# X. Labor Law

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## *A. Employment Contracts—Employment At Will*

The most significant development in employer-employee relations in Indiana during the survey period may well have been the denial of transfer by the Indiana Supreme Court in *Campbell v. Eli Lilly & Co.*[1]

Campbell had charged in his complaint that the company discharged him for reporting the lethal effects of various company-manufactured drugs to his superiors. Based upon the common law employment at will rule, the court of appeals held that Campbell's complaint did not state a claim upon which relief could be granted.[2] The court construed prior Indiana Supreme Court precedent[3] as creating an exception to the employment at will rule only when the plaintiff demonstrates that he was discharged in retaliation for having exercised a statutorily conferred personal right or for having fulfilled a statutorily imposed duty.[4] In *Campbell*, the court of appeals concluded that Campbell failed to show any statutory support for his actions.[5]

Justice Hunter wrote a strong dissent to the supreme court's denial of transfer, stating that he "would recognize an exception to the employment at will doctrine based on public policy."[6] Justice Hunter noted that Campbell's actions "which allegedly prompted his discharge served a vital public interest defined by statute—the protection of the public from dangerous drugs."[7] He noted the impact that the retaliatory discharge would have in frustrating this statutorily defined public policy and stated:

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[1]421 N.E.2d 1099 (Ind. 1981).

[2]Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1062 (Ind. Ct. App. 1980). For a discussion of the appellate court's decision, see Galanti, *Business Associations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 31, 54 (1982).

[3]Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973). The Indiana Supreme Court created an exception to the employment at will doctrine for a claimant who alleged she was discharged for filing a workmen's compensation claim against her former employer.

[4]In *Frampton*, the court determined that the plaintiff had a statutory source for the right to assert the claim of wrongful discharge under IND. CODE § 22-3-2-15 (1976). Frampton v. Central Indiana Gas Co., 260 Ind. 249, 252, 297 N.E.2d 425, 428 (1973).

[5]413 N.E.2d at 1061.

[6]421 N.E.2d at 1100.

[7]*Id. See* 21 U.S.C. § 301-450 (1976 & Supp. IV 1980); IND. CODE §§ 16-1-28-1 to -31-10 (1982).

> Our continued inflexible application of the [employment at will] rule, however, not only neuters the internal check which the aware employee inherently supplies, but also ultimately deprives the government of information concerning goods or conduct potentially injurious to the public welfare. It is these dubious ramifications which should not be countenanced, as well as the callous treatment which the rule permits to be foisted on the citizen who, in good faith, acts on the principle of civic duty or the mandates of a professional ethical code.[8]

In support of his proposed public policy exception to the employment at will rule, Justice Hunter cited authority from several other jurisdictions,[9] from critics of an inflexible application of the employment at will rule,[10] and from federal and Indiana statutes which exclude public employees from the scope of the employment at will rule.[11]

Rather than religiously following the employment at will rule, Justice Hunter would balance employers' interests in conducting business efficiently with society's interest in effectuating public policies, and thus would only deny a cause of action "[w]here a discharged employee's claim does not rest on an employer's conduct in contravention of a clearly mandated public policy."[12]

Justice Hunter's dissent is compelling but unfortunately remains only a dissent. The *Campbell* case clearly establishes that the Indiana Supreme Court will not consider any statutorily defined public policy exceptions to the employment at will rule in Indiana. As Justice Hunter stated: "No more compelling example for such need exists than the circumstances alleged [in *Campbell*]."[13]

The court of appeals decision in *Stanley v. Kelley*[14] illustrates the ramifications which flow from the employment at will rule. In *Stanley*, the court held that a contract of employment that is not for a definite and an enforceable term is a contract at will, and either party may terminate the employment at any time without cause.[15] Further, the

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[8]421 N.E.2d at 1101.

[9]*E.g.* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980).

[10]*E.g.* Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

[11]5 U.S.C. § 7503 (Supp. 1980); IND. CODE § 4-15-1-1 (1982).

[12]421 N.E.2d at 1102.

[13]*Id.* at 1103.

[14]422 N.E.2d 663 (Ind. Ct. App. 1981).

