UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

International Union of Operating Engineers, Local 399, AFL-CIO, *et al.*,	)	
Plaintiffs,	)	Case No. 16-cv-2395
v.	)	Judge Matthew F. Kennelly
	)	Magistrate Judge Susan E. Cox
Village of Lincolnshire, Illinois, *et al.*,	)	
Defendants.	)	

PLAINTIFF UNIONS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

This is a facial challenge to Sections 4 and 5 of Ordinance No. 15-3389-116 of the Village of Lincolnshire, Illinois, on the grounds that these provisions are preempted by the National Labor Relations Act, as amended. Identical provisions in an ordinance adopted by Hardin County, Kentucky, were declared invalid on NLRA preemption grounds in *United Automobile Workers v. Hardin County*, 2016 WL 427920 (W.D. Ky., Feb. 3, 2016), *appeal pending* Sixth Circuit No. 16-5246.[1] There is no factual dispute concerning the terms of the Ordinance. And, Plaintiffs are entitled to judgment as a matter of law, since the challenged provisions are clearly preempted by the NLRA. Accordingly, the Court should enter summary judgment in favor of Plaintiffs. Rule 56(a), Fed. R. Civ. P.

STATEMENT OF FACTS

Ordinance No. 15-3389-116 ("the Ordinance") was enacted by the Village of Lincolnshire, Illinois ("Village"), on December 14, 2015 (Plaintiff Unions' Rule 56.1 Statement of Uncontested Facts (hereinafter "Facts") ¶ 6). The Village is a unit of local government and a political subdivision of the State of Illinois (Facts ¶ 1). *See* Ill. Const. Art. VII, Sec. 1. The Village has elected to become a Home Rule unit and, as such, is authorized to enact certain ordinances that apply within the Village's geographical limits (Facts ¶ 1). *See* Ill. Const. Art. VII, Sec. 6. The Ordinance applies only to "'employee[s],' 'employer[s],' 'labor organization[s],' and 'person[s]' . . . as defined by the National Labor Relations Act." (Facts ¶ 7). *See* 29 U.S.C. §§ 152(1), (2), (3) & (5). The Ordinance applies to all contracts between employers and labor organizations covering employees within the Village entered into after December 14, 2015 (Facts ¶ 7).

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[1] On the rare prior occasions when other local governments attempted to enact local Right-to-Work laws, those enactments also were held to be preempted by the NLRA. *New Mexico Federation of Labor v. City of Clovis*, 735 F.Supp. 999, 1004 (D.N.M. 1990); *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360, 362 (1965).

Section 4 of the Ordinance makes it unlawful for any "person covered by the NLRA [to] be required as a condition of employment or continuation of employment . . . to become or remain a member of a labor organization[,] to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization[, or] to pay to any charity or other third party, in lieu of such payments, any amount equivalent to or a pro-rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization." (Facts ¶ 8). This provision of the Ordinance makes it unlawful for employers and labor organizations to apply to employees within the Village the sort of "union security" agreements requiring either union membership or the payment of union fees that are authorized and regulated by the NLRA.[2] Section 6 of the Ordinance declares all such union security agreements to be unlawful, null, and void, even where the agreements meet the requirements of the NLRA (Facts ¶ 10).

Each Plaintiff labor organization is party to one or more separate collective bargaining agreements that apply to one or more workplaces located within the Village (Facts ¶¶ 12-15, 17-20, 24-37, 43-47, 52-57, 61-63, 73-78). Each agreement contains a union security clause that is lawful under the NLRA (*id.*). Plaintiffs expect to include an identical union security clause in future agreements, but the ordinance would make it unlawful to agree to or apply such a union security clause within Lincolnshire (Facts ¶¶ 51, 71-72, 79).[3]

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[2] Agreements that make union membership or the payment of union fees a condition of employment generally are referred to as "union security" agreements. *NLRB v. General Motors Corp.*, 373 U.S. 734, 740 (1963). Union security agreements that speak in terms of requiring union membership are referred to as "union shop agreements," and those that speak in terms of paying union fees are referred to as "agency shop agreements." *Id.* at 743-44. Regardless of their different wording, union shop and agency shop agreements both require nothing more of covered employees than the payment of a fee to their union representative. *Id*. at 743.

