A No-Strike Clause Can Serve as Valid Consideration in Tenured Public School Teachers' Contracts - Bond v. Board of Education

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A NO-STRIKE CLAUSE CAN SERVE AS VALID CONSIDERATION IN TENURED PUBLIC SCHOOL TEACHERS' CONTRACTS—BOND V. BOARD OF EDUCATION

At common law, strikes by employees, whether in the public or the private sector, were prohibited. With increased union growth and pressure during the New Deal era, however, private sector employees were statutorily given the right to strike. Public sector employees, on the other hand, continually have been denied the right to strike. Most states, including Illinois, have not statutorily abrogated the common law, and strikes by public employees therefore remain illegal. As government employees, public school teachers are critically affected by this no-strike policy. The Illinois Supreme Court has repeatedly enjoined illegal strike activity by public

1. See United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C. 1971), aff'd, 404 U.S. 802 (1971) ("At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers"); Jefferson County Teachers Ass'n v. Board of Educ., 403 S.W.2d 627, 629 (Ky. Ct. App. 1967) ("Under the common law it is recognized that public employees do not have the right to strike or to engage in concerted work stoppages"); Head v. Special School Dist., 268 Minn. 496, 507, 182 N.W.2d 887, 894 (1971) ("it is clearly established common law that a strike by public employees for any purpose is illegal").


3. The common law was superseded by § 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157 (1976), which guaranteed the right to strike to workers in the private sector. The genesis of this Act was § 7(a) of the National Industrial Recovery Act of 1933 (NIRA), Pub. L. No. 90-67, 48 Stat. 195 (1933). The Supreme Court held the NIRA unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The NLRA, however, was passed by Congress the same year Schechter was decided, and after the court packing plan, the constitutionality of the NLRA was upheld by a bare majority in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

4. See note 21 infra.

5. The first case in Illinois to explicitly consider the legality of strikes by public employees was Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965). The court observed: "[A]lthough this is a case of first impression in a reviewing court of this jurisdiction, it is, so far as we can ascertain, the universal view . . . that a strike of municipal employees for any purpose is illegal." Id. at 571, 207 N.E.2d at 430. See notes 19-30 and accompanying text infra.

6. Board of Trustees v. Cook County College Teachers Union, 74 Ill. 2d 412, 426, 386 N.E.2d 47, 53 (1979) (public school teachers who are participants in illegal strike activity cannot benefit at the expense of non-strikers); Board of Educ. v. Kankakee Fed'n of Teachers, 46 Ill. 2d 439, 441, 264 N.E.2d 18, 20 (1970) (a strike by school employees is unlawful as it violates the expressed public policy of this state), cert. denied, 403 U.S. 904 (1971); Board of Educ. v. Redding, 32 Ill. 2d 567, 573, 207 N.E.2d 427, 431 (1965) (there is only a difference in degree between striking teachers and striking custodial employees and the majority rule is that strikes by all public employees are illegal).
school teachers in order to bring stability to the educational system of the state.8

Despite judicial decisions proclaiming public sector employee strikes illegal, public employees nationwide have continued to strike.9 Nationally, public school teachers have been among the most militantly defiant of the courts.10 Illinois has ranked near the top in the number of public school teachers’ strikes since 1972,11 and the number of work days lost in Illinois public education continues to climb.12 Indeed, the growing frequency of


8. The goal of providing stability is one of the main reasons the Illinois Supreme Court adopted the no-strike policy. See notes 23-30 and accompanying text infra.

9. Since the middle of the 1960’s, public employee strikes have multiplied, affecting every aspect of public services. In 1960, there were 36 strikes by federal, state, and local government employees idling 28,600 workers for 58,400 work days; in 1968, there were 254 strikes among 202,000 workers with 2,545,200 work days lost; in 1973, there were 387 strikes among 196,400 workers absent from 2,303,900 work days; in 1975, there were 478 strikes among 318,500 workers with 2,204,400 work days idle; and in 1978, there were 481 strikes among 193,700 workers producing 1,706,700 idle work days. [1980] Gov’t Empl. Rel. REP. (BNA) RF-71:1014.


12. In Illinois in 1972 there were 20 strikes in education with 17,300 work days lost; in 1973 there were 19 strikes in education with 291,000 work days lost; in 1974 there were 19 strikes in education with 14,300 work days lost; in 1975 there were 28 strikes in education with 354,000 work days lost; in 1976 there were 26 strikes in education with 20,600 work days lost; in 1977 there were 19 strikes in education with 16,700 work days lost; and in 1978 there were 28 strikes in education with 63,800 work days lost. U.S. Dep’t of Labor, Bureau of Labor Statistics, Work Stoppages in Government, 1972, Report 434, at 9-11 (1974); U.S. Dep’t of Labor, Bureau of Labor Statistics, Work Stoppages in Government, 1973, Report 437, at 9-11.
teacher strikes and the absence of state legislation covering strike activity and collective bargaining of public employees were two prime factors prompting the Illinois Supreme Court to formulate and enforce the no-strike policy.

In Bond v. Board of Education, the Illinois Supreme Court took another step to enforce the Illinois no-strike policy. The court held that a no-strike clause may serve as valid consideration in a tenured public school teachers' employment contract. In its attempt to decrease public school teachers' strike activity, the court, however, ignored established principles governing the formation of all contracts. Furthermore, the court may have weakened the bargaining relationship between school boards and public school teachers at a time when future contract negotiations must run smoothly to avoid further strike activity.


