

STATE OF INDIANA)
)
COUNTY OF LAKE)

IN THE LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE
SITTING IN HAMMOND, INDIANA

JOHN B. CURLEY, as Chairman of the Lake County,)
Indiana, Republican Central Committee, and as a)
registered voter, and JIM B. BROWN, as member of the)
Lake County Board of Elections and Registration and as)
a registered voter,)

Plaintiffs,)

v.)

LAKE COUNTY BOARD OF ELECTIONS AND)
REGISTRATION, and THE HONORABLE THOMAS)
PHILPOT, not individually but as Lake County Clerk,)

Defendants.)

LINDA PETERSON, ROOSEVELT PHILLIPS,)
MARY AARON, SERVICE EMPLOYEES)
INTERNATIONAL UNION, and INDIANA STATE)
CONFERENCE OF NATIONAL ASSOCIATION)
FOR THE ADVANCEMENT OF COLORED PEOPLE)
BRANCHES,)

Intervenor-Defendants.)

UNITED STEELWORKERS DISTRICT 7,)
HAMMOND TEACHERS FEDERATION LOCAL 394)
AMERICAN FEDERATION OF TEACHERS,)
EARLINE ROGERS, AND ROXANNA LUGO,)

Plaintiffs,)

v.)

LAKE COUNTY BOARD OF ELECTIONS AND)
REGISTRATION,)

Defendant.)

CAUSE NUMBER 45D02-0810-PL-00190
Consolidated with
CAUSE NUMBER 45C01-0810-PL-00256
Transferred to
The Honorable Diane Kavadias Schneider
as Special Judge under
CAUSE NUMBER 45D01-0810-PL-00082

Filed in Open Court

OCT 22 2008

Thomas R. Philpot
CLERK LAKE CIRCUIT COURT

ORDER OF OCTOBER 22, 2008

INTRODUCTION AND PROCEDURAL HISTORY OF THE CASE

On October 2, 2008, plaintiffs, John B. Curley and Jim B. Brown (hereinafter cited "Curley Plaintiffs"), filed their Motion for Temporary Restraining Order and Preliminary Injunction in the Lake Superior Court under Cause Number 45D02-0810-PL-190. After hearing evidence and argument on October 3, 2008, The Honorable Calvin D. Hawkins issued a temporary restraining order enjoining the

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Lake County Board of Elections and Registration (hereinafter cited "Board of Elections") and the Lake County Clerk from establishing early voting sites in the cities of Gary, Hammond, and East Chicago for facilitating in person absentee voting (hereinafter cited "early voting") without a unanimous vote of the Board of Elections authorizing same.

On October 3, 2008 and prior to the issuance of the temporary restraining order, Board of Elections filed its Notice of Removal to the United States District Court for the Northern District of Indiana.

On October 10, 2008, The Honorable Joseph S. Van Bokkelen, Judge of the United States District Court for the Northern District of Indiana, heard evidence and argument on the Request for Temporary Restraining Order of Linda Peterson, Roosevelt Phillips, Mary Aaron, Service Employees International Union, and Indiana State Conference of National Association for the Advancement of Colored People Branches (hereinafter cited "Intervenors").

On October 13, 2008, Judge Van Bokkelen ruled that the federal court lacked jurisdiction and remanded the case back to the state trial court for further proceedings.

On October 6, 2008, a second case was filed against the Board of Elections in the Lake Circuit Court under Cause Number 45C01-0810-PL-00256 by United Steelworkers District 7, Hammond Teachers Federation Local 394, American Federation of Teachers, Earline Rogers, and Roxanna Lugo (hereinafter cited "Steelworkers Plaintiffs").

After hearing evidence and arguments on October 14, 2008, The Honorable Lorenzo Arredondo issued an Order granting Steelworkers Plaintiffs' Motion for Preliminary Injunction and enjoined the Board of Elections from failing to establish early voting sites in the cities of Gary, Hammond, and East Chicago.

The Curley Plaintiffs then filed an original action with the Indiana Supreme Court contesting the jurisdiction of the Lake Circuit Court over a lawsuit similar to one previously filed in Lake Superior Court, Civil Division Room Two concerning the satellite voting sites.

On October 14, 2008, the Indiana Supreme Court issued an Order that

1. Consolidated the Lake Circuit Court case with the Lake Superior Court case,
2. Determined both cases should proceed before the Superior Court on a consolidated basis,
3. Allowed the preliminary injunction entered by the Circuit Court to remain in effect pending any action by the Superior Court, and
4. Granted the parties an opportunity to exercise a right to a change of judge and to select a special judge within a prescribed time frame.

