Commentary (Bargaining and Discussion-Is It a Happy Marriage?)

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Indiana Education Employment Relations Board

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Commentary

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Teacher and school board negotiators will soon begin their second year of bargaining under Indiana's first public employee collective bargaining law. The first year under any collective bargaining law seldom goes smoothly, and teacher-school board negotiations in Indiana in 1974 were no exception. Although bargaining was mandated to begin by the second week of February, many districts did not begin bargaining until about mid-April because of the backlog of unit determination and representation cases.

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2 Taking as standard the common practice of commencing the school year on the day following Labor Day—a rule generally though not universally followed in Indiana—there were 46 schools which opened the fall term before final agreements were reached. Of the 276 school districts with certified exclusive representatives, 137 required neutral intervention (mediation, fact-finding, or both) in the first year. See Doering, Bargaining and Discussion: Is It a Happy Marriage?, 50 IND. L.J. 284, 289 (1975), supra.

3 Under section 12 of the Act, table bargaining is mandated to begin on or before 180 days prior to the school corporation's budget submission date. IND. CODE § 20-7.5-1-12 (1973), IND. ANN. STAT. § 28-4562 (Supp. 1974). This would have been February 12, 1974, in most corporations.

4 See Doering, supra note 2, at 289.

5 One hundred and one unit representation disputes required Board assistance, and 53 formal hearings had to be held in 1974. The Board conducted secret ballot elections in 17 school corporations, and, although run-off elections are not specifically provided for in the Act, three were held in 1974. 1 IEERB ANNUAL REP. (1975).

Prior to the effective date of the Act many Indiana schools did not have an exclusive representative (a school employee organization representing a majority of the certificated employees in an appropriate unit for the purpose of collective bargaining). The start of bargaining was delayed in school corporations where there was no teacher organization authorized by a majority of the teachers to represent them in bargaining or where there were competing teacher organizations.

Some teacher organization officers requested school boards to recognize them on the basis of teacher membership lists. These requests were almost universally denied because majority authorization, not membership, is required before a school employer may recognize a school employee organization as the exclusive representative. An individual teacher could belong to more than one school employee organization, or could belong to a particular organization without wanting or designating that organization to represent him at the bargaining table.

This practice forced teacher organizations to collect authorization cards, or circulate petitions which indicated that the teacher had authorized a particular school employee organization to represent him for the purpose of collective bargaining. Where there were competing organizations seeking recognition, most school employers declined to grant recognition and petitioned the Board pursuant to section 10(c)(2) of the Act that one
Despite the delay at the beginning of the bargaining process, however, negotiations went remarkably well considering the unfamiliarity of both school boards and teachers with collective bargaining, the or more school employee organizations had presented to it a claim to be recognized as the exclusive representative in the appropriate unit. The Board is authorized to investigate such a petition pursuant to section 10(c) (4), and if it has reasonable cause to believe a question exists as to whether any organization represents a majority, it must hold a hearing to determine whether a question of representation in fact exists. If a question of representation is found, the Board must direct a secret ballot election.

Even where an employee organization offered authorization cards showing majority support, some employers preferred to petition the IEERB for an election rather than voluntarily recognize the teacher organization as the exclusive representative. By calling for an election, school boards would have the advantage of the 24-month election bar rule, which provides that there shall be no representation challenges for 24 months following an IEERB-conducted balloting. Also, it was believed that the secret ballot method of selecting the exclusive representative would discourage pressure tactics by competing teacher organizations seeking authorizations. In this regard cf. Linden Lumber Div., Summer & Co. v. NLRB, 95 S. Ct. 429 (Dec. 23, 1974), holding that it was not an unfair practice for an employer to refuse to bargain with an employee representative whose proof of being majority representative was based solely on authorization cards. The employer had committed no unfair practice during the employee organization's solicitation campaign, unlike the cases decided previously by the Supreme Court, so that the question was simply whether the employer could refuse to acknowledge majority status on the basis of signed authorization cards and could refuse to call for an election himself. Held, it was incumbent on the union to petition the NLRB for an election. Id. at 434. The Court, while noting that this position "is not to say that authorization cards are wholly unreliable as an indication of employee support for a union," pointed out that "[a]n employer concededly may have valid objections to recognizing a union on that basis." Id. at 432. The employer might believe, the Court observed, that the individual employees' participation in joint action under the direction of the union—in most instances satisfactory evidence of support for that union—might instead be motivated by fear of noncompliance or mere sympathy for other participating employees, and not "that they desire the particular union as their representative." Id.