[15]*Id.* at 667.

court reasoned that such a "contract of employment is unenforceable with respect to that which remains executory."[16]

This much of the court's interpretation regarding employment at will is sound. However, the court went on to conclude that "[s]uch a contract, terminable at will, cannot form the basis of an action for interference with a contractual relationship."[17] In footnote three, the court rejected Stanley's argument that the contract is a subsisting relationship of value until the contract is terminated.[18] The court recognized that this argument was supported by Prosser and was accepted as the majority position in other jurisdictions; however, the court held that it did not appear to be the law in Indiana.[19]

The ramifications of this decision to employer-employee relations are obvious. If the court's interpretation is correct, there is no interference with contract protection for employment at will contracts under Indiana tort law. This seems to be an unjustifiably harsh result, which is contrary to the logic of the majority rule.

In *Ohio Table Pad Co. v. Hogan*,[20] the court of appeals held that Hogan's acts of moving and giving up a prior job to accept new employment did not constitute valid consideration so as to convert a terminable at will employment contract to a contract of permanent employment requiring "good cause" for discharge.[21] The court reasoned,

> that in moving and/or giving up her prior job, the employee is merely placing herself in a position to accept the new employment. There is no independent detriment to the employee because she would have had to do the same things in order to accept the job on any baisis, and there is no independent benefit bestowed upon the employer.[22]

This case is significant in that it recognized an exception to the employment at will rule under circumstances where additional consideration supports the employment contract; however, it is also significant that the court narrowly construed that exception.

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[16]*Id.*

[17]*Id.* For further discussion of this case and the issue regarding the interference with a contractual relationship, see Mead, *Torts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 377, 406 (1983).

[18]422 N.E.2d 667 n.3.

[19]*Id.* (citing Miller v. Ortman, 235 Ind. 641, 136 N.E.2d 17 (1956)). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129, at 932 (4th ed. 1971).

[20]424 N.E.2d 144 (Ind. Ct. App. 1981).

[21]*Id.* at 147.

[22]*Id.* at 146.

### *B. Bargaining For Non-Teacher Public Employees*

The efforts of the courts to establish bargaining rights for public employees that are not covered under the 1973 Certificated Educational Employee Bargaining Act (CEEBA)[23] continued during the past survey period.

In *Michigan City Area Schools v. Siddall*,[24] the city had adopted a voluntary policy for collective bargaining with its non-teaching employees that was expressly conditioned upon all members of the employees' organization being school employees and upon all negotiating representatives of the employees' organization being school employees or attorneys. The non-teaching employees sought to be represented by an employee of the Indiana State Teachers' Association who was neither a school employee nor an attorney. When the school refused to recognize and to negotiate with the selected representative, a strike ensued. The school sought to enjoin the strike, and the employees counterclaimed to restrain the school from interfering with their choice of a bargaining representative.

The trial court permanently enjoined the employees from participating in the strike and ordered that the school bargain with the employees' selected representative. The only issue on appeal was the validity of the trial court's order restraining the school from interfering with the choice of a bargaining representative and mandating that the school bargain collectively. The court of appeals, while sustaining the injunction, overturned the trial court's order, holding that the school had no legal duty to bargain collectively.[25] The court noted that under common law there is no duty for employees and employers to engage in collective bargaining,[26] that the non-teacher employees were not under CEEBA,[27] and that the School Powers Act[28] authorized the school to fix the salaries and the compensation of its employees.

The court of appeals considered the employee's constitutional right to join a labor organization but concluded that there was no duty imposed upon the school to deal with such an organization or its representatives.[29] The court reasoned:

> If there is no legal obligation statutorily or at common law to engage in good faith collective bargaining with a duly chosen agent of a group or employees, there is no *illegal* interference with an employee's constitutional freedom of speech or associa-

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[23]IND. CODE §§ 20-7.5-1-1 to -14 (1982).

[24]427 N.E.2d 464 (Ind. Ct. App. 1981).

[25]*Id.* at 466.

[26]*See* County Dep't of Public Welfare v. American Fed'n of State, County and Mun. Employees, 416 N.E.2d 153 (Ind. Ct. App. 1981).

[27]IND. CODE §§ 20-7.5-1-1 to -14 (1982).

[28]*Id.* § 20-5-2-2(7).

[29]427 N.E.2d at 466-67.