13. Illinois lacks any legislation either prohibiting or allowing strikes by any public sector employees. It has been suggested that such legislation has not been enacted because the Illinois courts have willingly stepped into the legislative arena. See Feldman, supra note 2, at 619-20. Furthermore, because Illinois lacks statutory authorization of public sector collective bargaining, the courts are left to determine the permissible scope of collective bargaining agreements. The Illinois Supreme Court has held that discretionary governmental powers can neither be restricted by collective bargaining agreements nor delegated to an arbitrator or third party. Board of Trustees v. Cook County College Teachers' Union, 74 Ill. 2d 412, 386 N.E.2d 47 (1979); Board of Trustees v. Cook County College Teachers' Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); Illinois Educ. Ass'n v. Board of Educ., 62 Ill. 2d 127, 340 N.E.2d 7 (1975). See also Eisenhammer & Trizna, The Permissible Scope of Public Sector Bargaining in Illinois: A Proposed Solution, 12 J. MAR. J. PRAC. & PROC. 509 (1979); Shaw & Clark, The Need for Public Employee Labor Legislation in Illinois, 59 ILL. B.J. 628 (1971).

14. 81 Ill. 2d 242, 408 N.E.2d 714 (1980).
15. See note 31 and accompanying text infra.
16. 81 Ill. 2d at 249, 408 N.E.2d at 717.
18. For a basic overview of public sector labor negotiations and public employees' right to strike, see Burton & Krider, The Role and Consequences of Strikes by Public Employees, 79 YALE L.J. 418, 440 (1970) ("strikes by public employees inevitably distort the decision-making process in the public sector"); Glink, Issues in School Labor Relations, 55 CHI.-KENT L. REV. 627, 640 (1979) ("Where public employee strikes are prohibited, the weapon of strike nevertheless has been used often, but resulting settlements have been achieved at a cost of bitterness and frustration") [hereinafter cited as Glink]; Shaw & Clark, Public Sector Strikes: An Empirical Analysis, 2 J.L. & EDUC. 217, 233 (1973) ("There is an urgent need to develop greater competence on the part of those who represent public management and public sector unions . . . [to avoid] many strikes which should have never occurred"); Wellington & Winter, The Limits of Collective Bargaining in Public Employment, 78 YALE L.J. 1107, 1127 (1969) ("Legislation is
The judicial policy declaring all public employees' strikes illegal in Illinois is based on the three main propositions initially asserted in Board of Education v. Redding. The first basis was the "universal view that there is no inherent right in municipal employees to strike against their governmental employer." This position resulted from the widespread prohibition of public employee strikes in other states. Following the lead of these states and in the absence of Illinois legislation expressly prohibiting public employee strikes, the Redding court adopted the common law position that public employees have no "inherent right" to strike.

The second argument advanced in Redding in favor of the no-strike policy was derived from the 1870 Illinois Constitution. According to the court, to implement the state goal of providing free education to all persons, the state has a constitutional obligation to provide "a thorough and efficient system of

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20. Id. at 571, 207 N.E.2d at 430.
21. As a general rule, public employees are denied the right to strike or engage in a work stoppage against a public employer. See, e.g., Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) (public school teachers do not have the right to engage in strike activity); Teachers Local 519 v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969) (public school teachers may not engage in a strike for any purpose), cert. denied, 399 U.S. 928 (1970); City of Pawtucket v. Pawtucket Teachers Alliance, 87 R.I. 364, 141 A.2d 624 (1958) (teachers are agents of the government; to allow them to strike would be denying the authority of the government). Similarly, federal employees do not have the right to strike. See, e.g., Arnell v. United States, 384 U.S. 158, 161 (1966) (government employees are forbidden from exercising the right to strike); United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C. 1971) (public employees, in the absence of a statute so providing, do not possess the right to strike), aff'd mem., 404 U.S. 802 (1971).
22. See note 1 and accompanying text supra.
23. Ill. Const. art. VIII, § 1 (1870). That section provides: "The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." Id. (emphasis added).

The present constitution contains almost the exact language; therefore, adoption of the Illinois Constitution of 1970 since Redding has not disturbed the validity of that decision. For cases upholding the validity of the Illinois no-strike policy after 1970, see notes 6 & 7 supra. The 1970 Constitution provides:

SECTION 1. GOAL—FREE SCHOOLS
A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality educational institutions and services. Education in public school through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

Ill. Const. art. X, § 1 (emphasis added).
This duty, *Redding* stated, is discharged through the local boards of education, which have responsibility for effectuating the constitutional mandate. Strikes by public school teachers, therefore, directly contravene the Illinois Constitution because teachers' strikes reduce the efficiency and quality of the Illinois educational system.

The third argument asserted by the *Redding* court against permitting public employee strikes was that strikes impede and obstruct essential services provided by the government. Recognizing that governmental services are incapable of being replaced by alternative sources, the court concluded that thorough and efficient school operations could not be subject to the choice or whim of public school teachers. Furthermore, the court stated that as governmental employees public school teachers are agents who fulfill the will of the people and are therefore charged with a duty to refrain from conduct which would tend to harm the educational system. These three arguments—no inherent right of government employees to strike, the state constitutional requirement of efficient and quality education, and the potential interference with essential governmental services—form the no-strike policy as it presently exists in Illinois. In the last ten years, Illinois courts have frequently utilized this no-strike rule to suppress the growing number of public school teachers' strikes.

**Tenured Teachers' Rights**

In Illinois, tenured teachers have a vested contract right in continued employment with their boards of education. Although section 12-11 of the United States Constitution provides that

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24. 32 Ill. 2d at 572, 207 N.E.2d at 430. Ill. Const. art. VIII, § 1 (1870).

25. 32 Ill. 2d at 572, 207 N.E.2d at 430; Bond v. Board of Educ., 81 Ill. 2d 242, 248, 408 N.E.2d 714, 716 (1980) (the responsibility for effectuating the duty imposed by the constitution is delegated to the school boards); Allen v. Maurer, 6 Ill. App. 3d 633, 640, 286 N.E.2d 135, 140 (4th Dist. 1972) (the state has a duty, discharged through local board of education, to provide the public with an efficient and high quality educational system).