[3] For example, Operating Engineers Local 399 has a collective bargaining agreement containing a union security clause with Colliers International Asset and Property Management covering employees who work full time at Colliers' facility in Lincolnshire (Facts ¶¶ 12-15). Operating Engineers Local 150 has collective bargaining agreements containing union security agreements with construction companies that are both located in Lincolnshire and frequently perform work within Lincolnshire (Facts ¶¶ 17-20, 24-37, 43-46). The Construction and General Laborers District Council of Chicago and Vicinity has a collective bargaining

Section 5 of the Ordinance requires written authorization for an employer located within the Village to deduct union dues or fees from an employee's wages and requires that such authorization be revocable at any time (Facts ¶ 9). Payroll deduction of union dues or fees ("check-off") is authorized and regulated by both the NLRA and § 302(c)(4) of the Labor Management Relations Act. LMRA § 302(c)(4) specifically authorizes check-off authorizations that are "irrevocable for a period of [no] more than one year." 29 U.S.C. § 186(c)(4). Section 5 of the Ordinance thus would make unlawful payroll deductions of union dues or fees that are lawful under the NLRA and the LMRA. Further, Section 6 of the ordinance provides that "[a]ny agreement, understanding, or practice . . . that violates the rights of employees as guaranteed by provisions of this Ordinance is hereby declared to be unlawful, null, and void, and of no legal effect." (Facts ¶ 10). Section 6 could be read to invalidate check-off authorizations that are lawful under federal law, even where the employee intends for the authorization to continue in effect.

Plaintiff Unions receive dues and fees that have been deducted from the wages of employees working in the Village of Lincolnshire pursuant to written authorizations that are irrevocable for one year (Facts ¶¶ 16, 49, 70, 76). Section 5 of the Ordinance would make it unlawful to treat these written authorizations as irrevocable for one year. And, for that reason, Section 6 would seem to invalidate these authorizations even if no employee attempted to revoke the authorization.[4]

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agreement with a construction company that regularly performs work within Lincolnshire and with another construction company is located in Lincolnshire (Facts ¶¶ 24, 43, 52-57, 61-63, 64-68).

[4] For example, Operating Engineers Local 399 has a collective bargaining agreement containing a dues check-off clause with Colliers International Asset and Property Management covering employees who work full time at Colliers' facility in Lincolnshire (Facts ¶¶ 14-15). A number of these employees have signed dues deduction authorizations that are irrevocable for a period of one year (Facts ¶¶ 16). Other Plaintiffs, including Operating Engineers Local 150, the Construction and General Laborers District Council of Chicago and Vicinity, and Chicago Regional Council of Carpenters have collective bargaining agreements containing dues check-off clauses with construction companies that are both located in Lincolnshire and frequently perform work within Lincolnshire (Facts ¶¶ 24-27, 30-37, 43-47, 52-57, 61-63, 64, 68, 73-78).

Section 4 of the Ordinance makes it unlawful for any "person covered by the National Labor Relations Act [to] be required as a condition of employment or continuation of employment . . . to be recommended, approved, referred, or cleared by or through a labor organization." (Facts ¶ 8). This provision of the Ordinance makes it unlawful for employers and labor organizations to apply exclusive union hiring hall agreements that are authorized and regulated by the NLRA to employees within the Village of Lincolnshire. Section 6 of the Ordinance declares all such agreements to be unlawful, null, and void, even where the agreements meet the requirements of the NLRA (Facts ¶ 10).

Plaintiff Local 150 of the International Union of Operating Engineers is a party to separate collective bargaining agreements with construction employers located within Lincolnshire that routinely apply to construction projects located within Lincolnshire (Facts ¶¶ 24-27, 33-35, 37, 43-47, 50). The agreements contain an exclusive union hiring hall clause that gives Local 150 the right to refer job applicants, without regard to their union membership status, to work on jobsites within Lincolnshire (*id.*). Local 150's hiring hall agreements are lawful under the NLRA. Local 150 expects to include identical hiring hall clauses in future agreements, but the Ordinance would make it unlawful to agree to or apply such a union hiring hall clause within Lincolnshire (Facts ¶ 51).

ARGUMENT

The Lincolnshire Ordinance seeks to regulate several aspects of the relationships among "employee[s]," "employer[s]" and "labor organization[s]" that "are covered by the National Labor Relations Act." (Facts ¶ 7). In particular, the Ordinance seeks to regulate the negotiation and application of collectively bargained contract clauses that: make union membership or the payment

Employees of these employers have signed dues deductions authorizations that are irrevocable for one year (Facts ¶¶ 16, 49, 70, 76).

of union fees a condition of employment ("union security agreements"); provide for authorized payroll deduction of an employee's union dues or fees ("check-off agreements"); and, provide that a union shall refer job applicants for employment on a nondiscriminatory basis ("hiring hall agreements") (Facts ¶¶ 8, 9). These are all matters regulated by the NLRA.