> tion where an employer does no more than refuse to recognize and engage in collective bargaining with some employee selected organization or its agents.[30]

The appellate court adopted the holding in *Peters v. Poor Sisters of Saint Francis Seraph*[31] in which that court, following Professor Getman's analysis in his article dealing with Indiana Labor Relations Law,[32] held that Indiana Code section 22-7-1-2,[33] which established a worker's right to select his bargaining representative and to organize into a local union, does not impose upon an employer a duty to recognize the union as the collective bargaining agent nor does it impose upon an employer a duty to engage in the collective bargaining process.[34]

After determining that the school had no legal duty to engage in collective bargaining, the court addressed the impact of the school's policy statement. The court concluded that the school may voluntarily engage in collective bargaining and, in so doing, could impose qualifications and restrictions on its participation in collective bargaining.[35] The court reasoned that because "the classified employees did not comply with the policy conditions, there was no enforceable duty requiring the school to engage in collective bargaining."[36] Further, the court found that there was no evidence of "illegal interference" with the employees' selection of a bargaining representative.[37]

Judge Staton noted in his concurring opinion that in this case "the school board had no statutory, common law or contractual duty to enter negotiations"[38] and stated that "the school board's 'voluntary policy for collective bargaining,' as characterized by the majority, was nothing more than an offer to bargain with the employees if the employees met the two conditions set by the policy."[39]

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[30]*Id.* at 467.

[31]148 Ind. App. 453, 267 N.E.2d 558 (1971).

[32]Getman, *Indiana Labor Relations Law: The Case for a State Labor Relations Act*, 42 IND. L.J. 77, 87 (1966).

[33]IND. CODE § 22-7-1-2 (1982) provides that:

> No worker or group of workers who have a legal residence in the state of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association to exist within and pursuant to the laws of the state of Indiana: Provided, That this act shall in no way be deemed to amend or repeal any of the provisions of the National Labor Relations Act.

*Id.*

[34]427 N.E.2d at 467 (citing Peters v. Poor Sisters of Saint Francis Seraph, 148 Ind. App. 453, 267 N.E.2d 558 (1971)).

[35]427 N.E.2d at 468.

[36]*Id.*

[37]*Id.*

[38]*Id.*

[39]*Id.* at 469.

It is difficult to dispute the court's reasoning. However, *Siddall* leaves open the question of whether the school policy would have been enforceable had the employees complied with its conditions,[40] and the broader question of what circumstances would result in a contractual commitment to bargain. Other questions left unresolved by this decision include: what consideration would be required; what would be the duration of the commitment; and what would be required to comply with the contractual commitment — would the court assume the role of compelling good faith bargaining. These questions await further litigation.

### *C. Arbitration Appeals*

*1. Private Employer Arbitration Cases.*—The only private-sector arbitration case resolved on appeal during the survey period was *International Brotherhood of Electrical Workers, Local 1400 v. Citizens Gas & Coke Utility*.[41]

Citizens Gas posted an opening for a trainee position as a machinery repairman and ultimately awarded the position to the least senior of four applicants. One of the senior applicants filed a grievance and the grievance went to arbitration. The arbitrator found that the company had unreasonably determined that the grievant was unqualified for the position and ordered that the grievant be placed in the trainee position and made whole for his losses. The arbitrator's decision was based upon the company's requirement of a high school diploma which the grievant did not have. The arbitrator noted that the company had waived the diploma requirement in the past for applicants who were otherwise qualified, but the company had failed to do so here because it felt a high school diploma was essential to a trainee position. The arbitrator recognized that the company had wide discretion in establishing job requirements but held that the requirements had to be reasonable. The arbitrator concluded that the diploma requirement was unreasonable because in some school systems a diploma had become little more than a certificate of attendance.

The court of appeals upheld the trial court's decision to vacate the award of the arbitrator.[42] The appellate court recognized that, under the Uniform Arbitration Act, a court may review the substance of an award only when a party claims that the arbitrator has exceeded his power and the " 'award cannot be corrected without affecting the

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[40]For a discussion of this issue, see County Dep't of Pub. Welfare v. AFSCME, 416 N.E.2d 153 (Ind. Ct. App. 1981) and the author's comment relating to that case in Archer, *Labor Law, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 269, 273-77 (1982) [hereinafter cited as *1981 Labor Law Survey*].

[41]428 N.E.2d 1320 (Ind. Ct. App. 1981).

[42]*Id.* at 1327.

merits of the decisions upon the controversy submitted.' "[43] The court concluded, however, that the arbitrator's decision exceeded his authority which was controlled by the parties' collective bargaining agreement.[44]

In his decision, the arbitrator had acknowledged that the trainee's position required a high school diploma and had admitted that the grievant did not meet that requirement, which was specified in the job description.[45] Yet in resolving this dispute, the arbitrator looked beyond the express job requirements and considered the reasonableness of those requirements.