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On October 15, 2008, Judge Hawkins granted Steelworkers Plaintiffs their Motion for Change of Judge but the parties failed to select a special judge within the prescribed deadline set by the Indiana Supreme Court. Thereafter, on October 16, 2008, the Indiana Supreme Court entered an Order appointing The Honorable Diane Kavadias Schneider as Special Judge to hear the two consolidated cases which have now been transferred under Cause Number 45D01-0810-PL-00082.

On October 20, 2008, this court conducted a hearing. The following appeared: Mr. John B. Curley and Mr. Jim B. Brown, the Curley Plaintiffs, with their counsel, R. Lawrence Steele, Timothy R. Sendak, and Peggy Jo Stamper; Steelworkers Plaintiffs with their counsel James L. Wieser, Jonathan Weissglass, Barbara A. Bolling, Donald P. Levinson, Shana D. Levinson ; the Board of Elections by counsel, Frederick T. Work; and Intervenors, by counsel, Jonathan Weissglass, Barry A. Macey, and Anne Arkush.

Parties were sworn and evidence was presented. The court recessed the hearing in order to tour the four (4) early voting centers, beginning in Hammond, then traveling to East Chicago and Gary and concluding at the office of the Board of Elections. At each location the court observed lines of voters waiting to vote and the voting procedures for the casting in person early voting ballots.

Thereafter, the court heard additional evidence and the arguments of counsel.

After a review of the record herein, all the evidence, the applicable statutory and case law, and the arguments of counsel, the court now enters the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. The Indiana Supreme Court has vested this court with jurisdiction to hear these consolidated cases.
2. John B. Curley is Chairman of the Lake County Indiana Republican Central Committee and a registered voter in Lake County, Indiana.
3. Jim B. Brown is a member of the Lake County Board of Elections and Registration and a registered voter in Lake County, Indiana.
4. The Lake County Board of Elections and Registration (hereinafter cited "Board of Elections") is the duly constituted agency administering elections in Lake County, Indiana pursuant to Indiana Code §3-6-5.2.

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5. The Board of Elections consists of five (5) members: two (2) member appointed by each Chairman of each major political party, and the Circuit Court Clerk as an ex officio member.

6. The following individuals are current members of the Board of Elections: Al Salinas and John McCloud, as appointees of the Lake County Democratic Chairman; Jim B. Brown and Patrick E. Gabrione as appointees of the Lake County Republican Chairman; and Thomas R. Philpot, County Clerk, as an Ex-Officio member.

7. The Honorable Thomas Philpot is the duly elected Clerk of the Circuit Court in Lake County (hereinafter cited "County Clerk"). In that capacity he also serves as Clerk of the Superior Courts of Lake County.

8. Intervenors are individual voters and organizations representing individual voters who wish to take advantage of early voting if it is allowed to occur in their communities.

9. Steelworker Plaintiffs are individual voters and organizations representing individual voters who wish to take advantage of early voting if it is allowed to occur in their communities.

10. The state trial courts in Lake County, Indiana are unique in their configuration, with a Circuit Court and a Superior Court and numerous judicial officers in various geographic locations. These courts sit in four (4) separate courthouse locations; namely, Gary, Hammond, East Chicago, and Crown Point.

11. These four (4) courthouse locations afford Lake County citizens to file many of their cases in the city of their residence.

12. The County Clerk maintains offices in each of the four (4) courthouse locations.

13. The General Election in Indiana shall take place on November 4, 2008.

14. The Primary Election in Indiana was conducted on May 6, 2008.

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15. In addition to voting in person at a polling place on Election Day, there are three (3) alternate provisions under Indiana law for a registered voter to cast a ballot in the 2008 General Election:

- (A) voting an absentee ballot by mail
- (B) voting an absentee ballot in person
- (C) voting by traveling board

Ind. Code §3-11-10 *et seq.*

16. On September 23, 2008 a meeting of the Board of Elections was held in the Commissioners Court Room at the Lake County Government Center in Crown Point, Indiana.

17. The following members of the Board of Elections were present at that meeting: Al Salinas, John McCloud, Jim B. Brown, Patrick E. Gabrione and Sandy Radoja as proxy for the County Clerk.