"It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Labor & Human Relations v. Gould*, 475 U.S. 282, 286 (1986). "[T]he NLRA . . . comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement" because of "Congress' perception that . . . state legislatures and courts were unable to provide an informed and coherent labor policy." *English v. General Electric Co.*, 496 U.S. 72, 86 n.8 (1990). "[T]he comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the NLRA," *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 675-76 (1983), has "occupied the field" of labor relations "creat[ing] rights in labor and management both against one another and against the State," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989). *See Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008).

Section 14(b) of the NLRA creates "an exception to the general rule that the federal government has preempted the field of labor relations regulation," *Laborers Local 107 v. Kunco, Inc.*, 472 F.2d 456, 458 (8th Cir. 1973), that "gives the States power to outlaw even a union-security agreement that passes muster by federal standards," *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 757 (1963) ("§ 14(b) of the Act subjects [union security agreements] to state substantive law"). Precisely because it is § 14(b) that "allows individual States . . . to enact so-called 'Right-to-Work' laws," the Supreme

Court has held that those "Right-to-Work laws which are not encompassed by § 14(b) . . . are no[t] permissible" because such laws are preempted by the NLRA. *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 409, 413 n.7 (1976).[5]

The Ordinance does not come within "the limited shelter from preemption afforded state Right-to-Work laws by § 14(b)." *Trowel Trades Employee Health and Welfare Fund v. Edward L. Nezelek, Inc.*, 645 F.2d 322, 326 n.6 (5th Cir. 1981). There are two distinct reasons that Lincolnshire Ordinance is "not encompassed by § 14(b)." *Mobil Oil*, 426 U.S. at 413 n.7. First and most fundamentally, the Ordinance is not a "State . . . law" within the meaning of § 14(b) and thus is not encompassed by the exception at all. Second, the particular provisions in the Ordinance regulating dues check-off and union hiring halls would not come within § 14(b), even if they had been included in a state law, because check-off and hiring hall agreements are not "agreements requiring membership in a labor organization as a condition of employment" within the meaning of § 14(b). We take up each of these points in turn.

[5] The issue addressed in *Mobil Oil* was "whether, under § 14(b), Texas' right-to-work laws can void an agency shop agreement covering unlicensed seamen who, while hired in Texas and having a number of other contacts with the State, spend the vast majority of their working hours on the high seas." 426 U.S. at 410. The Court began its analysis by noting that "it is § 14(b) [which] gives the States power to outlaw even a union security agreement that passes muster by federal standards," and "that there [are no] applications of right-to-work laws which are not encompassed under § 14(b) but which are nonetheless permissible." *Id*. at 413 n.7 (quotation marks and citation omitted). Thus, "the central inquiry in th[e] case [wa]s whether § 14(b) permits the application of Texas' right-to-work laws to the agency-shop provision," because "[o]nly if [§14(b)] is to be so read is the agency-shop provision unenforceable." *Id*. at 412-13. The Court "h[e]ld that under § 14(b), right-to-work laws cannot void agreements permitted by § 8(a)(3) when the situs at which all the employees covered by the agreement perform most of their work is located outside of a State having such laws." *Id*. at 414. Thus, the Court concluded "that § 14(b) *does not allow enforcement* of right-to-work laws with regard to an employment relationship whose principal job situs is outside of a State having such laws." *Id*. at 418 (emphasis added).

I. The Lincolnshire Ordinance Is Not a "State Law" within the Meaning of NLRA § 14(B).

A. The Terms of NLRA § 14(b)

Section 14(b) of the National Labor Relations Act, as amended in 1947, provides (29 U.S.C. § 164(b)):

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

The terms of NLRA § 14(b) describe a carefully delimited exception to the federal policy of authorizing union security agreements. By providing that the exception applies "in any State or Territory" where "State or Territorial law" prohibits union security agreements, the terms of § 14(b) make clear that the only laws that come within the exception are those reflecting the policy of the State or Territory. If the Taft-Hartley Congress had intended § 14(b) to authorize local Right-to-Work laws, it would have used the term "local" law as it did in § 14(a). *See* 29 U.S.C. § 164(a) ("any law, national or local"). And, if it contemplated Right-to-Work laws having only a local reach, it would have used the phrase "any State or political subdivision thereof," 29 U.S.C. § 152(2), to describe the area in which the permitted laws could supplant federal policy rather than the phrase "any State."