The collective bargaining agreement permitted grievances to be filed challenging the reasonableness of job requirements; however, the high school diploma requirement had not been challenged when it was adopted, as required by the bargaining agreement. The court of appeals concluded from the thirty-day time limit for filing such a grievance set forth in the bargaining agreement, that this procedure was the exclusive remedy for challenging the reasonableness of job requirements and that job descriptions were to be deemed final if not challenged promptly when adopted.[46] Thus, when the arbitrator considered the reasonableness of the job requirement, he was acting beyond his powers and the court could vacate the arbitrator's award.

Because this was a private-sector case, Section 301 of the Labor Management Relations Act[47] and the cases construing that section are applicable. In 1960, the Supreme Court issued the *Steelworkers Trilogy* of cases[48] which provided clear instruction to the courts as to their role in enforcement of arbitration awards.[49] In *United Steelworkers of America v. American Manufacturing Co.*,[50] the Court stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is

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[43]*Id.* at 1325 (quoting the Uniform Arbitration Act, IND. CODE § 34-4-2-13(a) (1982)).

[44]428 N.E.2d at 1326.

[45]*Id.*

[46]*Id.*

[47]Labor Management Relations Act § 301, 29 U.S.C. § 185 (1976).

[48]United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[49]*See* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960). In that case the Court stated that "when the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." *Id.* at 569.

[50]363 U.S. 564 (1960).

> governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.[51]

In the *Citizens Gas* case, the court construed the procedure for reviewing job requirements as stated in the collective bargaining agreement. Although the arbitrator was not confronted with the argument that this review procedure foreclosed him from passing on the reasonableness of the job requirements, the court construed that procedural contract language and applied it directly to the case. In so doing, the court rejected the union's procedural argument that the company had waived this argument by not having raised it to the arbitrator, despite the settled law that procedural objections to arbitrability are to be decided by the arbitrator and not by the courts.[52]

The decision of the court as to the interpretation and application of the collective bargaining agreement may be sound; however, the case stands as a poor precedent. The court has decided questions which should have been presented to the arbitrator. At the very least, the court should have remanded the proceeding to the arbitrator for his resolution of the impact of the job requirement grievance procedure on the instant case and his resolution of whether that issue had been waived when it was not presented in the arbitrative hearing. The parties' past practice regarding these matters, the parties' bargaining history, and the vast body of arbitration case law,[53] should have been considered in addressing these questions.

It is difficult for this author, who is a labor arbitrator (though not the arbitrator in this case), to be in the position of advising the courts to restrict their judicial review of arbitration awards to comply with the Supreme Court directives in the *Steelworkers Trilogy*. Nonetheless, if the courts succumb to the temptation to review the merits of arbitrator's interpretative decisions, the process of arbitration will fail. To be viable, arbitration must afford the parties what they sought when they agreed to arbitration—a relatively inexpensive and speedy resolution of collective bargaining agreement disputes by an experienced arbitrator of their choosing. To superimpose the judicial system on arbitration cases, with its costly and slow moving appellate procedures, will destroy the arbitration system. The principal safeguard of the arbitration system is not judicial review, but the parties' right to select their own arbitrator.

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[51]*Id.* at 567-68.

[52]*See* John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964).

[53]*See, e.g.*, United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

*2. Public School Employer Arbitration Cases.*—In the arbitration appeals cases issued during the survey period, the court of appeals recognized that judicial review of an arbitrator's award must be limited in scope, but the court left numerous questions relating to those limits unanswered. In *School City of East Chicago v. East Chicago Federation of Teachers, Local 511*,[54] the court of appeals for the third district considered whether the school could challenge the correctness of the arbitrator's award after the statutorily set ninety-day period allowed for vacating, modifying, or correcting the award.[55] In addition, the court considered whether the reviewing court could intervene when the arbitrator has awarded punitive damages. The court of appeals concluded that the school could not directly challenge the arbitrator's award after the ninety-day period; however, the court of appeals allowed the school's collateral attack on the award of punitive damages and vacated the arbitrator's award.[56]

In *East Chicago Federation*, the arbitrator held that the school employer had refused to make dues deductions and rdered the school to pay punitive damages to the union. More than ninety days after the award was mailed to the parties, the union filed a motion in trial court to confirm and enforce the award. The school employer answered, attacking the correctness of the arbitrator's decision. The trial court held that the school was precluded from raising, as a defense, the correctness of the arbitration award, because the school had not complied with the provisions of the Indiana Uniform Arbitration Act which required a party to file a challenge to an award within ninety days.[57]

The issue, as the court of appeals perceived it, was whether the school employer was barred from challenging the correctness of the arbitrator's award because it failed to move for a vacation, modification, or correction of the award within the ninety-day period.

