benefits under the Indiana Act because a termination motivated by religion is not for "good cause" objectively related to the work.[95]

The Supreme Court based its reversal of the Indiana court's decision on *Sherbert v. Verner*,[96] noting that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection."[97] The court noted that Thomas had drawn a line between direct and indirect production of weapons and that it was not for the courts to say what was a reasonable

---

[90]414 N.E.2d at 969.
[91]49 U.S.L.W. 4341 (April 6, 1981).
[92]IND. CODE § 24-4-15-1 (1976).
[93]49 U.S.L.W. at 4345.
[94]*Id.* at 4342.
[95]Thomas v. Review Bd., 391 N.E.2d 1127, 1131 (Ind. 1979).
[96]374 U.S. 398 (1963).
[97]49 U.S.L.W. at 4343.

line.[98] The court also found the contrary opinion of the other employee Jehovah's Witness not to be controlling, noting that "the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect."[99] The court defined the "narrow function of a reviewing court in this context" as being "to determine whether there was an appropriate finding that the [employee] terminated his work because of an honest conviction that such work was forbidden by his religion."[100] On this record the court concluded that Thomas had terminated his employment for religious reasons.[101]

Relying upon *Sherbert*, the court concluded that a person could not be denied unemployment compensation for quitting work because his work became religiously objectionable.[102] The court noted that:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[103]

Another significant unemployment compensation case during the survey period was *Warner Press, Inc. v. Review Board*,[104] in which the court of appeals upheld established precedent permitting striking claimants to recover unemployment benefits for periods after their employer has hired replacements to restore or continue its operations. In this case the employer hired replacements for the strikers and contined its operations virtually unaffected by the strike. The Employment Security Act provides in pertinent part as follows: "An individual shall be ineligible for waiting period or benefit rights: for any week with respect to which . . . his . . . unemployment is due to a stoppage of work which exists because of a labor dispute . . . ."[105]

The court in *Warner Press* focused on the meaning of "stoppage of work." The court followed ample Indiana and out-of-state prece-

---

[98] *Id.*
[99] *Id.*
[100] *Id.* at 4344.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] 413 N.E.2d 1003 (Ind. Ct. App. 1980).
[105] IND. CODE § 22-4-15-3 (1976 & Supp. 1981).

dent[106] in concluding that "stoppage of work" meant a cessation or substantial curtailment of the employer's business rather than the cessation of an individual employee's labor.[107] As the employer's operations were not substantially curtailed by the strike because of its success in hiring replacements, the court held that there was no "stoppage of work" within the meaning of the Act and that the claimants were not barred from obtaining benefits by this portion of the Act.[108] Judge Hoffman concurred, relying upon *Jackson v. Review Board*[109] which he found to be directly on point.[110] Judge Garrard dissented, recognizing that *Jackson* was on point, but contending that it had been wrongly decided.[111]

E. Strike Injunction Enforcement

Bottoms v. B & M Coal Corp.[112] involved a contempt action for violations of a restraining order issued during a period of intense and occasionally violent labor strife in southern Indiana. B & M Coal was a non-union coal loading facility which operated during a United Mine Workers' strike. When its drivers were harassed by union members, B & M sought a temporary restraining order (TRO) and injunction from the trial court. The trial court issued a TRO forbidding members of the UMW to harass or impede B & M drivers. An amended TRO was issued which limited the union to three pickets per site. Copies of the TRO were served on the UMW district headquarters and its attorney. The TRO was read to striking miners at various coal mines by the local sheriff, and copies were passed out to strikers.

A month later, 400-500 strikers "raided" the B & M coal-loading facility. The raid occurred at night, and the strikers were heavily armed. Before the police arrived, over $173,000 in damages had been inflicted upon B & M equipment and vehicles. The sheriff and a deputy observed the entire incident from a nearby unmarked car. State police were called in and roadblocks were set up to stop the raiders. One hundred and ninety-one men were thus arrested and were named individual defendants together with the union in this contempt action.[113]

---

[106]*See, e.g.*, Jackson v. Review Bd., 138 Ind. App. 528, 215 N.E.2d 355 (1966); Carnegie-Illinois Steel Corp. v. Review Bd., 117 Ind. App. 379, 72 N.E.2d 662 (1947); Annot., 61 A.L.R.3d 693 (1975).

[107]413 N.E.2d at 1005-06.

[108]*Id.*

[109]138 Ind. App. 528, 215 N.E.2d 355 (1966).

[110]413 N.E.2d at 1006 (Hoffman, J., concurring).

[111]*Id.* at 1007 (Garrard, J., dissenting).

[112]405 N.E.2d 82 (Ind. Ct. App. 1980).

[113]*Id.* at 86-87.

The trial court held both the union and the 191 men in contempt of the TRO and ordered them to pay B & M damages, stating that if they failed to pay the damages within ten days, each defendant would be sent to jail until the damages were paid in full.[114]

The court of appeals deleted the incarceration order in the event that damages were not paid within ten days as an unlawful "predetermination of a penalty for noncompliance."[115] It upheld service of the TRO on the 191 individual defendants, recognizing the general rule that a TRO must be served on the person or persons restrained but finding that the instant individual defendants fell under an exception to that rule as there was ample proof that they had actual knowledge of the restraining order.[116]

The court dismissed the union as a defendant because there was no evidence that it, as a separate entity, was a participant in the raid. No union officers or employees were among those arrested or shown to be present at the raid. The court followed the rule that a union may be held liable only under the traditional doctrines of agency.[117] In contrast, however, the court found ample evidence that the 191 individual defendants were organized and acted jointly in conducting the raid and that their actions caused the damages B & M incurred from the raid.[118] Finally, the court remanded the case for reconsideration of some of the damages assessed by the trial court against the defendants which it found unsupported by the record.[119]

Bottoms establishes the civil contempt action as a viable means for collecting damages from violent strikers. Success in such an action will hinge upon care in assuring that potential defendants are served notice of the provisions of the restraining order or at least that all those who may violate the order can be established as having had actual knowledge of the order.

---

[114]*Id.* at 87.

[115]*Id.* at 88 (citing Thomas v. Woollen, 255 Ind. 612, 266 N.E.2d 20 (1971); Caito v. Indianapolis Produce Terminal, 162 Ind. App. 590, 320 N.E.2d 821 (1974)).

[116]405 N.E.2d at 89 (citing Shaughnessey v. Jordan, 184 Ind. 499, 111 N.E. 622 (1916); IND. R. TR. P. 65(D)).

[117]405 N.E.2d at 90 (citing United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); Mason-Rust v. Laborers Int'l Union Local 42, 435 F.2d 939 (8th Cir. 1970)).

[118]405 N.E.2d at 91.

[119]*Id.* at 96.