Given the statutory language, only a handful of local governments have attempted to enact local Right-to-Work laws in the seventy years that § 14(b) has been part of the NLRA. The few local Right-to-Work laws that were enacted have been struck down on the grounds that they do not constitute "State or Territorial law" within the meaning of § 14(b). *United Automobile Workers v. Hardin County,* 2016 WL 427920, pp. *2-*4; *New Mexico Federation of Labor v. City of Clovis*, 735 F.Supp. at 1004; *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d at 362. These precedents

have been cited in other contexts as reflecting a sound interpretation of § 14(b). *See Mobil Oil Corp.*, 426 U.S. at 413 n.7 (*citing Puckett* with approval); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1197 (10th Cir. 2002) (*relying on City of Clovis* for the proposition that NLRA § 14(b) "embraces diversity of legal regimes respecting union security agreements" only "at the level of 'major policy-making units'").

The Village of Lincolnshire is a unit of local government under the Illinois Constitution (Facts ¶ 1). Ill. Const. Art. VII, Sec. 1. As a municipality with a population of 7,000, Lincolnshire was not directly granted home rule authority by the Illinois Constitution but rather voted to assume that authority by referendum (Facts ¶¶ 1, 2). Ill. Const. Art. VII, Sec. 6. The Illinois Constitution does "not . . . confer extraterritorial sovereign or governmental powers directly on home-rule units." *Carbondale v. Van Natta*, 61 Ill. 2d 483, 485, 338 N.E.2d 19 (1975). Thus, Lincolnshire has authority to adopt legislation that applies only within the five square miles that comprise its territory (Facts ¶ 2).

The long and the short of the matter is that "'State' law does not include county or municipal law for purposes of § 14(b), and [such a local] Ordinance [thus] is not protected by §14(b)." *United Automobile Workers v. Hardin County*, 2016 WL 427920, pp. *4. The Lincolnshire Ordinance is, thus, not a "State law" within the meaning of § 14(b) and is, therefore, preempted by the NLRA.

B. The Legislative Context of NLRA § 14(b)

The legislative context of § 14(b) reinforces the plain meaning of the statutory terms. Congress added § 14(b) to the NLRA in 1947 in order to counteract, in a carefully limited way, the preemptive effect of the 1947 amendments to § 8(a)(3). "Section 14(b) simply mirrors . . . § 8(a)(3)" and, "[a]s its language reflects, § 14(b) was designed to make clear that § 8(a)(3) left

the States free to pursue their own more restrictive policies in the matter of union-security agreements." *Mobil Oil*, 426 U.S. at 417 (quotation marks and citation omitted). Since "[t]he connection between the § 8(a)(3) proviso and § 14(b) is clear," any effort to determine "the scope and effect of § 14(b)" must begin with the 1947 amendments to § 8(a)(3). *Retail Clerks v. Schermerhorn*, 373 U.S. at 750-51.

As a result of the 1947 amendments, "agreement[s] requiring membership in a labor organization as a condition of employment [are] authorized in section 8(a)(3)." 29 U.S.C. § 157; *see also* 29 U.S.C. § 159(e)(1) (providing that "such authorization [may] be rescinded" by a majority vote of covered employees). At the same time, the federal law began to regulate closely the wording and the application of the authorized union security agreements. The 1947 amendments to § 8(a)(3)'s first proviso require that union security agreements specify that membership is not required until "the thirtieth day following the beginning of . . . employment." 29 U.S.C. § 158(a)(3). And, the new second proviso added in 1947 regulates how such agreements may be applied.[6]

The Supreme Court has explained that "[b]oth the structure and purpose of § 8(a)(3) are best understood in light of the statute's historical origins." *Communications Workers v. Beck*, 487 U.S. 735, 747 (1988). The Court outlined the pertinent history as follows (*id*. at 747-48 (emphasis added; quotation marks, brackets and citations omitted)):

> Prior to the enactment of the Taft-Hartley Act of 1947, § 8(3) of the Wagner Act of 1935 (NLRA) permitted majority unions to negotiate 'closed shop' agreements requiring employers to hire only persons who were already union members. By 1947, such agreements had come under increasing attack, and after extensive

[6] "Provided further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3).

> hearings Congress determined that the closed shop and the abuses associated with it created too great a barrier to free employment to be longer tolerated. The 1947 Congress was *equally concerned*, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts.