Although school employer refusal to recognize on the basis of membership lists, authorization cards, or petitions may have delayed the start of bargaining in some school corporations, secret ballot elections remain the superior method of choosing the school employee organization which is to represent teachers in bargaining. Many teachers had signed authorization cards or petitions for more than one organization; moreover, the school boards did not relish the task of verifying individual signatures on the cards or petitions. And of course, there could be no recognition or election until the appropriate bargaining unit was determined either by agreement with a school employee organization representing 20 percent or more of the employees in the proposed unit, or by IEERB decision. For a discussion of the difficulties many school corporations experienced in determining the bargaining unit, see notes 12-13 infra & text accompanying.

Relatively few school boards or teachers' organizations had formal bargaining experience prior to the passage of the Act in 1973.

Prior to 1972, in some 10% of all districts, negotiations resulted in master agreements; in 53%, negotiations led to agreements which were effectuated through school board adoption; in 33%, teachers made proposals but did not enter into formal negotiations; and in 4%, no negotiations were attempted.


Despite the lack of experience of the parties, there is reason to be pleased with the
difficulty experienced by the parties and the Indiana Education Employment Relations Board (hereinafter referred to as the IEERB or the Board) in interpreting certain vague or ambiguous provisions of the Act, and the heavy burden placed on the IEERB staff by teacher and board requests for unit determination, representation, and unfair labor practice hearings and requests for mediation and fact-finding. There were no strikes in Indiana in 1974, and all school corporations in which the teachers selected a certified exclusive representative reached settlement prior to the date mandated for beginning the bargaining process in 1975.

Because the 99th Indiana General Assembly is now considering amendments to Public Law 217 as well as legislation extending mandatory collective bargaining to other public employees, an analysis of the first round of bargaining under the Act is instructive.

DELAYS IN BARGAINING

Once the parties reached the bargaining table the two most heated
subjects of contention were the economic items and the determination of what items beyond these were mandatory subjects of bargaining. Yet the start of bargaining in nearly one-third of Indiana’s schools was delayed by disputes over unit determinations and representation so that very little time was left for bargaining over the substantive terms of the contract prior to the budget submission deadline.11

Most of the representation disputes involved the questions of whether department heads or coaches were “supervisors” within the meaning of section 2(h) of the Act,12 and whether deans and guidance counsellors were “confidential employees” within the meaning of section 2(i) of the Act.13 Because the basis for inclusion in or exclusion from the bargaining unit is the employee’s actual job function, not the nominal title given his position, the IEERB was forced to make case-by-case appraisals requiring the taking of evidence at lengthy hearings.

Spiraling inflation, however, which sharply increased school corporation costs and reduced the purchasing power of teachers’ paychecks in 1974, was probably the most important single factor contributing to the difficulties many school corporations experienced in reaching a settlement. To make matters even worse for Indiana’s public schools, the General Assembly froze property tax levies in the same year it enacted

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11 In one-third of these districts, bargaining was delayed even past the date mandated by statute for bargaining to begin.


13 Both school boards and teachers took a firm stand on the makeup of the bargaining unit. Reluctance to compromise on the appropriate bargaining unit by teacher organizations can be explained in economic as well as structural terms. Exclusion of department heads, coaches, deans, and guidance counselors from the bargaining unit meant the loss of hundreds of dues-paying members statewide. Yet it is probable that the exclusion from the unit of many local teacher organization officers who held one of the disputed positions was a cause for even greater alarm. Active, experienced teachers are often promoted to the position of department head or dean, and thus a high percentage of the local teacher organization’s leaders would hold one of these positions.

School boards took a hard line on the composition of the bargaining unit for a variety of reasons. In large and middle-sized school corporations, the primary reason for seeking the exclusion of certain positions from the unit was one of managerial necessity; many smaller school corporations, on the other hand, sought to exclude certain positions from the unit under the mistaken assumption that this was a good in and of itself. This misconception can probably be traced to advice given at a series of negotiation seminars attended by school administrators in the autumn of 1973. Participants were told to try to exclude everyone possible from the unit. The underlying assumption of the advice—that the teachers would give up some of their other demands in exchange for an agreement by the board to modify the unit to include previously excluded positions—was not universally grasped. It is probable that school employers will consent to a modification of the unit in the future to include previously excluded positions should the exclusion of these positions from the unit prove unnecessary to the school employers’ management needs.
Public Law 217. Despite certain positive aspects of this legislation for homeowners with limited incomes, the property tax freeze has made it doubly difficult for school corporations to respond to teacher salary demands.