18. Prior to the Board of Elections September 23, 2008 meeting, an agenda for that meeting was published.

19. Under the "NEW BUSINESS" portion of the agenda was listed "ABSENTEE-IN PERSON VOTING-SATELLITE OFFICES."

20. During the September 23, 2008 meeting of the Board of Elections the following occurred:

A. Mr. Salinas moved to adopt a resolution to authorize the County Clerk to establish satellite offices in Gary, Hammond, and East Chicago and Mr. McCloud seconded the motion. The vote on the motion resulted in Mr. Salinas, Mr. McCloud and Mrs. Radoja voting in favor of the motion and Mr. Brown and Mr. Gabrione voting against the motion. There not being a unanimous vote in favor of the resolution, the motion was defeated.

B. There was much discussion and disagreement among those present as to the proper interpretation of the statutes applicable to early voting and when a unanimous vote was required to establish early voting.

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C. Mr. Salinas made a second motion to permit early voting at the offices of the Circuit Court Clerk, all locations. The vote on the motion resulted in Mr. Salinas, Mr. McCloud and Mrs. Radoja voting in favor of the motion and Mr. Brown and Mr. Gabrione voting against the motion.

D. The second motion stated the locations for early voting but did not state the hours during which early voting would take place.

E. Mr. Gillion (*sic*), the attorney advising the Democratic members of the Board, took the position that a unanimous vote was not required. Mr. Lambka, the attorney advising the Republican members of the Board, took the position that a unanimous vote was required.

[Board of Elections Hearing Transcript (Excerpt) September 23, 2008]

21. Any member of the Board of Elections as well as any other interested party had the opportunity to communicate an opinion in support of or against the establishment of early voting sites for the 2008 General Election.

22. During the September 23, 2008 meeting, the Board of Elections received testimony and written communications in support of the establishment of early voting sites for the 2008 General Election.

23. During the September 23, 2008 meeting, the Board of Elections received no testimony or communications opposing the establishment of early voting sites for the 2008 General Election.

24. Jim B. Brown and Patrick E. Gabrione, both members of the Board of Elections, refused to articulate a reason for their dissent in voting against each of the two (2) motions relating to early voting for the 2008 General Election.

25. Curley Defendants had the opportunity to advance a proposal to the Board of Elections to establish early voting in other locations in Lake County including locations where predominantly Republican voters reside.

26. Neither John B. Curley nor Jim B. Brown nor Patrick E. Gabrione advanced any proposal to the Board of Elections to establish early voting in other locations in Lake County in addition to those proposed for the cities of Gary, Hammond, and East Chicago.

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27. After the September 23, 2008 meeting of the Board of Elections, defendant, John B. Curley, issued a Press Release which read as follows:

Despite my efforts the Lake County Board has apparently voted to **usurp** the Indiana state law and over-ride the Republican votes illegally placing satellite voting in clerk's offices in **selected** locations in north Lake County. Sites included were **Gary, East Chicago and Hammond.**

South Lake County was left without these early voting locations. Winfield with 1600 voters going to one location was left out. Munster, Dyer and Schererville who have persons displaced by recent flooding were left out. Many long distance commuters in Lowell and Crown Point have limited voting time but were left out.

If you are going to allow satellites for one you must do it for all! I represent the entire county and resent this move.

[Defendant's Exhibit 2]

28. The Board of Elections provided the opportunity for early voting before the 2008 Primary Election Day at four locations: Gary, Hammond, East Chicago, and Crown Point.

29. Nearly 6,000 individuals participated in early voting in Lake County before the 2008 Primary Election Day.

30. The early voting conducted during the 2008 Primary Election is properly characterized as occurring at satellite voting locations because that early voting took place in the hallways of the courthouse buildings in Gary, Hammond, and East Chicago rather than in the offices of the Clerk of the Lake Circuit and Superior Court in those buildings.

31. Unlike the early voting conducted during the 2008 Primary Election, the early voting in the 2008 General Election is being conducted in the offices of the Clerk of the Lake Circuit and Superior Court in the courthouse buildings in Gary, Hammond, and East Chicago.

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32. Early voting began in Crown Point on October 6, 2008.

33. Early voting began in Gary, Hammond, and East Chicago on October 14, 2008.

34. Sally LaSota is the Director the Board of Elections.

35. Mrs. LaSota testified identical voting procedures were being used at each of the four (4) early voting locations. She related to the court those procedures:

A. The voter goes to a table to fill out Form ABS-1, marking off "B" which represents "in person voting."

B. Next, the voter goes to the Voter Board workers, composed of one (1) Republican and one (1) Democrat at each location. A mechanic from the Board of Elections is also present to deal with any voting machine issues.

C. Next, the voter presents a photo identification.

D. One of the Voter Board workers goes to the computer terminal and via a live feed to the Indiana Voter Registration System through the Clerk's office check the voter's voter registration data.