"The legislative solution embodied in § 8(a)(3) allows employers to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired as long as such membership is available to all workers on a nondiscriminatory basis, but it prohibits the mandatory discharge of an employee who is expelled from the union for any reason other than his or her failure to pay initiation fees or dues." *Beck*, 487 U.S. at 749. By expressly authorizing union security agreements, while at the same time regulating the terms and applications of such agreements, "the Taft-Hartley Act was intended to accomplish twin purposes" (*id*. at 748-49 (quotation marks and citation omitted)):

> On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

"Thus, Congress recognized the validity of unions' concerns about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason." *Id*. at 749 (emphasis, quotation marks, and citation omitted).

"Congress' decision to allow union-security agreements at all reflects its concern that the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." *Beck*, 487 U.S. at 750 (ellipses, quotation marks and citation omitted). "While § 8(a)(3) articulates a national policy that

certain union-security agreements are valid as a matter of federal law, § 14(b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from that policy." *Mobil Oil*, 426 U.S. at 416-17. In other words, "[f]ederal policy favors permitting such agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via Right-to-Work laws." *Id*. at 420. Thus, "with respect to those state laws which § 14(b) permits to be exempted from § 8(a)(3)'s national policy '[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws.'" *Id*. at 417, *quoting Schermerhorn*, 375 U.S. at 103.

"By the time § 14(b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices . . . ." *Retail Clerks v. Schermerhorn*, 375 U.S. at 100. The 1947 Congress was aware of the existence of such statewide laws, and resolved the "conflict between state and federal law" by enacting § 14(b). *Id*. at 103. The wording of § 14(b) reflects Congress's intent to allow states to adopt and apply certain statewide "statutes or constitutional provisions," *Schermerhorn*, 375 U.S. at 100, that prohibit "the execution or application of agreements requiring membership in a labor organization as a condition of employment," 29 U.S.C. § 164(b). But the fact that "§ 14(b) gives *the States* th[is] power," *Schermerhorn*, 375 U.S. at 103 (emphasis added), means that only a policy "that is the State's own," *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. ___, 133 S.Ct. 1003, 1010 (2013) (quotation marks and citation omitted), may override the federal policy favoring the negotiation of union security agreements. In other words, NLRA § 14(b) "embraces diversity of legal regimes respecting union security agreements" only "at the level of 'major policy-making units.'" *Pueblo of San Juan*, 276 F.3d at 1197.

"Congress was willing to permit varying polices at the state level," but it clearly did "not .

. . intend[] to allow as many local policies as there are local political subdivisions in the nation." *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d at 362. And, "a municipality's action undertaken pursuant to its 'Home Rule' authority is not action contemplated by the state and not an affirmative expression of state policy." *Perry v. City of Fort Wayne*, 542 F.Supp. 268, 273 (N.D. Ind. 1982), *citing Community Communications Co. v. Boulder*, 455 U.S. 40, 55-56 (1982). That being so, local Right-to-Work ordinances of the type adopted by the Village of Lincolnshire and Hardin County pursuant to general grants of home rule authority are not "State laws" within the meaning of § 14(b) and are, therefore, preempted by the NLRA.

C. Applying the § 14(b) Exception to Allow Local Right-to-Work Laws Would Impede Federal Labor Policy.

The Supreme Court has held NLRA § 14(b) should be interpreted so that "parties entering a collective bargaining agreement will easily be able to determine in virtually all situations whether a union- or agency-shop provision is valid." *Mobil Oil*, 426 U.S. at 419. "[T]he diversity that would arise if cities, counties, and other local governmental entities were free to enact their own regulations" is "qualitatively different" from "the diversity that arises from different regulations among various of the 50 states." *New Mexico Federation of Labor v. City of Clovis*, 735 F.Supp. at 1002-03. Not only would local regulation vastly increase the number of possibly applicable right to work laws, but "[t]he result would be a crazy quilt of [overlapping and possibly inconsistent] regulations" by the various levels of state, county and municipal government. *Id*. at 1002. Those problems are immensely amplified by the difficult issues that arise in determining whether any given piece of local legislation is within a local jurisdiction's home rule authority. "The unpredictability that such a [state of affairs] would inject into the bargaining relationship, as well as the burdens of litigation that would result from it, [should] make [one] unwilling to impute to Congress any intent to adopt such a [system]." *Mobil Oil*, 426 U.S. at 419.