Because school corporations are no longer able to raise additional revenues at the local level, school boards will join with teachers and administrators this year in seeking financial relief for the public schools from the legislature. Cooperation between the two groups, however, will unfortunately be limited to the question of additional state support for the public schools. The teachers and school boards are sharply divided over what the scope of bargaining should be. Some teacher organizations are seeking to broaden the mandatory scope of bargaining under Public Law 217, while the Indiana School Boards Association and school administrator organizations are opposing any changes in the present scope.

SCOPE OF BARGAINING

Before enacting any new public employee collective bargaining legislation, or amending Public Law 217, Indiana legislators and citizens need to understand why most Indiana school boards rejected teacher demands that the scope of bargaining be broadened; in addition, they should understand how the fundamental right to self-government is involved in the scope of bargaining controversy.

In section 1(d) of the Act, the General Assembly eloquently stated its determination that public school bargaining is inherently different from private sector bargaining:

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

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15 This law freezes the amount a school corporation may raise by property taxes at the amount that would have been raised in 1973 assuming 100% collection, unless increased or decreased due to special circumstances existing in the school district. Because the dollar levy and not the tax rate is frozen, an increase in school corporation assessed valuation has no effect on the school corporation's ability to raise additional revenues. Thus, rising land values no longer serve as a counterbalance to increases in school corporation costs attributable to inflation.
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.16

Nor is section 1(d) the only evidence of the legislature’s desire to narrowly define the scope of bargaining under Public Law 217. Sections 317 and 6(b)18 reserve to the school employer certain rights with which the collective bargaining agreement may not “conflict.” And section 410 limits the mandatory subjects of bargaining to “salary, wages, hours, and salary and wage related fringe benefits.”

Even if these sections were the only provisions of Public Law 217 relating to scope of bargaining, the task of the IEEERB in determining what subjects of bargaining are mandatory and what illegal still would not be an easy one. But the Board’s task is further complicated by the following features of the Act: the section 5 grandfather proviso which makes items included in 1972-1973 agreements between school corporations and school employee organizations subject to mandatory bargaining even though they do not fall within the subjects enumerated in section 4;20 the peculiar use of permissive bargaining language with respect

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16 IND. CODE § 20-7.5-1-1(d) (1973), IND. ANN. STAT. § 28-4551(d) (Supp. 1974).
17 Section 3 of the Act, IND. CODE § 20-7.5-1-3 (1973), IND. ANN. STAT. § 28-4553 (Supp. 1974), provides: “No contract may include provisions in conflict with . . . school employer rights as defined in Section 6(b) of this chapter.” See [1974] Ind. Acts 3.
18 Section 6(b) of the Act gives a listing of reserved managerial rights saved to the school corporation’s discretion, including but not limited to the right 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.
19 IND. CODE § 20-7.5-1-6(b) (1973), IND. ANN. STAT. § 28-4556(b) (Supp. 1974).
20 Section 4 of the Act provides:
A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related fringe benefits. A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitra-
to grievance procedures which are listed among the otherwise mandatory subjects of bargaining in section 4; and the language in section 5 permitting, though not mandating, bargaining over all subjects which the school employer is obligated to discuss with the teachers' exclusive representative.

Public Law 217 is more a patchwork of competing values than a carefully woven fabric of uniform texture and design. Teacher organizations and school boards argued over which patches in the quilt were the most significant, but the unenviable task of interpreting legislative intent and—where none could be clearly found—of weighing competing interests and values was left to the IEERB and its staff.

The reluctance of most Indiana school boards to negotiate on subjects other than those they believed to be mandatory subjects of bargaining does not originate from any attempt to stifle the bargaining process. As one commentator has recently stated: "To the extent that collective bargaining supplants the voters' control over government decisions, the ability of the community to influence its representatives is diluted." Stated another way: Should educational policy be determined in teacher-school board negotiations where concessions—a necessary part of good faith bargaining—must be made to but one of the many interest groups the school board is supposed to represent? Board policy adopted after careful consideration can be readily changed if it becomes evident that the policy is not in the best interests of the students or the community; a negotiated contract cannot. And, more basically, what is in the best interest of the students and the community is not always in the best interest of the teachers.