26. 32 Ill. 2d at 572-73, 207 N.E.2d at 430-31; City of Pana v. Crowe, 57 Ill. 2d 547, 553, 316 N.E.2d 513, 516 (1974) (strikes by public employees create emergencies that affect the health, safety, and welfare of the public); Board of Educ. v. Redding, 32 Ill. 2d 567, 572, 207 N.E.2d 427, 430 (1965) (agents of the school boards are charged with a duty to refrain from conduct that will render our schools less efficient and thorough); Allen v. Maurer, 6 Ill. App. 3d 633, 640, 286 N.E.2d 135, 140 (4th Dist. 1972) (control of the education system by the school board is necessary to achieve the constitutional mandate of free and efficient public institutions).

27. 32 Ill. 2d at 572, 207 N.E.2d at 430.

28. *Id.* at 573, 207 N.E.2d at 431.

29. *Id.* at 572, 207 N.E.2d at 430. Closely related to the essentiality argument is the sovereignty argument which is predicated on the belief that governmental employees are agents of the government and as such are exercising a portion of the sovereign power. The sovereignty argument declares that persons exercising a portion of this sovereign power have no right to strike against the government. See Note, *The Illinois Anti-Injunction Act is Not Applicable to Strikes by Public Sector Employees and Such Strikes are Illegal Per Se*, 6 Loy. Chi. L.J. 187, 195-200 (1978); Feldman, *supra* note 2, at 636-38; Wellington, *supra* note 18, at 1123-27.

30. See notes 6 & 7 and accompanying text *supra*.

Illinois School Code specifically establishes the rights of tenured teachers and the duties of the school boards,\textsuperscript{32} judicial decisions have been essential in delineating the precise meaning of certain Code provisions. The Illinois Supreme Court in \textit{Richards v. Board of Education}\textsuperscript{33} established boundaries on the statutory authority of school boards over tenured teachers' salaries.\textsuperscript{34} The court held that a school board's otherwise discretionary control over the salaries of its teachers is subject to the limits expressly established by the School Code\textsuperscript{35} and to the constitutional prohibitions of actions that are either arbitrary, discriminatory, and unreasonable, or based upon an improper classification.\textsuperscript{36} While the court granted broad discretionary control to the faculty member who has been employed in any district for a period of 3 consecutive school years shall enter upon tenure . . . . A tenured faculty member shall have a vested contract right in continued employment as a faculty member . . . ."\textsuperscript{Id.} § 103B-2 (Cumm. Supp. 1980).

\textsuperscript{32} Id. § 24-11. This portion of the Code is particularly relevant to tenured teachers and was the basis in \textit{Bond} for paying non-signers their previous year's salary. It provides in relevant part:

Contractual continued service shall continue in effect the terms and provisions of the contract with the teacher during the last school term of the probationary period, subject to this Act and the lawful regulations of the employing board . . . .

Contractual continued service status shall not restrict the power of the board . . . . to make such salary adjustments as it deems, desirable . . . .

\textsuperscript{Id.} (emphasis added).

There are three other statutes within the School Code that specifically apply to the boards' control over teacher salaries. "Duties of school board. The school board has the duties enumerated in sections 10-20-1 through 10-20-30." \textit{Ill. Rev. Stat.} ch. 122, § 10-20 (1979). These duties include the appointment and employment of teachers, as well as the ability to fix teachers' salaries. "Appoint teachers and fix salaries. To appoint all teachers and fix the amount of their salaries subject to limitations set forth in this Act." \textsuperscript{Id.} § 10-20.7. "Employment of teachers. To examine teachers by examinations . . . . and fix the amount of their salaries subject to limitations set forth in this Act." \textsuperscript{Id.} § 10-21.1.

\textsuperscript{33} 2111. 2d 104, 171 N.E.2d 37 (1961).

\textsuperscript{34} The plaintiff in \textit{Richards} was a full time tenured teacher. He filed an action for a declaratory judgment seeking to test the authority of the defendant board of education to combine its salary schedule with a program of professional growth. The schedule, which was adopted for the 1958-1959 school year, accorded teachers with the plaintiff's experience an annual raise of $400, provided the teacher had met the requirements of the professional growth program. Plaintiff's challenge to the statutory authority of the school board prompted the courts to define the board's powers under section 22-5 of the School Code. \textit{Ill. Rev. Stat.} ch. 122, § 22-5 (1957). \textit{21 Ill. 2d} at 107-08, 171 N.E.2d at 40-41. For the presently applicable sections of the Code, see note 32 supra.

\textsuperscript{35} \textit{21 Ill. 2d} at 109, 171 N.E.2d at 41. The court found that:

There is no provision in the Code which denies to school boards the right to weigh the factor of professional growth in classifying teachers and fixing their compensation but, on the contrary, the general purport of all the pertinent provisions and the specific directions of a few strongly support a legislative intent to permit the discretion of the board to be exercised in such a manner.

\textsuperscript{Id.}

\textsuperscript{36} \textit{Id.} See note 37 infra.
school boards, it also established the numerous rights to which tenured teachers are entitled under the School Code.\textsuperscript{37}

One of the more important rights the School Code confers on tenured teachers is the right to refuse or accept a new contract offered to them by the school board.\textsuperscript{38} Interpreting the School Code in \textit{Donahoo v. Board of Education},\textsuperscript{39} the court made it clear that if tenured teachers refuse to sign a new contract tendered to them by the board, they continue to be employed under the terms of their previous contract.\textsuperscript{40} The court rested this holding on the ground that tenure rights are necessary to protect qualified teachers and to assure them that their employment depends upon merit and not upon the partisan whims of individual school officials.\textsuperscript{41}

Two recent appellate court cases directly addressed tenured teachers' rights: \textit{Davis v. Board of Education}\textsuperscript{42} and \textit{Littrell v. Board of Education}.\textsuperscript{43}

\textsuperscript{37} 21 Ill. 2d at 107-08, 171 N.E.2d at 40. \textit{See also} Byerly v. Board of Educ., 65 Ill. App. 3d 400, 382 N.E.2d 694 (4th Dist. 1978). In \textit{Byerly}, the court held that the school board's powers, authorized by the School Code, are broad enough to include the power to make payments to retiring teachers for accumulated sick leave. \textit{Id.} at 403, 382 N.E.2d at 697. This holding was founded upon the rule established in \textit{Richards} that a school board has discretionary control over its teachers' salaries, subject only to limits established by the School Code and the constitution.