The court, finding no case law interpreting the Certificated Educa-

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[54]422 N.E.2d 656 (Ind. Ct. App. 1981).

[55]*See* IND. CODE §§ 34-4-2-13, -14 (1982).

[56]422 N.E.2d at 661-63.

[57]Section 12 of the Uniform Arbitration Act (UAA) adopted by Indiana provides:

> Upon application of a party, but not before ninety (90) days after the mailing of a copy of the award to the parties, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 13 and 14 [34-4-2-13, 34-4-2-14] of this act. Upon confirmation, the court shall enter a judgment consistent with the award and cause such entry to be docketed as if rendered in an action in said court.

IND. CODE § 34-4-2-12 (1982).

Sections 13 and 14 of the UAA provide for vacating an award and for modifying or correcting an award respectively; furthermore, both of those sections provide that applications for relief "shall be made within ninety (90) days after the mailing of a copy of the award to the applicant." *Id.* §§ 34-4-2-13, -14.

tional Employees Bargaining Act (CEEBA), looked to case law based upon the National Labor Relations Act (NLRA).[58] The court found that the legal precedent and federal policies on this issue would require the court to conclude that the school's defenses in *East Chicago Federation* were not timely asserted.[59] However, the court in *East Chicago Federation* stated that this precedent was not binding because the employer in this case, the school, was not subject to the NLRA.[60]

Although the court of appeals noted that the school was not subject to the NLRA, and further noted a distinction between the employee's relationship with private employers and the school corporation, the court held that the Indiana statutes preclude the assertion of any defense that is available for direct appeal after the ninety-day period.[61] In reaching this conclusion, the court found that the public policy to avoid labor strife, which supports the NLRA precedent on this issue, was applicable to this case.[62] It is interesting to note that the court of appeals did not consider a recent Indiana decision, *State Department of Administration v. Sightes*,[63] in which the court had ruled that a "defendant who has a valid ground for challenging the award but who fails to raise that challenge within the 90-day time limit should

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[58]29 U.S.C. § 151 (1976).

[59]422 N.E.2d at 659-60 (citing Chauffeurs, Teamsters, Warehousemen and Helpers v. Jefferson Trucking Co., 628 F.2d 1023 (7th Cir. 1980)). For further discussion of *Jefferson Trucking*, see *1981 Labor Law Survey*, *supra* note 40, at 283-84. The conclusion in *Jefferson Trucking* may be inconsistent with the ultimate holding in the *Chicago Federation* case. As is developed more fully in the text of the 1981 Survey Article, the court in *Jefferson Trucking* based its decision on a finding that an arbitrator's error of law, under which the arbitrator grants a form of relief that public policy does not permit, renders the award void and subject to attack after the UAA 90-day period. The trial court opinion in Chauffeurs, Teamsters, Warehousemen and Helpers v. Jefferson Trucking Co., 473 F. Supp. 1255 (S.D. Ind. 1979) notes that one of the defenses belatedly raised in that case was that the relief sought was not available at law. It is not clear whether this relief was one that public policy would not permit. If not, the seventh circuit was not called upon in *Jefferson Trucking* to address the narrow question the court dealt with in the *Chicago Federation* case.

[60]*See* 29 U.S.C. § 152(2) (1976).

[61]422 N.E.2d at 660-61.

[62]*Id.* at 661. The court stated that:

> We must, however, agree with Judge Steckler in *Jefferson Trucking Company* that the policies favoring arbitration are firmly aligned against permitting a party, who has voluntarily agreed to this form of dispute settlement, [arbitration] . . . [could not] simply ignore an award that has been made and then ask to be given its day in court when, in frustration, the other party is driven to institute suit for enforcement of the award.