THE DISCUSSION PROCESS

The discussion mechanism in the Act provides the teachers with

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21 Id. See Note, supra note 6, at 462 n.16. But see Marion Teachers Ass'n & Marion Community Schools, Bd. of School Trustees, [Unfair Practice] Case No. U-74-44-2865 (IEERB, Nov. 4, 1974). Cf. note 49 infra.

22 Note, supra note 6, at 461.

23 Section 3 of the Act mandates the "right and obligation to discuss any item set forth in Section 5 . . ." while section 5 enumerates a fairly inclusive group of conditions of employment and matters of professional concern. IND. CODE §§ 20-7.5-1-3, -5 (1973), IND. ANN. STAT. §§ 28-4553, -4555 (Supp. 1974). The mechanics of discussion required by section 2(o) of the Act are that the "superintendent and the exclusive representative [shall] meet at reasonable times to discuss, to provide meaningful input, to exchange points of view," with respect to the section 5 items. IND. CODE § 20-7.5-1-2(o) (1973), IND. ANN. STAT. § 28-4552(o) (Supp. 1974).
a means for supplying input into decisions which legitimately concern them, but which are of overriding concern to the students or the community at large. The Indiana School Boards Association repeatedly urged its members during the past year to establish discussion teams separate from their bargaining teams to discuss matters outside the scope of bargaining. The Association staff recommended that the school superintendent head the discussion team since in a school corporation he has the primary responsibility for developing and recommending educational programs and policies to the school board. While a few school administrators expressed satisfaction with the discussion process, many reported that teacher representatives were either unwilling to engage in discussion outside of the bargaining process, or attempted to turn the discussion session into full bargaining.

The IEERB Position

The IEERB has attached great weight to the discussion requirements of the Act and has resolved some important disputes over whether an item is a mandatory subject of bargaining by holding the disputed item to be a section 5 working condition which must be discussed if the exclusive representative so desires, and which may, but need not, be bargained. The Board's refusal to find that the Fairfield Community Schools had committed an unfair labor practice by deciding not to bargain the school calendar after it had indicated a willingness to discuss the issue is an excellent illustration of the Board's policy of enforcing the discussion mandate on subjects it determines to be outside the scope of mandatory bargaining.

The Fairfield opinion stated:

The hearing examiner takes notice of the fact that the General Assembly has provided in Public Law #217 a discussion mechanism which is a required alternative procedure to bargaining

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25 The case dealt with the refusal of the school board to bargain, despite the teacher association's insistence, over a number of scheduling decisions which, when taken together, are generally referred to as the "school calendar." These issues included:

1. The starting date of the teacher's employment;
2. The ending date of the teacher's employment;
3. The starting date of unpaid vacations, breaks, or recesses;
4. The ending date of unpaid vacations, breaks, or recesses;
5. The length of any unpaid vacation, break, or recess;
6. A contract term to the effect that no part of the school calendar would be changed by the school employer without first bargaining such a change with teachers' exclusive representative. Id. at 4-5.
in order to cope with issues in which the school employee has a vital interest but which by their nature are best dealt with away from the crisis, compromise, and time deadlines of the collective bargaining process. The requirement of Sec. 2 that discussion must consist of "meaningful input" provides a viable forum for the consideration of the school employee's interest. The duty to discuss provides the school employer the flexibility to avoid the problems that respondent's counsel contends would arise as a result of scheduling employment by the process of collective bargaining. The procedure of discussion also allows input from other groups in addition to school employees who also have a direct interest in the adoption of the school schedule. Based upon the above reasons, the legislative intent stated in Sec. 1, and the *sui generis* nature of Public Law #217, the hearing examiner concludes that the disputed items in this case are subjects of discussion in that such items are "working conditions other than those provided in Section 4." 26

The School Board's Position

The brief for the respondent Fairfield Community Schools, referred to in the opinion above, lucidly demonstrated why the school calendar could best be dealt with "away from the crisis, compromise, and time deadlines of the collective bargaining process."

The school calendar greatly affects many other individuals and public interests other than that of teachers. First, there are the other employees of the school system: Fairfield Schools reflect this situation in that there are 72 teachers in the bargaining unit, 75 employees outside the bargaining unit and 1600 students. Obviously, the aspects of the school calendar in dispute are of as much concern to the secretaries, cooks, aides, custodians, bus drivers, and administrators as they are to the teachers. Where these other school employees do negotiate—and it is not a wild speculation that they, too, may be protected very soon by collective bargaining legislation—they most certainly want to have a voice in these matters of when they start to work, break for vacations, and discontinue their services for the year.