E. The Voter Board worker then puts a colored sticker on the ABS-1 Form to designate the location (Gary, Hammond or East Chicago).

F. It is determined in which precinct the voter resides and the proper ballot for that voter's precinct is then programed into the voting machine.

G. Finally, the voter goes to the voting machine and casts his or her ballot.

36. Mrs. LaSota also testified that Indiana's photo identification requirement for in person absentee voting and voting at the polls is the strictest voting requirement in all 50 states.

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37. Mrs. LaSota also testified to the following:

A. Infinity voting machines are currently being used for early voting at all four (4) early voting locations.

B. A dramatic increase in the number of new voter registrations for the 2008 General Election.

C. The number of votes cast in Lake County during the 2008 Primary Election was unusually high.

D. It is expected that the number of votes cast in Lake County during the 2008 General Election will be very high.

E. There has been a high interest among the electorate in early voting. In the four (4) day period from October 14 through October 17, there were 1,773 votes cast in all four (4) early voting locations. Since October 6 there have been an approximate grand total of 3,000 in person absentee ballots cast.

F. The ballot in most cities and towns in Lake County for the 2008 General Election is very large, consisting of 6 pages on the electronic voting machine being utilized.

G. State law requires a "Two (2) Minute Rule" which allows a voter only two (2) minutes in the voting booth within which to cast a ballot.

H. Early voting will help alleviate the anticipated long lines at the polls on 2008 General Election Day and the long wait voters

I. Early voting in Lake County will serve to help facilitate and expedite the counting of votes after the polls close.

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J. She favored the Board providing for early voting in as many locations in Lake County as possible. She stated that "ten would be good."

K. She indicated that there were funds and personnel available to establish early voting locations in addition to those in Gary, Hammond, East Chicago, and Crown Point and that her office could immediately establish them.

38. The high number of registered voters, the length of the ballot, the "Two (2) Minute Rule," and the greater interest of the electorate in an election cycle including a presidential election, will all combine to make voting on November 4, 2008, the 2008 General Election Day in Lake County, somewhat cumbersome for voters who probably will experience long lines at the polls and a short time period to cast their ballots.

39. On August 22, 2008, Todd Rokita, Indiana Secretary of State, sent a letter to all Indiana county election administrators. In the letter he stated:

- Encourage voters to vote absentee early to help reduce negative impacts (long lines, ballot shortages, and poll-worker and voter confusion) to the voting process that will occur with extraordinary turnout on Election Day.
- Consider using Satellite Absentee voting options already permitted by state statute, to improve the convenience and availability of early voting options for your county's voters.¹

40. The record herein indicates that many Indiana counties are utilizing early voting centers for the November 2008 General Election:

A. There are three (3) locations in Indianapolis where early voting is being conducted.

B. In Evansville, in addition to the Civic Center, early voting will take place at satellite locations in the Evansville Public library branches.

¹This letter appears on the Indiana Secretary of State's website .

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C. Early voting is taking place at the courthouse in Michigan City and the courthouse in La Porte in La Porte County.

D. Monroe County will operate early voting sites in three (3) locations in Bloomington: the Monroe County Voter Registration Office, the Sherwood Oaks Christian Church, and the Indiana University campus.

E. Early voting is taking place at the courthouse in Elkhart and also in the county seat of Goshen in Elkhart County.

41. There was no evidence presented of any attempts to enjoin early voting in any of these other Indiana counties.

42. Curley Plaintiffs argue that fraud is one of the considerations for opposition to early voting in the northern part of Lake County.

43. Regrettably, Lake County has had a history of public corruption and voter fraud.

44. The Indiana Supreme Court issued an extraordinary ruling when it found massive voter fraud and overturned the results of the May 6, 2003 Primary Election to determine the Democratic nominee for mayor of East Chicago, Indiana. *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004).

45. The voter fraud in *Pabey* involved absentee voting by mail.

46. The *Pabey* Court noted “the East Chicago Democrat mayoral primary may be a ‘textbook’ example of the chicanery that can attend the absentee vote cast by mail.” *Id.* at 1145.

47. The *Pabey* Court found that a political subculture exists in Lake County which views the political machinations at issue with a “wink and a smile” and “business as usual.” *Id.*

48. The *Pabey* Court echoed the trial court’s observation that greater utilization of absentee voting in person might well have “served to eliminate much of the mischief and fraud at issue” in this matter. *Pabey*, footnote 1 at 1144.

49. Due to practices in past elections in Lake County, the concern of the Curley Plaintiffs with respect to voter fraud is well taken.