\textsuperscript{38} The applicable section of the Code affording tenured teachers this right to refuse or accept a new contract is set forth at note 32 \textit{supra}.

\textsuperscript{39} 413 Ill. 422, 109 N.E.2d 787 (1952).

\textsuperscript{40} Since plaintiffs were tenured teachers, they were not required to sign the new employment contracts offered to them by the board. As the court in \textit{Donahoo} stated:

\begin{quote}
The Teacher Tenure Law does not make it mandatory . . . to either accept or reject [the new contracts]. Of course, if an offer was properly made and unconditionally accepted, it would be in force according to its terms, but if not accepted or conditionally accepted, then the provisions of the Teacher Tenure Law apply.
\end{quote}

\textit{Id.} at 427, 109 N.E.2d at 789-90 (1952). Yet, in \textit{Bagley v. Board of Educ.}, 83 Ill. App. 3d 247, 403 N.E.2d 1285 (3d Dist. 1980), the Illinois appellate court rejected the argument that tenured teachers who refused to sign a new contract continued employment under the terms of their previous year's contract. \textit{Id.} at 251, 403 N.E.2d at 1289. The \textit{Bagley} court asserted that \textit{Donahoo} did not stand for the proposition that non-signing tenured teachers continued employment under their prior year's contract because \textit{Donahoo} dealt with a non-tenured teacher. \textit{Id.} The \textit{Bond} court resolved this problem when it distinguished the rights of tenured and non-tenured teachers. The court stated:

\begin{quote}
Under [the average employment contract], the employer offers a salary, the amount being totally discretionary, in exchange for a particular job performance, and if the employee is unwilling to accept the terms, employment may be terminated. A tenured teacher, however, has the option of declining the new contract and continuing employment, under the provisions of the School Code, at a salary and according to the terms of the prior year's contract.
\end{quote}

\textit{Id.} 2d at 250, 408 N.E.2d at 717-18. The court then cited \textit{Donahoo} to support this position. \textit{Id.} Therefore, \textit{Bagley} has been impliedly overruled.

\textsuperscript{41} 413 Ill. at 425, 109 N.E.2d at 789. \textit{See also} Hankerson v. Board of Educ., 10 Ill. 2d 560, 563, 141 N.Ed.2d 5, 7 (1957).

\textsuperscript{42} 19 Ill. App. 3d 644, 312 N.E.2d 335 (2d Dist. 1974).

\textsuperscript{43} 45 Ill App. 3d 690, 360 N.E.2d 102 (5th Dist. 1977).
In *Davis*, tenured teachers passed a resolution declaring that they would not return to the classrooms in the fall unless a satisfactory contract settlement could be reached with the board. Interpreting this action as a strike threat, the school board mailed a new contract to all tenured teachers with provisions including a salary increase, a no-strike clause, and other incidental benefits. A follow-up letter was sent to non-signing teachers offering them the option of signing the new contracts or continuing to receive their previous year's salary according to the provisions of the School Code. The plaintiffs, non-signing tenured teachers, returned to work in the fall for their previous year's salary.

The issue addressed in *Davis* was whether a salary differential between tenured teachers who signed and those who refused to sign the new employment contract was arbitrary, capricious, or unreasonable. The court reasoned that because the option of signing was offered to all tenured teachers and because the plaintiffs opted not to sign, they were not entitled to receive the salary increases signatories received. In short, the *Davis* court held the salary increase not arbitrary or discriminatory, but based upon a permissible classification—signatory or non-signatory of the new contract.

Three years later, the Illinois Appellate Court for the Fifth District was presented, in *Littrell*, with a case somewhat similar to *Davis*. On the first day of the 1974-1975 school term, the school board offered contracts to all its tenured teachers that incorporated a salary schedule the board had earlier adopted. The plaintiffs, tenured teachers employed by the school board, opted not to sign the contracts offered to them and were consequently paid their previous year's salaries.

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44. 19 Ill. App. 3d at 645, 312 N.E.2d at 336. The Aurora Education Association, East, was recognized by the school board as the tenured teachers' bargaining representative.
45. *Id.* This resolution was passed on June 9, 1971; the fall school term did not commence until September 7, 1971.
46. *Id.* The new contract was mailed on June 21, 1971, approximately 78 days before the start of the school term.
47. *Id.*
48. *Id.*
49. *Id.* at 646, 312 N.E.2d at 336. See note 37 supra.
50. 19 Ill. App. 3d at 646, 312 N.E.2d at 336.
51. *Id.* at 646, 312 N.E.2d at 337. The *Bond* court agreed with the *Davis* holding and found that "under the proper conditions, a salary distinction between signing and non-signing teachers is not arbitrary or unreasonable." 81 Ill. 2d at 247, 408 N.E.2d at 716. The court did not specify what those conditions were, but apparently they existed in *Davis*.
52. 45 Ill. App. 3d at 692, 360 N.E.2d at 103. The salary schedule adopted on July 8, 1974 was unlike any contract salary schedule prepared in previous years. Those previous years' contracts indicated the teacher's salary by the phrase "as per salary schedule." The new contract listed fixed dollar amounts, based on experience and educational level, according to the schedule earlier adopted by the board.
53. *Id.* The plaintiffs did not sign because they did not want to be bound by a written contract when they later attempted to negotiate raises.
54. *Id.* Each plaintiff received $415 less than teachers, with identical experience and education, who did sign the contracts.
The Littrell court distinguished the Davis decision because in Davis the contracts contained a no-strike provision and, more importantly, because the contracts in Davis were submitted to the teachers more than sixty days before the beginning of the school term. By reason of this distinction, the Littrell court held that paying non-signing plaintiffs less money than tenured teachers who signed the new contracts was arbitrary and based upon an unreasonable classification. The court concluded that the sole justification for paying a lower salary to the plaintiffs was their failure to sign the new contracts. This justification was deemed invalid, for even if the plaintiffs had executed the contracts, they would not have bound themselves to do any more than they were already obliged to do—in short, the contracts lacked consideration. The holdings of Littrell and Davis presented a conflict between districts of the appellate court which the Illinois Supreme Court addressed in Bond.

