

## Early-Voting Locations in Lake County

### *Curley v. Lake County Board of Elections and Registration* (Joseph S. Van Bokkelen, N.D. Ind. 2:08-cv-287)

The central question in this case was whether a majority vote or a unanimous vote by members of an election board was required to open satellite locations for early voting. A state-court judge issued an injunction favoring the unanimity requirement shortly after the case was removed to federal court. After the parties agreed to maintain the status quo until the federal judge could rule, some of their attorneys filed a similar action in another state court and got a conflicting state-court injunction. Employing the All Writs Act, the federal judge vacated the second injunction, but he later determined that his case was not removable.

*Subject:* Absentee and early voting. *Topics:* Early voting; poll locations; matters for state courts; removal; enforcing orders; intervention.

On October 2, 2008, two voters, who held additional positions of authority, filed a civil action in Indiana’s superior court for Lake County to enjoin the county’s board of elections and registration from establishing, on October 6, additional locations for absentee voting in East Chicago, Gary, and Hammond.<sup>1</sup> The plaintiffs were a member of the board who opposed the additional locations and the chair of the county’s Republican Central Committee.<sup>2</sup> According to the complaint, the board had unanimously approved electronic voting by absentee ballot at its office in Crown Point, but the vote for the three additional locations was three in favor and two opposed, and a unanimous vote was required.<sup>3</sup>

After an evidentiary hearing,<sup>4</sup> the state judge issued a temporary restraining order on October 3.<sup>5</sup> Earlier on October 3, the board removed the action to the federal court’s Hammond courthouse in the Northern District of Indi-

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1. Complaint, *Curley v. Lake Cty. Bd. of Elections & Registration*, No. 45D02-0810-PL-00190 (Ind. Sup. Ct. Lake Cty. Oct. 2, 2008) [hereinafter *Sup. Ct. Complaint*], *filed as* Complaint, *Curley v. Lake Cty. Bd. of Elections & Registration*, No. 2:08-cv-287 (N.D. Ind. Oct. 2, 2008), D.E. 1; State *ex rel.* *Curley v. Lake Cir. Ct.*, 899 N.E. 2d 1271, 1271 (Ind. 2008).

2. *Sup. Ct. Complaint*, *supra* note 1; *Curley*, 899 N.E.2d at 1271.

3. *Sup. Ct. Complaint*, *supra* note 1; see John Byrne, *Early Vote Sites Await Court OK*, *Merrillville Post-Trib.*, Oct. 4, 2008, at A4 [hereinafter *Early Vote Sites*]; John Byrne, *Satellite Voting Fight Now in Lake County Courtroom*, *Merrillville Post-Trib.*, Oct. 3, 2008, at A5 (“The three Democratic members of the county Election Board voted last week to institute the in-person absentee voting at the Clerk’s Offices in the three cities—over the objections of two GOP board members.”).

4. Transcript, *Curley*, No. 45D02-0810-PL-00190 (Ind. Sup. Ct. Lake Cty. Oct. 3, 2008), *filed as* Transcript, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008, filed Oct. 7, 2008), D.E. 21.

5. Temporary Restraining Order, *Curley*, No. 45D02-0810-PL-00190 (Ind. Sup. Ct. Lake Cty. Oct. 3, 2008), *filed as* Vacated Temporary Restraining Order, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 13; *Curley*, 899 N.E.2d at 1272.

ana, stating that the board's actions in dispute were motivated by compliance with section 2 of the Voting Rights Act.<sup>6</sup> The superior court's order was regarded as void because of the earlier removal.<sup>7</sup>

Three voters and two organizations moved to intervene in the federal action to support the board's allowances for early voting.<sup>8</sup>

Judge Joseph S. Van Bokkelen held a hearing at 2:00 p.m. on the day the case was removed.<sup>9</sup> He granted the intervention motion.<sup>10</sup> He and the parties agreed that additional voting locations would not be established before October 10 and that briefing on the court's jurisdiction and other matters would be due on October 8.<sup>11</sup>

On October 6, two voters and two unions filed a civil action in Indiana's circuit court for Lake County<sup>12</sup> and obtained that day from the circuit judge a temporary restraining order requiring establishment of the additional absentee-voting locations,<sup>13</sup> an order in conflict with the superior-court order. The filing of this action was in conflict with agreements among the judge and attorneys in Judge Van Bokkelen's case to maintain the status quo until October 10; there was an overlap of lawyers in the two cases.<sup>14</sup>

Judge Van Bokkelen held a telephone conference at noon on the following day,<sup>15</sup> at which he granted the motion to remand the case.<sup>16</sup> Employing the All Writs Act,<sup>17</sup> Judge Van Bokkelen vacated the circuit court's order, be-

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6. Notice of Removal at 2, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 2; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10301; *Curley*, 899 N.E.2d at 1272.

7. See *Curley*, 899 N.E.2d at 1272; Motion to Vacate at 2 n.1, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 32; see also Byrne, *Early Vote Sites*, *supra* note 3 (“‘There is no state temporary restraining order,’ Van Bokkelen declared as the federal proceedings got under way.”).

