IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO, et al.,	)	
Plaintiffs,	)	Case No. 16-cv-2395
v.	)	Judge Matthew F. Kennelly
VILLAGE OF LINCOLNSHIRE, ILLINOIS, et al.,	)	Magistrate Judge Susan E. Cox
Defendants.	)	

DEFENDANTS' REPLY
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

In their Response Brief in Opposition to Defendants' Motion for Summary Judgment (Doc. 56, hereinafter "Plfs.' Resp."), the Plaintiff Unions fail to show that Congress clearly, manifestly intended to preempt local Right-to-Work laws such as the Ordinance at issue in this case when it enacted the National Labor Relations Act ("NLRA"). In the absence of such a clear and manifest intention by Congress, the Unions' claims challenging the Ordinance as preempted by the NLRA must fail on their merits. In addition, the Unions have failed to refute Defendants' arguments regarding the Unions' lack of standing and their failure to state a claim under 42 U.S.C. § 1983. The Court should therefore grant Defendants' motion for summary judgment.

I. The Taft-Hartley Act did not preempt the field with respect to union security agreements.

Contrary to the Unions' argument, Congress did not preempt the field with respect to regulation of union security agreements when it amended the NLRA with the Taft-Hartley Act in 1947. (*See* Plfs.' Resp. 5.) The Unions' argument ignores the ample evidence in the Taft-Hartley Act's legislative history that Congress intended to maintain the Wagner Act's non-preemption of

Right-to-Work laws, and it ignores the Supreme Court case law that has reached that same conclusion.

As Defendants have shown in their primary brief, multiple statements in the Taft-Hartley Act's legislative history demonstrate that Congress intended to maintain the Wagner Act's policy of non-preemption of state laws prohibiting compulsory unionism and that the only purpose of the new NLRA § 14(b) was to make this abundantly clear. (*See* Doc. 53, Defendants' Memorandum in Support of Their Motion for Summary Judgment ("Defs.' Mem.") 13-14.) The lack of any change with the passage of the Taft-Hartley Act is reflected in the language of NLRA § 8(a)(3), in which Congress retained the words of the Wagner Act (the former NLRA § 8(3)) that the Supreme Court found expressed an intent not to preempt Right-to-Work laws. *See Algoma Plywood & Veneer Co. v. Wis. Employment Rels. Bd.*, 336 U.S. 301, 307 (1949) ("obvious inference" to be drawn from Congress's use of the words "nothing in this Act . . . or in any other statute of the United States" was that "§ 8(3) [now § 8(a)(3)] merely disclaims a national policy hostile to the closed shop or other forms of union security agreement"). Accordingly, the Supreme Court has concluded that the NLRA, as amended by the Taft-Hartley Act, does not "preempt the field" with respect to union security agreements, just as the Wagner Act version of the NLRA did not do so. *Retail Clerks Int'l Ass'n, Local 1624, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 101 & n.9 (1963) (legislative history shows "clear and unambiguous . . . purpose of Congress not to preempt the field"; "It was never the intention of the [NLRA] . . . to preempt the field . . . ." (quoting H.R. Rep. 501, 80th Cong, 1st Sess., p. 60)); *see also Sweeney v. Pence*, 767 F.3d 654, 682 (7th Cir. 2014) (Wood, J., dissenting) (legislative history shows drafters of § 14(b) "understood it as a reaffirmation of the original NLRA").

The lack of field preemption means that local governments are free to legislate within that field to the extent allowed by state law, and it is unnecessary for the Court to reach the Unions' arguments about the meaning of "State" in NLRA § 14(b). Section 14(b) simply exists to confirm the NLRA's lack of preemption in this area, as reflected in the Supreme Court's analysis in *Algoma*, 336 U.S. at 314, and *Schermerhorn*, 375 U.S. at 101-05. Indeed the title of § 14 – "Construction of provisions" – confirms that § 14(b) is only intended to show how courts should construe other provisions of the Act – i.e., they should construe them as non-preemptive with respect to union security agreements. 29 U.S.C. § 164.