**FACTS OF BOND**

On May 27, 1977, ninety days before the start of the school year, the defendant board of education tendered individual contracts to its tenured teachers, who had ten days to sign. The contracts provided that both signers and non-signers would retain tenure rights and contained a clause stating that all signing teachers were to refrain from participating in any work stoppage, sit-in, or strike. Teachers were not required to sign, and non-signers were to continue employment under provisions of the School Code; however, tenured teachers who did not sign the new contracts were to receive the salary they had been paid in the prior school year.

The plaintiffs, twenty-three tenured teachers, did not sign the contracts offered them by the board of education. The plaintiffs nevertheless taught

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55. Id. at 696-97, 360 N.E.2d at 106.
56. Id.
57. Id. at 699, 360 N.E.2d at 108.
58. Id. at 698, 360 N.E.2d at 107.
59. 81 Ill. 2d at 245, 408 N.E.2d at 715. The defendant, Board of Education of Mascouche Community Unit School District No. 19, unilaterally adopted a salary schedule for the 1977-1978 school year and sent the schedule, along with an employment contract, to its tenured teachers. Brief for Petitioner at 6, Bond v. Board of Educ., 81 Ill. 2d 242, 408 N.E.2d 714 (1980).
60. 81 Ill. 2d at 245, 408 N.E.2d at 715.
61. Brief for Petitioner at 28. The contract provided: "The parties hereto acknowledge that they are each aware of their legal and moral duty and obligation to provide a full school term of education for the students . . . . The Teacher will not participate in a work stoppage, sit-in, strike or any activity similar thereto . . . ." Id. (emphasis added).
62. 81 Ill. 2d at 245, 408 N.E.2d at 715. See notes 38-40 and accompanying text supra.
63. 81 Ill. 2d at 245, 408 N.E.2d at 715. The board also sent a tender letter accompanying the contract of employment. The letter contained the following paragraph: "In the event the contract is not signed by an individual teacher, the Board guarantees that all of the teachers rights, under the school code, shall be accorded the teacher, including the right to receive the same salary received during the 1976-77 school term." Brief for Petitioner at 7.
classes during the 1977-1978 school year and performed the same duties as the teachers who had signed the new contracts.\textsuperscript{64} Consistent with the language of the contract, however, the plaintiffs were paid the same salaries as they had been paid during the 1976-1977 school year. Subsequently, the plaintiffs initiated an action for a declaratory judgment seeking compensation under the salary schedule in effect for the 1977-1978 school year.\textsuperscript{65} The plaintiffs argued that the no-strike clause in the new contracts gave the defendant nothing it could not already expect, because teachers as public employees were prohibited by law from striking.\textsuperscript{66} A promise to refrain from doing something one is already bound by law not to do, the plaintiffs averred, cannot constitute valid consideration.\textsuperscript{67} Thus, the plaintiffs argued that the no-strike clause could not serve as valid consideration within the employment contracts, and that the payment of a higher salary to teachers who signed those contracts was arbitrary, unreasonable, and discriminatory, and based upon an improper classification.\textsuperscript{68}

The defendant contended that the no-strike clause was valuable consideration and, consequently, that paying the signing teachers a higher salary than the non-signing teachers was not arbitrary, capricious, or unreasonable.\textsuperscript{69} The circuit court held in favor of the plaintiffs, and the appellate court, by summary order, affirmed.\textsuperscript{70} The Illinois Supreme Court granted the defendant's petition for leave to appeal and reversed.

Rationale Employed in Bond

The defendant in Bond contended that Davis should control,\textsuperscript{71} because the Davis facts were "on all fours" with the facts presented in Bond.\textsuperscript{72} The plaintiffs, on the other hand, contended that Littrell should control.\textsuperscript{73} Before addressing the main issue of whether a no-strike clause was valid consideration,\textsuperscript{74} the Illinois Supreme Court first sought to resolve the appar-
ent conflict between Littrell and Davis. After a lengthy discussion of both cases, the court, however, concluded that neither Littrell nor Davis was relevant to the case before it.\textsuperscript{75} On the contrary, Bond presented the issue of whether a no-strike clause could serve as consideration in tenured public school teachers' contracts, an issue not directly addressed in either Littrell or Davis. Therefore, the court found that the facts of Bond neither paralleled nor were in conflict with the Littrell or Davis holdings.\textsuperscript{76}

To resolve the main issue presented in Bond, the court reiterated the long-standing Illinois no-strike policy as demonstrating the illegality of public school teachers' strikes. Relying primarily upon the mandate of the Illinois Constitution,\textsuperscript{77} the court emphasized that the no-strike policy was necessary to avoid disruptions in education and to provide an element of stability in school boards' planning and budgetary responsibilities.\textsuperscript{78} The court recognized, however, that the prohibition of strikes by public employees had been largely ignored.\textsuperscript{79} The court also expressed deep concern that school boards would exhaust their budgets and be unable to provide quality education if illegal strikes by teachers continued.\textsuperscript{80} The court held, therefore, that a no-strike clause is valid consideration for paying signing teachers a higher salary than non-signing teachers.\textsuperscript{81}