1. Reading NLRA § 14(b) to authorize local Right-to-Work laws enacted pursuant to general grants of home rule authority would introduce difficult and important questions of state law into any case involving the negotiation or enforcement of a union security agreement that was arguably covered by such a local law. This is so, because the legal meaning of "the home rule concept" is "controversial, uncertain, and highly variable." Briffault, *Home Rule for the Twenty-first Century*, 36 The Urban Lawyer 253, 256 (2004). As a leading expert has explained (*id*. at 253 & 255-56 (citations omitted)):

> Even within a state, the source and the scope of home rule may vary between cities and counties, or even among cities. In many states, the home rule grant is relatively brief. In others, there is a detailed constitutional and statutory treatment of a broad range of powers and limitations. Moreover, in every state, home rule is shaped by court decisions, with the judicial approach to similar home rule language varying from state to state, and even within a state, depending on the issue presented.
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> These cases have forced courts to address anew such questions as the scope of local authority to initiate new laws, the meaning of such open-ended phrases as 'municipal affairs,' [and] 'local affair,' . . .; the power of local governments to make new law in areas subject to state regulation; and the relative roles of states and localities in areas that raise both state and local concerns. These cases and others like them often divide the courts that hear them and lead to different outcomes in different states.

The problems that can arise in determining the scope of a municipality's Home Rule authority are well-illustrated by *Bernardi v. City of Highland Park*, 121 Ill.2d 1, 520 N.E.2d 316, 317 (1988), in which the Illinois Supreme Court considered whether "a home rule municipality must conform to the requirements of [the State Prevailing Wage Act] in seeking bids and awarding contracts for public works projects." The Illinois Constitution is unusual in expressly providing that State law does not generally preempt the home rule authority of a municipality. *See Id*. at 323-25 (Miller, J., dissenting). Nevertheless, the Court concluded that "[d]eparture from the prevailing wage in this case is beyond the authority accorded home rule units because it directly

affects matters and individuals outside the territorial boundaries of Highland Park." *Id*. at 321. The Court explained this conclusion in terms that are directly applicable to the Lincolnshire ordinance (*id*. at 323):

> Were home rule authorities allowed to govern their local labor conditions, the Illinois Constitution's vision of home rule units exercising their powers to solve local problems would be corrupted and that power used to create a confederation of modern feudal estates which, to placate local economic and political expediencies, would in time destroy the General Assembly's carefully crafted and balanced economic policies. It is precisely for this reason, to avoid a chaotic and ultimately ineffective labor policy, that the State has a far more vital interest in regulating labor conditions than do local communities. The disintegration of uniform labor rights and standards under State law would certainly follow the breakup of State monopoly in this field, and it is doubtful whether local units of government could agree upon statewide labor policies that would bring to Illinois the benefits of a well-compensated and skilled labor force.

The Ordinance is justified in large part as fostering "the promotion of job growth for the Village's residence" by "compet[ing] for employment opportunities and business development with other municipalities." (Facts ¶ 11). In other words, the Ordinance is designed "to placate local economic and political expediencies" and to undermine "statewide labor policies" allowing the negotiation of union security agreements. *Bernardi*, 520 N.E.2d at 323. There is thus a serious question whether, notwithstanding NLRA preemption, the Village of Lincolnshire had Home Rule authority to forge its own labor policy regarding union security agreements.

The salient point for present purposes is not whether the Village of Lincolnshire had Home Rule authority to adopt its own local labor policy. Rather, the point is that Congress could not possibly have intended the legality of union security agreements under the NLRA to turn on resolving such difficult questions of state law.

2. Even once the difficult questions of local legislative authority are resolved, allowing a "multiplicity of varying local rules on similar behavior can have a burdensome effect on individuals, businesses, and activities operating in many localities at once," because "[i]t may be

difficult to find out about the many local rules and even more costly to comply with multiple different local rules." Briffault, *Home Rule for the Twenty-first Century*, 36 The Urban Lawyer at 261. This problem is well illustrated by the situation of Operating Engineers Local 150.

Local 150 has several multi-employer collective bargaining agreements covering construction work performed in a nine-county area in northern Illinois (Facts ¶¶ 21-23). There are 315 towns, villages, and cities located within this area, several of which have Home Rule authority (Facts ¶ 22). Each time one of the covered employers undertook a job within this area, it and the union would have to determine whether there was a valid local Right-to-Work law covering the work in question and, if there were, what precisely the law required (*see* Facts ¶ 23).

Congress was well aware of the potentially disruptive effect of applying inconsistent Right-to-Work laws to a single collective bargaining agreement and expressly addressed that problem in the 1950 amendments to the Railway Labor Act authorizing union security agreements under that statute. The Supreme Court has treated the 1950 RLA union security amendments as highly informative with regard to the intent of the 1947 NLRA union security amendments. *Beck*, 487 U.S. at 750-52.