To try to overcome all of this, the Unions rely on a footnote in the Supreme Court's decision in *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976). The *Mobil Oil* case, however, had nothing to do with whether Congress preempted the field with respect to union security agreements. Rather, that case only concerned whether Texas's Right-to-Work statute could apply to seamen who performed "the vast majority" of their work on the high seas, not in Texas. 426 U.S. at 409-10. In other words, *Mobil Oil* was about how to determine which jurisdiction's law regarding union security agreements should govern a given employment relationship; it was not about the scope of federal preemption under the NLRA. The Court concluded that the question of which jurisdiction's law on union security agreements should apply to an employment relationship should be determined by a "job situs" test, under which the law of the jurisdiction in which the employee primarily performs his or her work controls. *Id.* at 417-20.

The Unions' argument depends on a footnote in *Mobil Oil*, which states that "[t]here is nothing in either § 14(b)'s language or legislative history to suggest that there may be applications of right-to-work laws which are not encompassed under § 14(b) but which are

nonetheless permissible." 426 U.S. at 413 n.7. The Unions argue that this statement implies that the NLRA preempts the field with respect to union security agreements except as specifically authorized by § 14(b). (Plfs.' Resp. 6.) But the footnote, like the case generally, was concerned with the question of what contacts between a state and an employment relationship suffice for that state's Right-to-Work law to govern that employment relationship; it was not concerned with preemption and should not be interpreted as resolving a controversial question regarding preemption that the parties did not brief or argue and that was not necessary to deciding the case. And even if the footnote, standing alone, might arguably support the inference that the Unions draw from it, that inference is contradicted elsewhere in the decision, where the Court states that "§ 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.'" 426 U.S. at 417 (quoting *Algoma Plywood*, 336 U.S. at 314). Because § 8(a)(3) "left the states free," § 14(b) merely confirmed a lack of preemption of Right-to-Work laws that would have existed anyway – just as the legislative history and analysis in *Schermerhorn* indicate. *See also NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1197 (10th Cir. 2002) ("What Congress has not taken away by § 8(a)(3) it need not give back (by § 14(b)) . . . ."). To the extent that the Supreme Court's language in these two statements in *Mobil Oil* creates arguable ambiguity on this point, the legislative history – and the Court's discussion of it at length in *Algoma Plywood* and *Schermerhorn*, which, unlike *Mobil Oil*, actually involved questions regarding federal preemption in the field of union security agreements – resolves it against the Unions' position. (*See* Defs.' Mem. 13-14.)[1]

[1] In addition, one of the five justices who joined *Mobil Oil*'s majority opinion wrote separately to clarify that he did not accept the "suggestion that federal policy favors permitting union-shop and agency-shop provisions." *Mobil Oil*, 426 U.S. at 421 (Stevens, J., concurring). Therefore, to the extent that *Mobil Oil* might be read as contradicting *Algoma Plywood*'s holding on federal law's

II. The Unions cannot overcome the presumption that a reservation of authority to "States" allows states to delegate that authority to their political subdivisions.

Even if the Unions were correct that Right-to-Work laws are only permissible to the extent provided in NLRA § 14(b), their challenge to the Ordinance's core Right-to-Work provision would still fail because they cannot overcome the presumption that a federal statute's reservation of authority to "States" allows a state to delegate that authority to its political subdivisions. The Unions barely address, and fail to distinguish, the two Supreme Court decisions most closely on point, *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991), and *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002).