*Id.*

[63]416 N.E.2d 455 (Ind. Ct. App. 1981), *discussed in 1981 Labor Law Survey*, *supra* note 40, at 282-83. In *Sightes*, the arbitrator construed a statute so as to award the teachers back pay. The defendants alleged that the arbitrator erred in his construction of the statute and noted subsequent arbitrator's decisions in support of this con-

not be permitted to raise that challenge when the plaintiff applies for confirmation of his award."[64]

The court next considered the school's collateral attack, claiming that the arbitrator's award of punitive damages so exceeded the arbitrator's authority as to be void. The court noted the general rule that an arbitrator's award will not be vitiated because of legal errors but then listed three choices available to a reviewing court if an arbitrator does not follow the law. According to the court, the three choices include: disregarding the error because it is within the authority of the arbitrator; considering the error because it is the basis for a direct attack to vacate or modify the award; or voiding the award because it is beyond the jurisdiction of the arbitrator.[65] The court explained:

> Which choice should be made depends upon the nature of the error. Since many errors will fall into the category of not being grounds for any modification of the award, it follows that some public policy element must be brought to bear before an error can be "promoted" into the second category. What then may constitute the third category, that [sic] at issue in the school's claim before us?
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> Having surveyed the authorities we conclude that where the arbitrator has jurisdiction of the case and of the parties it is only where he affords a form of relief that public policy does not permit the parties to voluntarily agree to, that he so acts beyond his jurisdiction that the award is void and subject to collateral attack.[66]

The court in *East Chicago Federation* chose the third category and found that the arbitrator's award of punitive damages was beyond his jurisdiction, thus the award was void.[67]

In reaching this conclusion, the court cited the decision of the New York Court of Appeals in *Garrity v. Lyle Stuart, Inc.*,[68] in which the court held that an arbitrator had no power to award punitive damages, even though it was agreed to by the parties, because the award of punitive damages is a sanction reserved to the state. The *Garrity* court concluded that the enforcement of an award of punitive damages would violate strong public policy considerations because it would be both

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tention. Again, however, it is not clear that the arbitrator's award in *Sightes* was one that public policy would not permit.

[64]416 N.E.2d at 450.

[65]422 N.E.2d at 662.

[66]*Id.*

[67]*Id.* at 662-63.

[68]40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

unpredictable and uncontrollable and because it would amount to an unlimited draft upon judicial power.[69] However, *Garrity* was a commercial arbitration case, not a labor case, and the court made no reference to the Uniform Arbitration Act.

An additional authority cited in *East Chicago Federation* was a 1963 law review article[70] in which the author criticized a New York decision that failed to enforce an arbitrator's award of punitive damages against a union. The author stated that labor arbitration cases require a different treatment than commercial arbitration cases because labor arbitration is a necessary complement to negotiation and a substitute for industrial strife.[71]

A strong argument can be made that, especially in the absence of contractual authority to award punitive damages, an arbitrator does not have authority to award punitive damages. However, doubt creeps in regarding the decision in *East Chicago Federation* because the court, with little authority or explanation of its decision, permitted an arbitrator's punitive damages award to be challenged after the expiration of the statutory ninety-day period.

This case is significant in many respects. The court noted a distinction between employers who are subject to the NLRA and employers who are not subject to the NLRA. The court acknowledged that for the former employers precedent would dictate that the defenses in this case were not timely filed.[72] As to employers not under the NLRA, the court appears to have created some exceptions to the general rule that errors of law do not afford a basis for attacking an arbitrator's award.

The exceptions created in *East Chicago Federation* were cited with approval in *Southwest Parke Education Association v. Southwest Parke Community School Trustee's Corp.*[73] In *Southwest Parke*, the court of appeals for the first district held that the Indiana Uniform Arbitration Act,[74] as a general rule, does not permit an arbitrator's award to be vacated for an erroneous interpretation of law.[75]

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[69]*Id.* at 358, 353 N.E.2d at 795-96, 386 N.Y.S.2d at 833-34.

[70]Note, *Judicial Review of Arbitration: The Role of Public Policy*, 58 NW. U. L. REV. 545 (1963).

[71]*Id.* at 551-55. The case was Publisher's Ass'n v. Newspaper & Mail Deliverers' Union, 280 A.D. 500, 114 N.Y.S. 401 (1952). The court in *Publisher's Association* refused enforcement of the arbitrator's award of punitive damages despite the parties' collective bargaining agreement in which they agreed to punitive damages. This case is criticized in Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1209 (1962).

[72]422 N.E.2d at 660 (citing Chauffeurs, Teamsters, Warehousemen and Helpers v. Jefferson Trucking Co., 628 F.2d 1023 (7th Cir. 1980)).

[73]427 N.E.2d 1140 (Ind. Ct. App. 1981).

[74]IND. CODE §§ 34-4-2-1 to -22 (1982).

[75]427 N.E.2d at 1148.