Moreover, the school calendar impinges upon other community interests: There are, after all, 1600 students involved in the Fairfield Schools compared to 72 teachers in the bargaining unit, and the multiplier effect of their families illustrates that a sizable portion of the total community is directly affected by the setting of the school calendar. There is great public pressure on the School Board to adopt a calendar by February of the previous year, since so many community decisions revolve around the school calendar. You cannot overlook the economic child care functions of the school system by foolishly thinking that the calendar is a

26 *Id.* at 10-11.
matter of prime concern to the teacher. In a time when women are working increasingly, the school schedule becomes a matter of important economic interest to many families in the community.

As if the interests of the other employees, the students, the patrons, and the community were not enough, Fairfield, and it is typical, must coordinate its calendar with other school systems. Fairfield is in a Vocational Cooperative School project involving 50 of its students, with the school systems of the City of Elkhart, West Noble, and Lakeland (Syracuse). Further, Fairfield is part of a Joint Special Education project with seven school systems of Elkhart County, and must also coordinate its calendar to accommodate the special program which it alone could not afford to offer the boys and girls who need this special education.

The calendar must also be set at an early date so that numerous school-related activities may be scheduled and planned in advance, such as athletic events, physical examinations and the letting of contracts.

... .

The IEERB should be mindful, in deciding this issue, that the teachers do have a protected right under Public Law 217 to have substantial input into the non-negotiable aspects of the school calendar through the discussion process. The School Board does not deny that teachers have an interest in these non-negotiable aspects of the school calendar and Fairfield, in fact, did discuss these matters with the exclusive representative.  

Moreover, the respondent school corporation pointed out that an impasse over the school calendar might create a "no-strike" strike since there can be no formal strike if the opening day of school has not been set. The school corporation concluded in its brief, "Surely the legislature did not mean to say that only the teachers should have input into this important community decision [on the school calendar]."

At its meeting of October 31, the IEERB ruled that its decision in the Fairfield case should be expressly considered as a precedent in other similar cases, and it held that "[d]aily hours and the total number of days to be worked are negotiable items for collective bargaining. All other calendar items are discussable."
The Teachers' Position

A major stumbling block to bargaining in many Indiana school corporations was the teacher organization's refusal to begin bargaining on items which both parties agreed were bargainable, unless the school board would first agree to negotiate items the board believed to be outside the scope of bargaining. In the Huntington case the Board found that the school employee organization had committed an unfair labor practice by refusing to enter into a collective bargaining agreement on section 4 items unless the school board first agreed to negotiate teacher preparation or planning time, a subject which the IEERB held to be discussible under section 5 as a "working condition, other than those provided in Section 4." The Huntington decision is significant for several reasons. It was the first case in which teachers were found to have committed an unfair practice in refusing to negotiate in good faith, a finding with added significance since the practice found to be unfair was common among many teacher negotiators. The Board held that it was an unfair labor practice in violation of section 7(b)(3) and section 7(b)(4) of the Act

for a school employee organization or its agents to insist to impasse any item not a subject of mandated collective bargaining or to insist upon the resolution of any issue concerning such non-mandated bargaining items as a condition for agreement upon any mandated bargaining item.

Second, the IEERB held that

Public Law #217 (Acts 1973) does not establish the mutual obligation to bargain collectively for the school employer and the exclusive representative an assigned period of time during the regular school day or week for the purpose of preparation and planning by

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82 Id. at 7-8.


84 "It shall be an unfair practice for a school employee organization or its agents to: . . . (3) refuse to bargain collectively with a school employer, if the school employee organization is the exclusive representative . . . ." Ind. Code § 20-7.5-1-7(b)(3) (1973), Ind. Ann. Stat. § 28-4557(b)(3) (Supp. 1974).

85 "It shall be an unfair practice for a school employee organization or its agents to: . . . (4) fail or refuse to comply with any provision of this chapter." Ind. Code § 20-7.5-1-7(b)(4) (1973), Ind. Ann. Stat. § 28-4557(b)(4) (Supp. 1974).

the teacher of lessons, lectures, teaching material and aids, and for
the preparation of other general records and materials exclusive of
the unassigned duty time that is guaranteed by IC 1971 20-6-19-1. 87

Finally, the Board adopted a commonsense definition of “hours” 88 and
rejected the teachers’ contention that the term included the manner in
which the teacher spends his hours during the workday.