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50. However, current voting procedures, including the requirement of photo identification, reduces the likelihood of fraud during early voting when that voting is conducted by in person absentee ballot.

51. There is no requirement or procedure in place under Indiana law for the requirement of photo identification for those voters voting an absentee ballot by mail.

52. Voters who vote by in person absentee ballot have the additional safeguard of registration checks through the Indiana State Voter Registration database, something unavailable at polling places.

53. Mrs. LaSota testified to only one (1) incident of fraud detected in the nearly 6,000 ballots cast by early voting in the 2008 Primary Election. That involved a voter who attempted to vote twice at one of the early voting locations. The procedures in place detected the problem and invalidated the duplicate vote.

54. There has been no evidence of any voter fraud during the period of early voting at any of the four (4) early voting locations operating for the 2008 General Election.

55. Absentee voting by mail requires the applicant to state a specific reason for the need to vote by absentee ballot.

56. Ind. Code §3-11-10-24 provides that a voter who satisfies any of the following is entitled to vote by mail: (1) a voter who will be absent from the county on election day; (2) a voter who will be absent from the precinct of the voter's residence on election day because of service in certain statutorily-prescribed election day worker positions; (3) a voter who will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury; (4) a voter with disabilities; (5) an elderly voter; (6) a voter who is prevented from voting due to the voter's care of an individual confined to a private residence because of illness or injury; (7) a voter who is scheduled to work at the person's regular place of employment during the entire 12 hours that the polls are open; or (8) a voter who is eligible to vote under Ind. Code §3-10-11 (relating to persons who have moved not more than 30 days prior to the election) or Ind. Code §3-10-12 (relating to persons who change residence from a precinct to another precinct and do not notify the county voter registration office of the change of address before election day).

57. Without any reason, any registered and qualified voter may cast an absentee ballot prior to election day in person before an absentee voter board. Ind. Code §3-11-10-26.

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58. Absentee voting by mail and the availability of in person absentee voting only at the office of the Board of Elections in Crown Point is inadequate and disenfranchises many residents of Gary, Hammond, and East Chicago.

59. The Indiana Bipartisan Task Force on Election Integrity was created in the wake of the 2000 elections. That Task Force conducted a comprehensive review of the state's election procedures and explained the need for in person early voting. It found that early voting is most helpful to those whose work or family obligations are such, because they work long shifts, or two jobs, or have sick or disabled children or parents, that they have difficulty voting on election day. Arkush Dec., Ex. B at 39.

60. Lake County does not have the availability of public transportation to many of its residents. The location and infrequency of the public transportation options available would make it difficult if not impossible for most Lake County residents to travel to Crown Point to avail themselves of early voting at the Board of Elections.²

61. Even if residents had the ability to ride in their own vehicle or that of a relative, friend, or neighbor, travel to and from Crown Point from the cities of Gary, Hammond, and East Chicago involves a great deal of time and often requires a circuitous route of travel.

62. There is a high probability that if early voting locations did not exist in the cities of Gary, Hammond, and East Chicago, many residents of those cities would not vote.

63. If early voting was not offered in the cities of Gary, Hammond, and East Chicago, the voters in those communities would be the only voters in Indiana who would not be able to vote at a courthouse located in their city of residence.

64. The harm posed to the Intervenor and Steelworkers Plaintiffs by the lack of in person absentee voting at the courthouses in Gary, Hammond, and East Chicago outweighs the harm to the Curley Plaintiffs.

² In his closing argument, Mr. Steele, counsel for Curley Plaintiffs, argued that Lake County has adequate public transportation for voters in the northern part of Lake County to utilize to travel to Crown Point and cast an early ballot at the offices of the Board of Elections. This court would invite Mr. Steele and the Curley Plaintiffs to go to the intersections of 5th Avenue and Broadway in Gary, or Main Street and Broadway Avenue in East Chicago, or Hohman Avenue and Russell Street in Hammond and attempt to travel to Crown Point via public transportation. It is highly probable that they would find it difficult, if not impossible, to do so.

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65. Curley Plaintiffs have moved to vacate the October 14, 2008 preliminary injunction directing the Board of Elections to open early voting locations in Gary, Hammond, and East Chicago. Pursuant to the preliminary injunction order, the Board of Elections has opened these locations and voting has proceeded as of October 14, 2008.

66. Curley Plaintiffs are duly registered voters of Lake County, Indiana and have standing to bring their action.

67. Since October 14, 2008, Lake County residents have cast early ballots without incident.

68. Curley Plaintiffs have provided the court with no evidence that they have been harmed in any way by this ongoing voting.