RLA bargaining units are nationwide in scope and typically cover workplaces in a number of states. The 1950 RLA amendments authorizing union security agreements in railroad and airline industries did *not* create an exception allowing state Right-to-Work laws, because Congress determined that application of inconsistent state laws to a single bargaining unit would be unduly disruptive. In this regard, the House Report on the 1950 RLA amendments explained that "it would be wholly impracticable and unworkable for the various States to regulate such [union security] agreements," because the "agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay, rules of working conditions of employees in many States."

H.Rep. No. 2811, 81st Cong., 2d Sess., p. 5 (1950).

Multi-location and multi-facility bargaining units were not uncommon under the NLRA by 1947. *See, e.g., Sixth Annual Report of the NLRB* 65-66 (1941) ("Multiple-Plant and System Units") *Fifth Annual Report of the NLRB* 66-67 (1940) (same); *Fourth Annual Report of the NLRB* 89-91 (1939) (same). It is inconceivable that Congress would have refused to allow the application of *existing* state Right-to-Work laws to RLA union security agreements on the grounds that applying multiple laws to a single collective bargaining agreement "would be wholly impracticable," H.Rep. No. 2811 at 5, if three years earlier it had voted to authorize every village, township, city, and county in the nation to adopt their own myriad local right to work laws. It is equally inconceivable that the Taft-Hartley Congress would have intended to require the States to adopt affirmative measures prohibiting their local governments from enacting their own Right-to-Work laws if the States wished to avoid the chaos that would inevitably result from the application of overlapping and potentially inconsistent local laws to multi-location collective bargaining agreements.

The only plausible interpretation of § 14(b) is that the provision means what it says and creates an exception to the federal policy of authorizing union security agreements only "in any State or Territory" where the negotiation and application of such agreements "is prohibited by State or Territorial law."

* * *

The Lincolnshire Ordinance is not a "State or Territorial law" within the meaning of § 14(b) and is thus "not encompassed by § 14(b)." *Mobil Oil Corp.*, 426 U.S. at 413 n.7. The ordinance, therefore, is preempted by the NLRA. *Id*. at 413 & n.7.

II. Check-Off and Hiring Hall Agreements Are Not "Agreements Requiring Membership in a Labor Organization as a Condition of Employment" within the Meaning of NLRA § 14(b).

In the preceding section, we demonstrated that the Ordinance is preempted by the NLRA insofar as it attempts to regulate the negotiation and application of union security, check-off, and hiring hall agreements because the Ordinance is not a "State law" within the meaning of NLRA § 14(b). In this section, we show that even if the ordinance were a "State law" under NLRA § 14(b), the provisions regulating dues check-off and union hiring halls are preempted for the additional reason that check-off and hiring hall agreements are not "agreements requiring membership in a labor organization as a condition of employment" within the meaning of NLRA § 14(b). Again, the precedents interpreting § 14(b) are unanimous on these points.

A. Check-off

Section 5 of the Ordinance makes it "unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges . . . unless the employee has first presented . . . a signed written authorization of such deductions, which authorization *may be revoked by the employee at any time by giving written notice of such revocation to the employer*." (Facts ¶ 9 (emphasis added)).

Section 302 of the Labor Management Relations Act makes it unlawful for an employer "to pay, lend or deliver, any money . . . to any labor organization . . . which represents . . . any of the employees of such employer," but states an exception "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization" where "the employer has received from each employee, on whose account such deductions are made, a written assignment *which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner*." 29 U.S.C.

§§ 186(a)(2) & (c)(4) (emphasis added).

The Ordinance and LMRA § 302(c)(4) not only overlap in their regulation of check-off authorizations, they contradict one another. While the ordinance provides that check-off authorizations may be "revoked by the employee at any time," LMRA § 302(c)(4) provides that check-off authorizations "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." And, while the ordinance specifies that an employee must "giv[e] written notice of such revocation to the employer," LMRA § 302(c)(4) says nothing about how the revocation must be given.

Deduction of union dues or fees from an employee's pay after the employee has revoked his or her authorization at one of the times specified by LMRA § 302(c)(4) is an unfair labor practice subject to the jurisdiction of the NLRB. *See NLRB v. Atlanta Printing Specialties & Paper Product Union 527*, 523 F.2d 783 (5th Cir. 1975). An employer's refusal to deduct union dues or fees in accordance with the terms of its collective bargaining agreement and pursuant to an employee authorization meeting the requirements of LMRA § 302(c)(4) is also an unfair labor practice subject to the jurisdiction of the NLRB. *See NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d 396 (4th Cir. 1977). Finally, an employer's transmission to a labor organization of union dues or fees that have been deducted from an employee's pay without the authorization required by § 302(c)(4) is subject to both criminal and civil enforcement actions in federal court. *See* 29 U.S.C. §§ 186(d) & (c).