The holding was based on the notion that the no-strike clause was a "practical benefit to the defendant," and by refusing to sign the contract, the plaintiffs avoided a personal commitment not to strike.\textsuperscript{82} Furthermore, the clause was "the embodiment of public policy—as a reasonable and practical consideration extracted by a board to better enable it to perform its constitutionally mandated duties."\textsuperscript{83} Having concluded that the no-strike clause was valid consideration, the court further reasoned that a reasonable difference existed between signing and non-signing teachers to justify a salary differential.\textsuperscript{84} Therefore, when the plaintiffs declined to provide such additional consideration by refusing to sign the contracts offered to them,\textsuperscript{85} they

\begin{itemize}
  \item informed that if they did not sign the contract, they would have the right to be paid a salary determined under the School Code. Under the School Code, they were entitled to continued employment at a salary and under the terms of the prior year's contract. They did, in fact, continue at that salary. Thus, the court dismissed the argument that the plaintiff's salary had been improperly reduced. \textit{Id.}
  \item 75. \textit{Id.} 2d at 247, 408 N.E.2d at 716.
  \item 76. \textit{Id.} at 246, 408 N.E.2d at 716.
  \item 77. See notes 23-26 and accompanying text \textit{supra}.
  \item 78. \textit{Id.} 2d at 248, 408 N.E.2d at 717.
  \item 79. \textit{Id.} See note 88 \textit{infra}.
  \item 80. \textit{Id.} 2d at 248-49, 408 N.E.2d at 717.
  \item 81. In the court's words, "[because] we have found a no-strike provision to be consideration, it follows that the classification between signers and non-signers is reasonable and justifies the salary differential." \textit{Id.} at 249, 408 N.E.2d at 717.
  \item 82. \textit{Id.}
  \item 83. \textit{Id.}
  \item 84. \textit{Id.}
  \item 85. See notes 32 & 40 and accompanying text \textit{supra}.
\end{itemize}
justifiably received a salary based upon the previous year's salary schedule while retaining employment under the provisions of the School Code.86

CRITICISM AND ANALYSIS

In holding that a no-strike clause can serve as valid consideration in public school teachers' contracts, the Bond court made an indirect attempt to effectuate the Illinois no-strike policy. By the court's own admission, however, this policy has been repeatedly ignored by striking public school teachers.87 Indeed, it is common knowledge that teachers repeatedly break the law by participating in rigorous strike activity, regardless of the clarity or frequency of judicial decisions declaring strikes illegal.88 The Illinois Supreme Court, however, continues to cling to the hope that the no-strike policy can foster stability in the Illinois educational system.89

In its quest to promote this stability, the Bond court ignored a traditional principle of contract law. A promise not to do something that one may not in any case lawfully do cannot form valid consideration because it creates no new obligation on the promisor's part.90 This principle has been recognized in Illinois courts91 as well as in many other state courts.92 In Bond, the only

87. 81 Ill. 2d at 248, 408 N.E.2d at 717.
89. 81 Ill. 2d at 248, 408 N.E.2d at 717.
90. 1 S. Williston, Contracts § 132 (3d ed. 1957). The general rule is that a promise to do what the promisor is already legally bound to do cannot constitute consideration.
91. Moehling v. O'Neil Constr. Co., 20 Ill. 2d 255, 266, 170 N.E.2d 100, 106 (1960) (the law is well settled that a promise to do something one is already obligated to do is no consideration); Trisko v. Vignola Furniture Co., 12 Ill. App. 3d 1030, 1035, 299 N.E.2d 421, 425 (1st Dist. 1973) (defendant's promise to repair unmerchantable goods sold in violation of express warranties no consideration for plaintiff's return promise not to sue because defendant was already under a legal duty to repair the goods); Plain v. Golden, 334 Ill. App. 264, 78 N.E.2d 822 (1st Dist. 1948) (no consideration when tenants promised to pay the landlord one-half the cost of installing fire escapes since fire escapes were required by law); Macks v. Macks, 329 Ill. App. 144, 152, 67 N.E.2d 505, 509 (1st Dist. 1946) (it is firmly established that a promise to do something that one is already obligated to do is no consideration and creates no new obligation).
92. See, e.g., Bowers v. Alexandria Bank, 75 Ind. App. 345, 130 N.E. 808 (1920) (husband's promise to pay his wife to resume her marital duties is no consideration for her return promise not to abandon him); Kovacich v. Metals Bank & Trust Co., 139 Mont. 449, 362 P.2d 639 (1961) (agreement of buyers to pay what they were obligated to pay under a sales contract is no consideration for a return promise by seller not to repossess); Rhoades v. Rhoades, 40 Ohio App. 2d 559, 321 N.E.2d 242 (1974) (defendant's promise to pay a sum less than what he was already obligated to pay was not considered for plaintiff's return promise); McLeod v. Sandy Island Corp., 265 S.C. 1, 216 S.E.2d 746 (1975) (father's promise to fulfill his legal duty to support his minor daughter is no consideration to support a contract); Baggs v. Anderson, 528 P.2d 141 (Utah 1974) (defendant's promise to pay future alimony support was no consideration for plaintiff's return promise since defendant was already obligated to pay $200 per month).
additional promise a signing teacher gave the school board was a promise not to strike. Since public school teachers’ strikes are illegal in Illinois, the teachers were already legally bound not to strike. Therefore, their promise not to strike could not under established contract principles serve as valid consideration for the school board’s return promise to pay a higher salary. Absent valid consideration, the payment of a lower salary to the plaintiffs merely because they refused to sign the new contracts must be considered unreasonable, arbitrary, discriminatory, and consequently unjustified. A no-strike clause is better viewed as a mere formality, inserted into public employment contracts as a reminder that the law prohibits any strike activity by public employees.

In addition, no-strike clauses will not solve the growing problem of disruptive and illegal teachers’ strikes. The prevention of strikes by public school teachers will not be accomplished while the court maintains the pres-

93. The plaintiffs and defendant agreed in their briefs that in order for the salary differential to be based on a reasonable classification, there must be some provision in the contract which gave the board additional consideration to justify paying signers a higher salary than non-signers. The plaintiffs argued that because the only additional obligation imposed was the no-strike clause and because it is illegal for Illinois public employees to strike, the clause could not serve as valid consideration, and paying signing teachers a higher salary was arbitrary, discriminatory, and based upon an unreasonable classification. Brief for Respondent at 9-13, Bond v. Board of Educ., 81 Ill. 2d 242, 408 N.E.2d 714 (1980). The defendant argued that the additional obligation of the no-strike clause was a personal assurance to the board that the individual teacher would be on duty for the entire school year, that this promise gave the board something of value, regardless of the pre-existing policy that public employees strikes were illegal, and that value permitted the board to pay a higher salary to those teachers who agreed not to strike. Brief for Petitioner at 32.