8. Intervention Motion, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 3, 2008), D.E. 5.

9. Docket Sheet, *id.* (N.D. Ind. Oct. 3, 2008) [hereinafter N.D. Ind. Docket Sheet] (D.E. 3, 14); see Byrne, *Early Vote Sites*, *supra* note 3.

Tim Reagan interviewed Judge Van Bokkelen for this report by telephone on August 2, 2012.

10. Interview with Hon. Joseph S. Van Bokkelen, Aug. 2, 2012.

11. N.D. Ind. Docket Sheet, *supra* note 9 (D.E. 14); see Byrne, *Early Vote Sites*, *supra* note 3.

12. Complaint, *United Steelworkers Dist. 7 v. Lake Cty. Bd. of Elections & Registration*, No. 45C01-0810-PL-00256 (Ind. Cir. Ct. Lake Cty. Oct. 6, 2008), *attached to* Emergency Motion, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 7, 2008), D.E. 18 [hereinafter N.D. Ind. Emergency Motion]; *Curley*, 899 N.E.2d at 1271-72.

13. Temporary Restraining Order, *United Steelworkers Dist. 7*, No. 45C01-0810-PL-00256 (Ind. Cir. Ct. Lake Cty. Oct. 6, 2008), *attached to* N.D. Ind. Emergency Motion, *supra* note 12; *Curley*, 899 N.E.2d at 1272; see Piet Levy, *Judge Orders Opening of Early Voting Sites Despite Hearing*, *Merrillville Post-Trib.*, Oct. 7, 2008, at A7.

14. Interview with Hon. Joseph S. Van Bokkelen, Aug. 2, 2012.

15. N.D. Ind. Docket Sheet, *supra* note 9 (D.E. 17, 19).

16. *Id.* (D.E. 19).

17. 28 U.S.C. § 1651.

cause it contradicted agreement of the parties and interfered with Judge Van Bokkelen's jurisdiction over the matter.<sup>18</sup>

On October 13, Judge Van Bokkelen remanded the case back to state court.<sup>19</sup> The case turned on the number of votes required to open satellite early-voting sites under Indiana law; it did not really include a federal question.<sup>20</sup> Judge Van Bokkelen determined that the case was not removable under the refusal clause for civil-rights cases,<sup>21</sup> "for refusing to do any act on the ground that it would be inconsistent with [any law providing for equal rights]."<sup>22</sup>

The Defendants' claim that they are being brought to court for refusing to abide by Indiana law requiring a unanimous board vote before opening satellite offices is a stretch, for the alleged wrong here is ultimately in their action (trying to open the satellite offices), not refusal to act in accordance with state law (ignoring voting requirements).<sup>23</sup>

While the case was on its way back to the superior court, the additional voting locations opened on October 14 in compliance with the circuit-court judge's renewed order.<sup>24</sup>

The dissenter from additional early-voting locations filed an original action in Indiana's supreme court to resolve the conflicting state cases, and the supreme court ordered that same day that they be consolidated in the superior court.<sup>25</sup> Because the parties could not agree on a superior-court judge to hear the case, the supreme court appointed one.<sup>26</sup> On October 22, the new superior-court judge enjoined the board from terminating the early voting that had begun in East Chicago, Gary, and Hammond.<sup>27</sup> Indiana's court of appeals affirmed the injunction on October 31.<sup>28</sup>

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18. Order, *Curley v. Lake Cty. Bd. of Elections & Registration*, No. 2:08-cv-287 (N.D. Ind. Oct. 7, 2008), D.E. 20; see *Curley*, 899 N.E.2d at 1272; see also John Byrne, *Unions Join Early-Voting Battle*, Merrillville Post-Trib., Oct. 8, 2008, at A3.

19. Opinion, *Curley*, No. 2:08-cv-287 (N.D. Ind. Oct. 13, 2008), D.E. 47 [hereinafter N.D. Ind. Opinion]; *Curley*, 899 N.E.2d at 1272; see John Byrne, *Satellite Voting Fight Not a Federal Case Bokkelen Says*, Merrillville Post-Trib., Oct. 14, 2008, at A3.

20. Interview with Hon. Joseph S. Van Bokkelen, Aug. 2, 2012.

21. N.D. Ind. Opinion, *supra* note 19, at 3–5.

22. 28 U.S.C. § 1443(2).

23. N.D. Ind. Opinion, *supra* note 19, at 4.

24. *Curley*, 899 N.E.2d at 1272; see John Byrne, *Judge Opens Voting Sites*, Merrillville Post-Trib., Oct. 15, 2008, at A3.

25. *Curley*, 899 N.E.2d 1271; *Curley v. Lake Cty. Bd. of Elections & Registration*, 896 N.E.2d 24, 27 (Ind. Ct. App. 2008).

26. *Curley*, 896 N.E.2d at 28; see John Byrne, *Vote Fight Takes New Turn*, Merrillville Post-Trib., Oct. 16, 2008, at A5.

27. *Curley*, 896 N.E.2d at 32; see John Byrne, *Remote Voting Fight Off to Indianapolis*, Merrillville Post-Trib., Oct. 23, 2008, at A3.

28. *Curley*, 896 N.E.2d at 40–41; see John Byrne, *Early NWI Vote Program Gets Court's Support*, Merrillville Post-Trib., Nov. 1, 2008, at A3.