The negotiation and application of check-off agreements is a matter that is regulated carefully by the NLRA and the LMRA. The Ordinance's overlapping and inconsistent regulation of check-off agreements is, therefore, clearly preempted unless the ordinance comes within NLRA § 14(b)'s exception from federal preemption. However, "dues checkoff provisions are not union

security devices but are intended to be an area of voluntary choice for the employee." *Atlanta Printing Specialties*, 523 F.2d at 787. For that reason, *SeaPAK v. Industrial Technical and Professional Employees*, 300 F.Supp. 1197, 1200-01 (S.D. Ga. 1969), *aff'd* 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971), squarely holds that state laws regulating check-off do not come within NLRA § 14(b). The Supreme Court's affirmance of *SeaPAK* makes that decision a binding precedent.

Under *SeaPAK*, state laws regulating the voluntary deduction of union dues or fees are not within § 14(b) and are, therefore, preempted. *See, e.g., United Automobile Workers v. Hardin County*, 2016 WL 427920, p. *7 (following *SeaPAK*); *Local 514, Transport Workers v. Keating*, 212 F.Supp.2d 1319, 1327 (E.D. Okla. 2002) (same).

B. Hiring Halls

Section 4(E) of the Lincolnshire Ordinance provides that "[n]o person covered by the National Labor Relations Act shall be required as a condition of employment . . . to be recommended, approved, referred, or cleared by or through a labor organization." (Facts ¶ 8). Both state and local laws containing identical provisions have been found to be preempted by the NLRA. *Local 514, Transport Workers v. Keating*, 212 F.Supp.2d at 1326-27 (identical provision in state law); *United Automobile Workers v. Hardin County*, 2016 WL 427920, pp. *6-*7 (identical provision in local law).

It is not uncommon for collective bargaining agreements in the construction industry to contain clauses giving a union the exclusive right to refer applicants for employment. *See* 29 U.S.C. § 158(f)(3) (expressly authorizing such agreements).[7] Operating Engineers Local 150's

[7] As the Supreme Court has observed in *H. A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 721 n. 28 (1981):

agreements with Accurate Group, Inc., Central Boring, Inc., Dick's Heavy Equipment Repair, and Revcon contain such a provision (Facts ¶¶ 19-20, 25-26, 34-35, 44-45). These contract clauses are referred to as "hiring hall agreements." Like the clause in the Local 150 agreement, hiring hall agreements typically give the employer the right to turn down referred applicants (Facts ¶ 50). And, as does the Local 150 clause, they typically require the union to make referrals without regard to the applicant's union membership (*id.*).

The NLRA regulates the negotiation and application of hiring hall agreements to ensure that referrals are made in a fair and nondiscriminatory manner. *See Breininger v. Sheet Metal Workers*, 493 U.S. 67, 73-84 (1989) (describing the federal regulation of hiring halls). Provided the referrals are made in a manner that does not discriminate on the basis of union membership, "the hiring hall, under the [federal] law as it stands, is a matter of negotiation between the parties." *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 676 (1961). "As a result, courts which have interpreted section 164(b) of the LMRA in this context have held that it does not grant the States the authority to prohibit non-discriminatory exclusive hiring halls." *Local 514, Transport Workers v. Keating*, 212 F.Supp.2d at 1326-27 (citing authority).

In many industries, unions maintain hiring halls and other job referral systems, particularly where work is typically temporary and performed on separate project sites rather than fixed locations. By maintaining halls, unions attempt to eliminate abuses such as kickbacks, and to insure fairness and regularity in the system of access to employment. In a 1947 Senate Report, Senator Taft explained: 'The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall.' S. Rep. No. 1827, 81st Cong., 2d Sess., 13 (1947), quoted in *Teamsters v. NLRB*, 365 U.S. 667, 673-674.

CONCLUSION

Sections 4 and 5 of the Ordinance are invalid on the ground that they are preempted by the NLRA. The Court should, therefore, enter judgment in favor of Plaintiffs declaring those provisions void, enjoining their enforcement, and granting such other relief as the Court deems appropriate.

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on June 3, 2016, he electronically filed the foregoing ***Plaintiff Unions' Brief in Support of Their Motion for Summary Judgment*** with the Clerk of Court using the CM/CM/ECF system, which sent notification to the following:

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