94. Justice Ward so argued in his dissent. He also recognized that the majority breached these simple contract principles to reach a decision comporting with the established no-strike policy. Although Bond may have been a "hard case," the applicable law was clear. "Strikes by public employees violate the express public policy of this state and are unlawful. The promise here was simply to forbear from acting illegally. The promise of a forbearance already imposed by law cannot be a sufficient consideration . . . ." 81 Ill. 2d at 251-52, 408 N.E.2d at 718 (Ward, J., dissenting).

95. While discussing the validity of the no-strike clause in the Davis contract, the Littrell court reasoned that a no-strike clause could not serve as valid consideration. The Court stated:

We note parenthetically that we cannot understand how such a contractual provision [a no-strike clause], by which one of the parties agrees not to do what he is already bound by law not to do, could serve as valid consideration. It is unlawful for public employees to strike in the State of Illinois.

45 Ill. App. 3d at 694 n.2, 360 N.E.2d at 104 n.2.

96. See notes 35-37 supra. In Bond, the board exceeded its discretionary powers and granted a salary increase based upon invalid consideration. Arguably, therefore, there exists an unconstitutional classification between signing and non-signing tenured teachers and the plaintiffs should have been paid the amounts they were entitled to under the 1977-1978 salary schedule.

This absolute prohibition of the right to strike has not only failed to reduce strike activity, but has distorted the give and take bargaining relationship necessary to implement fair contracts between teachers and school boards.

The denial of the right to strike has the effect of weighting the bargaining process heavily in favor of the school board because the board maintains all the bargaining leverage, while teachers are left with none. This imbalance creates an inherent bargaining advantage for school boards which can ignore teachers' demands by using the absolute no-strike policy. In other words, the absolute no-strike policy in Illinois blankets a school board with a fortified bargaining position, a security that enhances the likelihood of ignoring teacher demands, and in turn increasing the urge to strike. Therefore, while effectuating the Illinois no-strike policy and while allowing no-strike clauses to serve as valid consideration in employment contracts, the supreme court has actually widened the negotiating gap between school board and teacher. This judicially imposed alienation cannot create stability in an educational system that depends upon the cooperation of school boards and teachers. Unilateral contracts that do not result from fair negotiations can only create further teacher animosity toward school boards, and may ultimately lead to sustained teachers' strikes.

**Impact of the Bond Decision**

Ironically, although the Bond court recognized public school teachers' blatant defiance of the Illinois no-strike policy, its decision will do nothing to prevent future strikes. Undoubtedly, this decision will encourage school boards to exact a personal commitment from teachers not to strike by inserting no-strike clauses into all tenured teachers' contracts. It is unlikely, however, that public school teachers will obey these no-strike clauses. Recent strike activity demonstrates the willingness of teachers to violate the

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100. See Rosenberg, *Teacher Strikes: A Proposed Solution*, 16 URB. L. ANN. 331, 354 (1979) [hereinafter cited as Rosenberg].


102. 81 Ill. 2d at 248, 408 N.E.2d at 717. *See note 88 and accompanying text supra.*
law and suffer the punishment when their frustration with school boards results in a negotiation impasse.

The broader implications of Bond's reasoning may sanction contracts with tenured teachers that are unreasonably favorable to the school board as long as the provisions are a "practical benefit" to the board in executing its constitutionally mandated function. Consequently, the school board is assured of complete control over contract formation, placing tenured teachers in a situation with limited options. Short of resigning, a tenured teacher can either sign new contracts with unfavorable provisions or receive a lower salary than co-workers who are performing the same job. Yet, the exercise of any of these alternatives may cause increased tension between school boards and teacher unions and continue to weaken the role teachers play in the contract negotiation process.

Ultimately, without the right to strike, teachers may have no power to influence the contract negotiations between themselves and the board. Without such power, tenured public school teachers are left with the mere illusion of choice—accept a board's unfavorable contract terms or participate in an illegal strike. Given the growth of teachers' unions and the regard with which teachers have considered the no-strike policy, public school teachers are likely to choose the latter.

**ALTERNATIVES TO THE ILLINOIS NO-STRIKE POLICY**

Because the absolute prohibition of the right to strike has in the past failed to retard illegal strike activity, public school teachers should be
afforded a limited or qualified right to strike. Such a right would equalize the bargaining positions of both parties and avoid the foreseeable strikes caused by the imposition of unilateral contract terms. The "non-stoppage" and "graduated" strike alternatives seem to offer the most feasible solutions.

Non-stoppage Strike Alternative

During a non-stoppage strike, operations continue as usual while both sides negotiate and attempt to settle contract differences. While the "strike" is in effect, both the teachers and the school board make payments based on a specified percentage of total cash wages into a special penalty fund. Therefore, in addition to paying regular wages, the employer deposits into the fund an extra amount, equal to what the employees have foregone. To be effective, this central fund must be beyond the recapture of either party. The teachers' union has the option of increasing the amount of the contribution, thereby escalating pressure on the board to promote settlement. More importantly, while both parties are under pressure to settle, educational services are not disrupted.

The non-stoppage strike provides public school teachers with the leverage they need to bargain effectively with the various school boards. It not only applies pressure on the public officials who deal directly with the teachers' union, but also attracts the attention of the executive branch and the local legislature. Furthermore, the non-stoppage strike provides incentives for

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110. Bernstein, supra note 109, at 469-75; Rosenberg, supra note 100, at 356-58. It should be noted that the non-stoppage and graduated strike proposals should be a part of a comprehensive public labor relations scheme. This scheme would provide protection of employees against reprisal for collective activity, procedures for ascertaining appropriate bargaining units, elections to determine employee preferences, recognition and mandatory bargaining, mediation procedures for bargaining disputes, and fact-finding with recommendations in the case of bargaining deadlock. Bernstein, supra note 109, at 469 n.34.