69. The balance of hardships weighs heavily in favor of maintaining the status quo and allowing early voting to continue.

70. The Curley Plaintiffs have not established that they will suffer any injury if voting continues. Nor have they shown the irreparable injury necessary to warrant such extraordinary relief.

71. Intervenors and Steelworkers Plaintiffs will suffer grave and irreparable harm to their fundamental right to vote should this court halt early voting.

72. The public interest also strongly favors in person absentee voting (early voting) to continue at each of the County Clerk offices in Gary, Hammond, East Chicago, and Crown Point.

73. The public interest would be disserved if in person absentee voting (early voting) were not allowed to continue at each of the County Clerk offices in Gary, Hammond, East Chicago, and Crown Point.

74. The harm posed to the Intervenors and Steelworkers Plaintiffs by the lack of absentee in person voting at the courthouses in Gary, Hammond, and East Chicago outweighs any harm to the Curley Plaintiffs.

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75. It would be in the best interests of all citizens of Lake County if the Board of Elections addressed election issues well in advance of any Primary Election or General Election and not on the eve of an election. This would allow for any legal challenges to the action or inaction of the Board to be heard and resolved in sufficient time to clearly advise the electorate of their options in casting their ballots in any election.

CONCLUSIONS OF LAW

1. A preliminary injunction is an order compelling a party to act, or refrain from acting, and will remain in effect until there has been a trial on the merits.

2. A preliminary injunction is an extraordinary equitable remedy and should be granted sparingly and only in the rare instances in which the law and facts are clearly with the party requesting the injunction. *M.K. Plastics Corp. V. Rossi*, 838 N.E.2d 1068 (Ind. Ct. App. 2005).

3. In scheduling the hearing, a court, in its discretion, may consolidate the hearing with a trial on the merits. Trial Rule 65(A)(2).

4. The party requesting injunctive relief has the burden of proving the following elements:

(A) the remedy at law is inadequate and the moving party will suffer irreparable harm pending resolution of the action,

(B) the moving party is reasonably likely to prevail on the merits,

(C) the threatened injury to the moving party if an injunction is denied outweighs the threatened harm to the adverse party if the injunction is granted, and

(D) the public interest will be disserved if injunctive relief is not granted.

Doe v. O'Connor, 781 N.E.2d 672 (Ind. 2003).

5. If a party fails to prove any one of these elements, the motion for injunction should be denied. *Indiana Family & Social Services Admin., Div. Of Family and Children, Lake County Office v. Ace Foster Care and Pediatric Home Nursing Agency Corp.*, 823 N.E.2d 1199 (Ind. Ct. App. 2005)

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6. A party may be relieved from the obligation to establish some of the preliminary injunction elements when the defendant has violated a statute or has engaged in some unlawful conduct. *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108 (Ind. Ct. App. 2004)

7. In determining whether to grant a preliminary injunction, a trial court must evaluate harm which may be caused defendant if the injunction is issued, as compared with harm which would befall plaintiff if application is denied. *Mid-America Marketing, Inc. V. Falender Development Corp.*, 406 N.E.2d 372 (Ind. Ct. App. 1980).

8. A court has the duty to consider whether the public interest will be promoted or harmed by granting or denying the application. *Id.* at 377.

9. Even if a plaintiff's claim has merit, an injunction must be denied if public interest would be substantially adversely affected if granted. *State ex rel. Atty. Gen. v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005), cert. denied, 126 S.Ct. 398, 163 L. Ed. 2d 276 (U.S. 2005).

10. In making the determination to grant or deny injunctive relief, a court must consider whether an injunction is in the public interest. *Platt v. State*, 664 N.E.2d 357 (Ind. Ct. App. 1996).

11. An order granting or denying a preliminary injunction is an interlocutory order which may be appealed as a matter of right in accordance with Appellate Rule 14(A)(5).

12. The grant or denial of a preliminary injunction is within the trial court's discretion and will be reviewed on appeal for an abuse of discretion. *Apple Glen Crossing, LLC v. Trademark Retail, Inc.* 784 N.E.2d 484 (Ind. 2003).

13. The cardinal rule of statutory construction is that if a statute is unambiguous, then a court need not and cannot interpret it; rather, it must apply its plain and clear meaning. *Vanderburgh County Election Board v. Vanderburgh County Democratic Central Committee*, 833 N.E.2d 508 (Ind. App.2005).

14. The relevant portion of Indiana Code Section 3-11-10-26 provides for in person absentee voting:

Sec. 26 (a) As an alternative to voting by mail, a voter is entitled to cast an absentee ballot before an absentee voter board:

(1) in the office of the circuit court clerk (or board of elections and registration in a county subject to IC 3-6-5.2); or

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(2) a satellite office established under section 26.3
of this chapter.