The Board did hold, however, that it was not an unfair practice
for either the school employer or a school employee organization “to
propose an item which is a permissive subject of bargaining,” to demand
that permissive items be bargained (though not as a precondition to
bargaining on mandated items), or to insist upon “the resolution of an
issue concerning a permissive subject as Quid Pro Quo for a com-
promise on a mandated bargaining item.” 89 The Board, by this holding,
has not discouraged good faith bargaining on permissive subjects of
negotiation.

The Mechanics of Discussion

Certainly, many issues important to teachers are not within the
mandated subjects of bargaining under Public Law 217. Most of these
items, however, must be discussed in a meaningful way. What is the
discussion obligation of a school board, though? In the Tippecanoe
case, 90 the Board set out some guidelines on discussion and made clear
its position that whatever “discussion” is, it involves more than merely
sitting and listening to the teachers and then taking unilateral action. 91

The hearing examiner explained:

Regardless of what is done with agreements reached in dis-
cussion, the obligation under P.L. 217 contemplates more than the
raising of problems. Sec. 2 (o), the definition of the word “dis-
cuss”, indicates that the parties are mutually obligated “... to
provide meaningful input, to exchange points of view...” While
the parties are not required to agree to a proposal or make con-
cessions, meaningful input is more than just listening and taking
unilateral actions. “Input” refers to the discussion process; each
side is required to put something in to it. 92

The decision went on to say that the teachers’ association should be

87 Id.
88 Id. at 6.
89 Id. at 5.
90 Bobbe June Blom v. Tippecanoe School Corp., [Unfair Practice] Case No. U-74-
15-7865 (IEERB, July 5, 1974).
91 For further discussion on this point, see Doering, supra note 2, at 292-94.
92 Tippecanoe at 10.
given an opportunity to state its position on the proposed calendar before adoption by the school board, but held that discussible items may not be used as a pretext by either party to refuse to bargain over mandated subjects of bargaining.\textsuperscript{43}

The discussion procedure, while a valuable alternative to bargaining, also has its limits. The legislature set up the discussion process as an alternative method of resolving differences over issues of common concern to both teachers and school boards where the issues would be of overriding concern to the community as a whole. The extension of the discussion mandate in the \textit{Baugo}\textsuperscript{44} and \textit{Delphi}\textsuperscript{45} cases to include individual personnel decisions is unwarranted in light of the availability of traditional grievance procedures.\textsuperscript{46} Section 4 of the Act appears to authorize the inclusion of a grievance procedure in the master contract,\textsuperscript{47} and all fact-finders considering this question have so held.\textsuperscript{48} Were this not so, the negotiated grievance procedure would be wholly superfluous.\textsuperscript{49}

\textbf{THE “GRANDFATHER CLAUSE”}

In addition to the carefully drawn discussion mandate in the Act

\textsuperscript{43}Id. at 9–10.

\textsuperscript{44}Consolidated cases Sarah Borgman & Board of School Trustees of the Baugo Community School Corp., Sharon Poyser & Board of School Trustees of the Baugo Community School Corp., [Unfair Practice] Cause No. U-74-11-2260-12; Donald Bacher & Board of School Trustees of the Baugo Community School Corp., [Unfair Practice] Cause No. U-74-11-2260-11 (IEERB, Sept. 5, 1974) [hereinafter referred to as \textit{Baugo}].


\textsuperscript{46}Another issue in the \textit{Baugo} and \textit{Delphi} cases is the remedy selected. To remedy the violation of the discussion mandate, the hearing examiners ordered the teachers who had not been offered renewal contracts to be reinstated. This remedy may be beyond the Board’s power to invoke. While the National Labor Relations Act, section 10(c), 29 U.S.C. § 160(c) (1970) grants the NLRB the power to order reinstatement and back wages, Public Law 217, section 11 merely states: “The board, but not a hearing examiner or agent thereof, may enter such interlocutory orders after summary hearing as it deems necessary in carrying out the intent of this chapter.” Ind. Code § 20-7.5-1-11 (1973), Ind. Ann. Stat. § 28-4561 (Supp. 1974). \textit{But see} Doering, \textit{supra} note 2, at 296–97 & n.62.

\textsuperscript{47}The text of section 4 is quoted at note 20 \textit{supra}.

\textsuperscript{48}See Doering, \textit{supra} note 2, at 300–01.