In *Southwest Parke*, the arbitrator had held that the school board's dismissal of the grievant teacher was invalid under the Indiana General School Powers Act[76] because the school board had voted to dismiss the teacher by only a majority of those present and not a majority of the school board. The arbitrator construed the Act to require the majority vote of the school board for such action.

The court of appeals concluded that if the arbitrator committed an error of law in his construction of the Act, it had to fall in the first two of the three exceptions set forth in *East Chicago Federation* because the trial court, in vacating the original award, found the arbitrator's interpretation of the law, rather than the relief granted, to be faulty.[77] The court of appeals stated that under the Uniform Arbitration Act the general rule is that "an arbitrator's mistake of law or erroneous interpretation of the law does not constitute an act in excess of the arbitrator's powers."[78] However, the court noted that there are exceptions to this general rule for an arbitrator's manifest disregard of the law or gross errors of judgment in law.[79] The court concluded that neither of these exceptions applied to the instant case because the "arbitrator's findings, opinion, and award indicate[d] not only a knowledge of the applicable law and facts, but also a conscientious attempt to apply the law to the facts."[80] Thus, without ever deciding if the arbitrator had erred in his interpretation of the General School Powers Act, the court of appeals upheld the arbitrator's award requiring reinstatement of the grievant teacher with reimbursement for lost earnings.[81]

To be compared to *Southwest Parke* is *Tippecanoe Education Association v. Board of School Trustees*,[82] in which the holding of the court of appeals conflicts with CEEBA. In *Tippecanoe*, the grievant high school teacher, who taught physical education, had been transferred involuntarily by the school board to a similar position in the junior high school. The reason for the transfer was to create a physical

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[76]Indiana General School Powers Act, IND. CODE § 20-5-3-2(6) (1982) provides:

> Quorum. At a meeting of the governing body, a majority of the members shall constitute a quorum. No action may be taken unless a quorum is present. Except where a larger vote is required by law with respect to any matter, a majority of the members present may adopt a resolution or take any action.

*Id.*

[77]427 N.E.2d at 1147 (construing School City of East Chicago v. East Chicago Fed'n of Teachers, Local 511, 422 N.E.2d 656, 662 (Ind. Ct. App. 1981)).

[78]427 N.E.2d at 1147. *See* IND. CODE § 34-4-2-13 (1982).

[79]427 N.E.2d at 1147.

[80]*Id.* at 1148.

[81]*Id.*

[82]429 N.E.2d 967 (Ind. Ct. App. 1981).

education teaching position for the newly hired basketball coach at the high school. The school board felt that it was important for the coach to teach at the school where he was to coach. The school board contended that this transfer was made in compliance with its collective bargaining agreement which listed the criteria and the procedure to follow in transferring teachers, and further provided that: "*The Board reserves the right to make involuntary transfers for the general welfare of the corporation.*"[83]

The arbitrator found that the board had followed the criteria and procedure set forth by the collective bargaining agreement in transferring the grievant, but the arbitrator construed the words "general welfare of the corporation" to refer to the school's best interest when viewed from the vantage point of the entire school corporation. The arbitrator reasoned that a basketball coach deals personally with a limited number of students and that his teaching assignment at the school where he coaches would help only the few players on his team. He thus concluded that the grievant teacher's right to continue in his teaching position at the high school was more in the "general welfare of the school corporation" than the assignment of the new coach to teaching duties at the school.

On appeal, the court considered whether the trial court had correctly concluded that the arbitrator exceeded his authority in determining the rights of the grievant teacher, by interpretating what was for the general welfare of the school. The court looked to section 6(b) of CEEBA which provides that:

> 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 . . . (3) hire, promote, demote, transfer, assign and retain employees.[84]

In addition, the court considered section 3 of CEEBA, which in defining the "duty to bargain collectively" under the Act states, in part, that "[n]o contract may include provisions in conflict with . . . (c) school employer rights as defined in Section 6(b)."[85]

In construing these provisions, the court relied upon a prior decision, *Anderson Federation of Teachers, Local 519 v. Alexander*,[86] where the court found that under CEEBA the school was limited in the scope

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[83]*Id.* at 969.

[84]IND. CODE § 20-7.5-1-6(b) (1982).

[85]*Id.* § 20-7.5-1-3.