15. A reading of Indiana Code Section 3-11-10-26 invites various interpretations as to where early voting locations may occur in a county. Some of the different possible interpretations of Section 26(a)(1) would provide early voting

- (A) either in the County Clerk's office or the Board of Elections in a county subject to IC 3-6-5.2, but not both;
- (B) both in the County Clerk's office and the office of the Board of Elections;
- (C) only at the office of the Board of Elections in a county subject to IC 3-6-5.2;
- (D) either in the County Clerk's office or a satellite office but not both;
- (E) either in the office of the Board of Elections or a satellite office, but not both
- (F) in both the County Clerk's office and a satellite office;
- (G) in the County Clerk's office, the office of the Board of Elections, and a satellite office.

16. The relevant portion of Indiana Code Section 3-11-10-26.3 provides for the establishment of satellite offices for in person absentee voting:

Sec. 26.3 (a) A county election board may adopt a resolution to authorize the circuit court clerk to establish satellite offices in the county where voters may cast absentee ballots before an absentee voter board.

(b) To be adopted under this section, a resolution must be adopted by the unanimous vote of the board's entire membership.

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(c) A resolution adopted under this section must do the following:

(1) State the location of the satellite offices.

(2) State the hours at which absentee voting may occur at the satellite offices.

17. The Board of Elections failed to establish satellite voting locations at its September 23, 2008 meeting due to a lack of a unanimous vote coupled with the procedural flaw of not including the hours of absentee voting in the motion or resolution.

18. The Board of Elections by majority vote did establish absentee voting in the office of the circuit court clerk by reason of one of the possible interpretations of Indiana Code Section 3-11-10-26.

19. In the absence of fraud, election statutes generally will be liberally construed to guarantee to the electorate an opportunity to freely cast his ballot, to prevent his disfranchisement, and to uphold the will of the electorate. *Cave v. Conrad*, 24 N.E.2d 1010, 1012 (Ind. 1940); *State ex rel. Harry v. Ice*, 191 N.E. 155, 157 (Ind. 1934).

20. The overriding principle that election laws should be construed to enfranchise voters, not disfranchise them is firmly established. See, e.g., *Brown v. Grzeskowiak*, 101 N.E.2d 639, 646-47 (Ind. 1951).

21. The *Brown* Court stated

[I]t must be kept in mind, even when applying the rules of strict construction, in ascertaining the meaning of the language used [in the election laws] together with the intent of the Legislature, that the will of the majority of those who have legally voted is the thing to be most desired. *Id.*

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22. Indiana courts routinely interpret the election laws to ensure that the maximum number of legitimate votes will be cast and counted, despite technical violations. As the Indiana Supreme Court has recognized:

To disenfranchise [voters] because of a mere irregularity or a mistaken construction of the law by a party committee or election commissioner would defeat the very purpose of all election laws.

Lumm v. Simpson, 194 N.E. 341, 342 (Ind. 1935).

23. Early voting is proceeding and votes are being cast in Lake County. To stop voting now on the basis of an alleged technical irregularity (that only a majority of the Board of Elections voted to establish the voting locations) would contravene the very purpose of the election laws and the longstanding judicial principle of construing election laws to broaden, not restrict, the franchise.

24. The Steelworkers Plaintiffs are likely to prevail on their claim that denying access to early voting in the cities of Gary, Hammond, and East Chicago would violate the Indiana Constitution.

25. Article 2, Section 1 of the Indiana Constitution proclaims that “[a]ll elections shall be free and equal.”

26. In *Morris v. Powell*, 25 N.E. 221, 225 (Ind. 1890), the Indiana Supreme Court announced a constitutional standard for the regulation of elections under Article 2, Section 1 that has stood for the past 118 years: all voting regulations must be reasonable, uniform and impartial.

27. The failure to provide the opportunity for in person absentee voting in the cities of Gary, Hammond, and East Chicago violates these constitutional principles in several respects:

(A) It would be neither reasonable nor fair to deny accessible early voting to residents of Gary, Hammond, and East Chicago. If Gary and Hammond have no early voting locations, they would be the largest cities in Indiana without early voting facilities.

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(B) Travel to Crown Point is impractical or impossible for many residents of Gary, Hammond, and East Chicago. It is not reasonable or fair to allow voters residing in Crown Point or in close proximity thereto to cast an early ballot there, while at the same time requiring the many more voters in Gary, Hammond, and East Chicago to make an onerous and lengthy round-trip there to vote.