\textsuperscript{49}If section 5 does encompass the obligation to discuss individual personnel decisions, it seems odd that section 4 expressly provides that contracts may contain a grievance procedure, the traditional method for resolving disputes over personnel decisions affecting individual employees. Yet the hearing examiner in \textit{Delphi} concluded that the school corporation had committed an unfair practice by refusing to discuss with the teacher organization the promotion of a particular teacher to tenure, and by refusing to discuss with that teacher and the employee organization his teaching methods, assignment to middle school, the maintenance of student discipline, and the size of the band classes. In \textit{Baugo}, a similar refusal to discuss assignment, rehiring, teaching methods and student discipline problems of individual teachers was found to be an unfair practice. An appeal from these interpretations has been taken to the full Board, and oral argument was heard on January 23, 1975. A decision is expected shortly. \textit{See} Doering, \textit{supra} note 2, at 294–97.
and the reservation of management rights, there is further provision for the protection of the interests served by collective bargaining and the often conflicting interests served by local control of education. The section 5 grandfather clause provides that, notwithstanding the enumeration of items withdrawn from bargaining otherwise, "any items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable."\(^{50}\)

This language in itself fails to reveal the underlying policy the legislature sought to effectuate and fails to give practical guidance to the IEERB, or to teachers and school boards, in their attempt to comply with the requirements of this provision. Whether a 1972-1973 agreement even existed is perhaps the most difficult question.

Prior to 1973, collective negotiations in Indiana between school corporations and teachers often culminated in agreements which were not master contracts. While many negotiated agreements contained all the formalities of contracts, others were oral, memorialized solely by notation in the minutes of the school board meetings. Since § 5 grants bargaining rights far in excess of those in § 4, the determination of eligibility under this provision needs administrative or judicial clarification.\(^{51}\)

Another troublesome question that must be answered is the meaning of the language "any items" in the grandfather proviso. Does this language limit the requirements of the grandfather clause to the specific items that were actually included in the 1972-1973 contract, or does it extend to include the general category of items of which the specific item is but a part?\(^{52}\)

**Conclusion**

Because this was the first year under the Act, many problems in statutory interpretation arose, as was to be expected. However, before rushing to open-scope bargaining, either to "clear up" scope questions or to satisfy teacher organizations' desires, citizens generally and legislators in particular must keep in mind what the true significance of the scope of bargaining dispute involves. Though there are competing

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values, "a narrow interpretation of the scope of bargaining and a broad interpretation of rights reserved to management can best protect the rights of citizens acting through their school boards."58 Such an approach ensures that "questions of school policy which may also involve considerations of political priority are to be answered at the polls rather than at the bargaining table."59

It is possible that many of the current scope disputes will be resolved at the bargaining table. While Public Law 217 is a narrow-scope bargaining law, a very comprehensive range of items, including many section 5 permissive subjects and even a few items which are probably "nonnegotiable," was actually included in the collective bargaining agreements negotiated during the first year of teacher-school board negotiations.60

The legislature should wait until the next long session of the General Assembly61 before enacting any substantive changes in Public Law 217. By 1977 teachers and school boards will have gained valuable experience in the bargaining process, and the IEERB and courts will have construed many of the Act's unclear provisions. This experience will enable all parties concerned to judge the strengths and weaknesses of the Act with a better perspective than would be possible after only this first year of negotiations.

58 Id. at 468.
59 Id.
60 For a list of the items thus negotiated, and the frequency with which they appeared in the 1974 contracts, see Appendix following. The list was compiled by Dr. Max Shaw, Director of Personnel and Research Services of the Indiana School Boards Ass'n, and by Mr. Lee Webb, doctoral student in education, Indiana University.
61 A "long" 61-day session is held every other year, with a "short" 30-day session in intervening years. IND. ANN. STAT. § 2-2.1-1-2 (Code ed. Supp. 1974).