111. A suggested starting percentage could be 10% of the employees' total wages. As additional pressure is needed, the union might opt to raise this percentage to gain added bargaining leverage. Bernstein supra note 109, at 470.

112. One problem raised by the use of the non-stoppage strike is the allocation of the penalty fund into which employer and employee will contribute after dispute settlement. To insure that the loss actually disciplines the parties, the fund would have to be beyond recapture. One commentator recommends that a special committee have control over fund allocation and preferably funnel it back into the school system on projects that would not directly benefit either side. Id. at 472-73.

113. The most direct effect of a non-stoppage strike is the lost revenue suffered by the school boards. Because most school boards have limited budgets, every day a non-stoppage strike continues the boards are under increased pressure to settle with teachers so as not to lose further revenue. This pressure would emanate from various governmental officials. In turn, these officials are directly pressured by the public at large because these officials are elected by the public. Id. at 471.
these various bodies of government to seek settlement and to take serious steps in the recognition of teachers' demands.\textsuperscript{114} Finally, because these strikes would not be illegal and would not deprive students of an education, the merits of the dispute would be clearly delineated, rather than clouded by the hysteria and frustration now typical of illegal strikes.\textsuperscript{115}

\textit{Graduated Strike Alternative}

When a non-stoppage strike is insufficient to produce settlement, more direct pressure may be applied by the use of the graduated strike. In a graduated strike, the employees stop working during portions of their usual work week and suffer comparable reductions of wages.\textsuperscript{116} For example, during the first week or two of the strike, the teachers would not report to work for half of a day. The absences would increase in stages as additional pressure is needed.\textsuperscript{117} Thus, the teachers' union could halt educational services for longer periods to secure responsive action from governmental officials.

The graduated strike alternative allows decreases in educational service without the shock and total deprivation that accompanies conventional strikes. Citizens angered by the disruption of their children's education could apply pressure on teachers and the school board to promote settlement. The school boards, however, would not be stripped of options in the negotiation procedure. If they are financially burdened, the boards could limit the teachers' unions to the use of the graduated strike which only results in a loss of services.\textsuperscript{118} If the service is so essential that cessation is not possible,\textsuperscript{119} the boards could limit the unions to the expensive non-stoppage strike.

The Illinois courts and legislature should adopt a new policy to control public school teachers' strikes.\textsuperscript{120} A qualified right to strike, utilizing the

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Bernstein, supra note 109, at 474; Rosenberg, supra note 100, at 357.
  \item \textsuperscript{117} Bernstein, supra note 109, at 475.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id. Other essential services provided by public employees, such as fire and police protection, are two areas where a strike immediately endangers the safety of the public.
  \item \textsuperscript{120} Currently in five states, public employee strikes, especially teachers strikes, are permissible if they do not create a clear or present danger or threat to the health or safety of the public. \textsc{Alaska Stat.} § 23.40.200(c) (1975) ("A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety or welfare of the public . . . ."); \textsc{Hawaii Rev. Stat.} § 89-12(c) (1976) (where the strike occurring . . . endangers the public health or safety . . . [and] [t]he board finds that there is imminent or present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid . . . such imminent or present danger"); \textsc{Or. Rev. Stat.} § 243.726 (1979-80) (with the exception of police, fire fighters, or guards at correctional institutions or mental hospitals, strikes are permissible if they do not create "a clear and present danger or threat to the health, safety or welfare of the public"); \textsc{Pa. Stat. Ann. tit.} 43, § 1101.1003 (Purdon Supp. 1980) ("[a] strike by public employees . . . shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public"); \textsc{Vt. Stat. Ann. tit.} 16, § 2010 (Supp. 1980-81) ("[a]ny restraining order or injunction issued by a court . . . shall prohibit only a specific act or acts
graduated and non-stoppage strike methods, balances the bargaining power of teachers and school board and creates a serious negotiating process that can satisfy the needs and demands of both sides.\textsuperscript{111} This in turn may reduce the strikes and work stoppages that have plagued Illinois throughout the past fifteen years.\textsuperscript{112}

**CONCLUSION**

In implementing its no-strike policy, the court not only rendered an ill-reasoned opinion, but perhaps undermined the very policy it wished to promote. As long as public employee strikes remain illegal in Illinois, a no-strike provision cannot serve as valid consideration in a contract. Alternatives do exist to ensure that both school boards and teachers have equal positions at the bargaining table. Without this equality teachers will refuse to accept one-sided contracts and will continue to disobey the no-strike policy. Therefore, either legislative or judicial action is needed to provide public school teachers with an effective bargaining tool, while at the same time allowing the school boards sufficient power to operate an efficient educational system.

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expressly determined . . . to pose a clear and present danger”). Furthermore, strikes by public employees in these states are only permissible after the processes of mediation or arbitration have failed.

In Minnesota, violations of certain arbitration procedures by public employers can be used by public employees as a defense to an otherwise illegal strike. Minn. Stat. Ann. § 179.64(7) (West Supp. 1980). The Montana Supreme Court has interpreted a Montana statute to give public employees the same right to strike as employees in the private sector. State v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974). Although the statute in question did not apply to teachers when this decision was issued, the statute has since been amended to bring them under its coverage. Mont. Rev. Codes Ann. § 59-1602(2) (Supp. 1977). Finally, Wisconsin allows all public employees, with the exception of police and fire fighters, the right to strike if authorized by specific impasse procedures. Wis. Stat. Ann. § 111.70(4)(1) (West Supp. 1979-80). See Jascourt, *Responses to Union Concerted Activity: An Overview*, 8 J.L. & Educ. 57, 61-70 (1979).

\textsuperscript{121} See notes 98-101 and accompanying text supra.

\textsuperscript{122} See notes 9-12 and accompanying text supra.