(C) There is no reasonable justification for a change in election procedures from the 2008 Primary Election and the 2008 General Election. To provide for fewer early voting locations during the 2008 General Election, in which many more Lake County residents will vote, than existed during the 2008 Primary Election is unreasonable and makes voting comparatively more burdensome and difficult for the large population of voters in Gary, Hammond, and East Chicago.

(D) Making early voting comparatively more burdensome and difficult for the large population of voters in Gary, Hammond, and East Chicago also cannot be deemed fair and equal. The Court in *Brewer v. McClelland*, 32 N.E. 299, 300 (Ind. 1892) held "it cannot be demonstrated by any course of sound reasoning that an election held under a law which imposes upon one class of citizens burdens not borne by others is equal."

28. Providing early voting in the community of Crown Point, with an overwhelming white population, and denying accessible early voting to the majority of Lake County's African-American and Latino residents, would violate Section 2 of the federal Voting Rights Act.

29. Section 2 of the federal Voting Rights Act prohibits any political subdivision from enacting or employing any "standard, practice, or procedure . . . in a manner which results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. §1973(a).

30. Section 2 of the federal Voting Rights Act requires only a discriminatory impact to show a violation and a party need not show improper or discriminatory intent to prevail on a Section 2 claim. See 42 U.S.C. §1973(b); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1550 n.1 (11th Cir. 1986).

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31. The location of early voting locations is a voting standard, practice, or procedure subject to Section 2 of the federal Voting Rights Act. The U.S. Supreme Court has held that, for the purposes of the Voting Rights Act, "we think it clear that the location of polling places constitutes a 'standard, practice, or procedure with respect to voting.'" *Perkins v. Matthews*, 400 U.S. 379, 387 (1971). Absentee ballot procedures are also covered by Section 2. *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968). In *Brown v. Dean*, 555 F. Supp 502, 504-06 (D.R.I. 1982), the court held that the location of a polling place distant from, and difficult to reach by, African-Americans, violated Section 2.

32. Other than the day on which the ballot is cast, there is no meaningful difference in Lake County between what voters do if they vote early by in person absentee ballot or if they vote on election day.

33. The voting procedures in place at the early voting locations in Gary, Hammond, and East Chicago have safeguards which are designed to prevent the casting of fraudulent ballots.

34. Although Curley Plaintiffs concerns about voter fraud at early voting locations in Gary, Hammond, and East Chicago are based on past election fraud in Lake County, the concerns at this juncture are merely speculative and insufficient to prevent the continued early voting at those locations.

35. Curley Plaintiffs allege that the early voting at issue is "vote dilution."

36. Vote dilution occurs because one jurisdiction has been allocated a much greater number of registered voters than another jurisdiction.

37. Vote dilution does not occur when voters turn out within a properly drawn jurisdiction.

38. Curley Plaintiffs' allegations of "vote dilution" have no merit because the votes of Mr. Curley and Mr. Brown will in no way be "diluted" by the casting of early ballots of other validly registered voters, any more than if they had cast those ballots on election day. The casting of ballots by other lawfully registered voters within the relevant jurisdiction is *democracy*, not vote dilution.

39. This court lacks jurisdiction and authority to order the establishment of additional early voting locations in other communities in Lake County so as to expand in person absentee voting throughout Lake County. If this court had such jurisdiction, it would certainly do so.

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ORDER

IT IS THEREFORE ORDERED that Intervenors' Motion to Dismiss the Complaint of Curley Plaintiffs for lack of standing is DENIED.

IT IS FURTHER ORDERED that Curley Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is DENIED

IT IS FURTHER ORDERED that Curley Plaintiffs' Motion to Vacate the October 14, 2008 Preliminary Injunction directing the Board of Elections to open early voting locations in Gary, Hammond, and East Chicago is DENIED.

IT IS FURTHER ORDERED that Intervenors' and Steelworkers Plaintiffs' Motion for Preliminary Injunction is GRANTED. The Lake County Board of Elections and Registration is hereby enjoined from terminating the operation of in person absentee voting currently being conducted in the offices of the Clerk of the Lake Circuit Court in the courthouse buildings in Gary, Hammond, and East Chicago and the offices of the Lake County Board of Elections and Registration in Crown Point..

IT IS FURTHER ORDERED that all ballots that have been already been cast at the early voting locations in Gary, Hammond, East Chicago, and Crown Point shall not be invalidated except for instances of voter fraud.

SO ORDERED this 22nd day of October, 2008.


Diane Kavadias Schneider, Special Judge

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