APPENDIX

Items Bargained in 1974

THE 140 MOST COMMON ITEMS FOUND IN 265 CONTRACTS BARGAINED IN 1974, WITH FREQUENCY OF OCCURRENCE

<table>
<thead>
<tr>
<th>Admission (free) to school</th>
<th>Control items:</th>
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<tbody>
<tr>
<td>events</td>
<td>Academic freedom</td>
</tr>
<tr>
<td>Calendar</td>
<td>Access to building</td>
</tr>
<tr>
<td>Committees required</td>
<td>Activity calendar provided</td>
</tr>
<tr>
<td>Control bill</td>
<td>Administrator evaluation by</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
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<td></td>
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<tr>
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<tr>
<td></td>
<td>2</td>
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</table>
After school duties (voluntary) .......... 43
Assemblies: attendance by teachers .......... 1
Attendance at special meetings .... 1
Bell schedule to teachers .... 1
Class size .......... 20
Classroom interruptions .... 2
Cleaning services .......... 1
Department chairman provisions .......... 12
Disciplinary authority of teachers .......... 24
Dismissal of teachers .......... 33
Emergency school closing .. 3
Evaluation of teachers ...... 63
Faculty meetings .......... 59
Final exam schedule ..... 1
Grades and report cards ...... 1
Hall duty .......... 2
Home visitations .......... 1
I.R.S. statement for teachers 2
In-service meetings .......... 26
Instructional load .......... 29
Job security .......... 9
Leave building during day 7
Legal representation for teachers .......... 3
Lesson plans and objectives .. 2
Maintenance of standards ... 24
Materials and supplies for instruction .......... 13
Noninstructional duties ...... 4
Nonprofessional employment ...... 4
Observation requires consent 9
Parent complaint procedures 5
Parent conferences .......... 33
Preparation time .......... 47
Professional conduct .......... 2
Protection for teachers .......... 3
Psychometrist availability .......... 1
Pupil assignment .......... 1
Safety glasses provided .......... 1
Share contract printing costs ..... 4
Special education .......... 1
Staff reduction .......... 14
Student teaching approval .. 7
Substitutes hired when needed 12
Taking other classes (emergency) .......... 21
Tardiness .......... 1
Teacher assignment .......... 13
Teacher contract requirements 4
Teacher responsibility .......... 12
Teacher schedules .......... 1
Transfer and promotion 45
Tuition free for teachers' children .......... 2
Vacancies posted .......... 32
W-2 forms .......... 1
Days .......... 137
Death benefits .......... 1
Discussion procedures .......... 60
Due process .......... 20
Dues deduction .......... 172
Dues deduction procedure 123
Duration .......... 246
Duty free lunch .......... 68
Extracurricular activity guide 240
Facilities:
  Adequate .......... 3
  Cabinet/file for storage ...... 2
  Health and safety .......... 3
  Lounge .......... 9
  Maintenance .......... 2
  Mowing grass .......... 1
  Parking .......... 2
  Reference library .......... 3
  Special rooms during construction .......... 1
  Telephone availability .......... 6
  Workroom and resources ...... 8
  Fair practices .......... 27
  Advisory arbitration 65 (24.5%)
  Binding arbitration 59 (22.3%)
  Board last level 77 (29.1%)
  Committee/panel last level .......... 6 (2.3%)
  No procedure 58 (21.9%)
  Hours .......... 207
  Dental .......... 1
  Health .......... 241
  Income protection .......... 37
<table>
<thead>
<tr>
<th>Category</th>
<th>Amount</th>
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<td>Liability</td>
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<tr>
<td>Life</td>
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<td>Personal property</td>
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### Leaves with pay:

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<tr>
<td>Conferences</td>
<td>26</td>
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<tr>
<td>Emergency</td>
<td>26</td>
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<tr>
<td>Family illness</td>
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<td>Field trips</td>
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<td>Medical and dental</td>
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<tr>
<td>Personal</td>
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<td>Religious holidays</td>
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<td>Sabbatical</td>
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<td>Staff development</td>
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<td>Work related injuries</td>
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### Leaves without pay:

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<td>Adoptive</td>
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<td>Consultative</td>
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<td>Court</td>
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<td>Disability</td>
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<td>Election</td>
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<td>Exchange teaching</td>
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<td>Jury duty</td>
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<tr>
<td>Maternity</td>
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<td>Military</td>
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<td>Other</td>
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<td>Parental</td>
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<td>Pregnancy</td>
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<td>Public office</td>
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<td>Sabbatical</td>
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<td>Study</td>
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<td>Summer school</td>
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<td>Travel</td>
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<td>Unrequested</td>
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<td>Management rights</td>
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<td>Medical requirements</td>
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<td>Negotiating procedures</td>
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<td>No lockout</td>
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<td>No strike</td>
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<td>Payroll deduction</td>
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<td>Recognition</td>
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<td>Retirement/severance</td>
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<td>B.S. +8.55%</td>
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<td>Severability</td>
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<td>Sick leave bank</td>
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<td>Substitute salary</td>
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<td>Summer school/night school</td>
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<td>Waiver</td>
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