[86]416 N.E.2d 1327 (Ind. Ct. App. 1981). For a discussion of this case, see *1981 Labor Law Survey*, *supra* note 40, at 269-73.

of its collective bargaining. The court in *Anderson Teachers* stated:

> The scope of collective bargaining by schools, then, is to be restricted because school corporations have duties to the public, to the legislature, and to their employees as individuals, which they must not be permitted to bargain away.
>
> . . . .
>
> . . . the legislature has plainly expressed its intent that the responsibilities and authority of school corporations, as partially described in section 6(b) of the Act, are duties entrusted by the legislature to the sole discretion of school corporations, and can not be restricted in a collective bargaining agreement."[87]

Applying the rationale in *Anderson Teachers*, the court of appeals found that the arbitrator's consideration of the general welfare of the school corporation created a conflict because such responsibility had been entrusted to the sole discretion of the school board; thus, the court held that the arbitrator's decision had been properly vacated.[88]

This reasoning supports the court's action in vacating the arbitrator's award, and it is consistent with the general rule in *Southwest Parke* that an arbitrator's erroneous interpretation of law is not a sufficient reason to set aside the arbitrator's award.[89] In *Southwest Parke*, the arbitrator construed a state statute and, while he may have been in error, such error, in itself, would not be grounds to deny enforcement of the award under the general rule of the Uniform Arbitration Act. In *Tippecanoe*, the arbitrator did not construe the statute in question. There is no indication in the opinion of the court of appeals that the arbitrator was even made aware of the statute. While his award may have been based upon a correct interpretation of the parties' collective bargaining agreement, the agreement, as the court construed it, was beyond the authority of the parties. In effect, the court in *Tippecanoe* found that the agreement was unenforceable as contrary to the public policy expressed by the legislature in CEEBA.[90]

If the court had said nothing more on this point, it would seem that any collective bargaining agreement relating to school employer rights under section 6(b) of CEEBA would be unenforceable. However, the court went on to narrow its holding by stating:

> It is apparent, however, [that] the arbitrator may intervene where the Board's action conflicts with applicable law or express, lawful Master Contract provisions, and that the Board

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[87]416 N.E.2d at 1331-32.
[88]429 N.E.2d at 973.
[89]*See* 427 N.E.2d at 1147.
[90]429 N.E.2d at 971.

> is required to observe the procedures and criteria specified . . . [in the agreement] in making transfers. Though the arbitrator may not generally substitute his judgment for that of the Board, we believe appropriate review will lie in a proper case for actions involving purely arbitrary, capricious or fraudulent exercise of the powers granted to the Board by the General School Powers Act.[91]

This interpretation considerably softens the literal language of sections 3 and 6(b) of CEEBA as it allows arbitrator enforcement of the parties' agreements with respect to the criteria and the procedure for school employer exercise of CEEBA section 6(b) powers, and this interpretation permits arbitrator review of arbitrary, capricious or fraudulent exercises of such powers.

After *Southwest Parke* and *Tippecanoe*, questions still remain as to the circumstances under which the exceptions stated in *East Chicago Federation* will be applied by the courts in reviewing arbitration decisions. The first "choice" that the court in *East Chicago Federation* lists encompasses the general rule that the court will disregard the error by the arbitrator.[92] The second "choice" for a court is to permit a direct attack on the award within the ninety-day statutory period.[93] In *East Chicago Federation*, the court noted that this second category involves public policy considerations and included in footnote thirteen, authority recognizing an exception for an arbitrator's "manifest disregard of the law."[94] No one can take issue with a court having authority to set aside an award based upon an arbitrator's "manifest disregard of the law." But does this constitute the only circumstance which would permit a direct attack based upon an arbitrator's error of law?

Finally the *East Chicago Federation* court stated that in the third "choice," the "only" circumstance under which it will void the award as being beyond the arbitrator's jurisdiction is where the arbitrator "affords a form of relief that public policy does not permit the parties to voluntarily agree to."[95] *East Chicago Federation* involved punitive damages. What other forms of relief would fall within this third category? Would an arbitrator's award based upon an incorrect interpretation of CEEBA section 6(b) or an interpretation in conflict with that section, such as in *Tippecanoe*, fall within this third category, or would such defenses have to be raised within the ninety-day period? These questions also will have to await further litigation.

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[91] *Id.* at 973 (citation omitted).

[92] 422 N.E.2d at 662.

[93] *Id.*

[94] *Id.* at 662 n.13 (citing San Martine Compania de Navegacion v. Saguenay Terminals, Ltd., 293 F.2d 796 (9th Cir. 1961)).

[95] 422 N.E.2d at 662.