Under *Mortier* and *Ours Garage*, a provision of federal law authorizing a "State" to enact a particular type of law does not, standing alone, prevent a state from delegating its authority to enact that type of law to its political subdivisions – i.e., to local governments. *See Mortier*, 501 U.S. at 607 (Congress's "[m]ere silence" on this question does not suffice to preempt local laws); *Ours Garage*, 536 U.S. at 432 (same). (*See* Defs.' Mem. 17-20.) The Unions' only response to this is to argue that § 14(b)'s reference to "State" laws does not "stand alone" in the statute because, according to the Unions' theory, it creates a limited exception to the NLRA's general rule of field preemption. (Plfs.' Resp. 7.) But that does not meaningfully distinguish this case from *Mortier* and *Ours Garage* because those cases both involved exceptions to an explicit general rule of preemption. Even if it were correct that states' authority to enact Right-to-Work laws derives entirely from § 14(b), that would shed no light on whether Congress intended that exception to permit only laws enacted at a statewide level. And even if the alleged field preemption that the Unions rely on were a reason to believe that Congress *might* not have

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neutrality and non-preemption with respect to Right-to-Work laws, that view did not have the support of a majority of the Court.

intended to allow States to delegate their authority to their political subdivisions – which the Unions have not established – it still would not show the "clear and manifest intent" necessary to conclude that, with § 14(b), Congress intended to deny States their usual ability to act through their political subdivisions.

The Unions emphasize references to "the States," "state laws," and "state policy" in the discussions of § 14(b) in *Schermerhorn* and *Mobil Oil* to argue that § 14(b) only tolerates Right-to-Work laws that apply statewide. (Plfs.' Resp. 7-8.) But those cases did not consider whether states may exercise their authority to enact Right-to-Work laws through their political subdivisions. Accordingly, one cannot reasonably infer that statements in those cases about "state" law and policy reflect a determination that Congress intended to exclude laws and policies enacted by a state's political subdivisions exercising powers the state chose to delegate to them.

In addition, the cases interpreting the Sherman Act that the Unions rely on to argue that "State" laws under § 14(b) must apply statewide are not relevant to the federal preemption analysis the Court must undertake in this case. (*See* Plfs.' Resp. 9-10.) In the primary antitrust case the Unions rely on, the Supreme Court extended the existing immunity from Sherman Act liability for "state action" to cover actions taken by a local government, but only where a local government acts "pursuant to [a] state policy to displace competition with regulation or monopoly public service." *Cmty. Comms. Co. v. City of Boulder*, 455 U.S. 40, 51 (1982). The Unions use this to suggest that local governments, including home rule units, likewise could only adopt Right-to-Work laws if they were acting pursuant to a policy established by the state's central government. (Plfs.' Resp. 9-10.) But the antitrust cases have no relevance to this case because they concern immunity from liability under the Sherman Act, not federal preemption of

local laws in a particular field. Thus it is not surprising that the Supreme Court cases that *do* address federal preemption of local laws, *Mortier* and *Ours Garage*, make no reference to the antitrust cases and instead apply a different analysis that focuses on Congressional intent, not on whether a given local law was adopted pursuant to a state policy.

And while the Supreme Court's antitrust cases reflect concern about local governments interfering with "the Nation's economic goals reflected in the antitrust laws," *Cmty. Comms.*, 455 U.S. at 51, as the Plaintiffs observe (Plfs.' Resp. 10), its labor cases express no similar concern with respect to union security agreements. To the contrary, with respect to union security agreements, the Nation has not established any "goals" but has instead chosen "to abandon any search for uniformity" and "to suffer a medley of attitudes and philosophies on the subject." *Schermerhorn*, 375 U.S. at 104-05.

Finally, there is no merit in the Unions' notion that Congress must have intended to prohibit local Right-to-Work laws because it supposedly is "unheard of" to "require" home-rule states to affirmatively legislate to prevent local governments from adopting such laws. (Plfs.' Resp. 8.) Home-rule states such as Illinois have chosen to delegate extremely broad authority to certain political subdivisions, allowing home rule units to exercise police powers with respect to matters in their local jurisdictions to the full extent that the State could exercise those powers statewide, except where the state constitution or state legislation affirmatively prevents them from doing so. *See, e.g., Triple A. Servs. v. Rice*, 131 Ill. 2d 217, 230, 545 N.E.2d 706, 711 (1989) ("Home rule units . . . have the same powers as the sovereign, except where such powers are limited by the General Assembly."); *City of Urbana v. Houser*, 67 Ill. 2d 268, 273, 367 N.E.2d 692, 694 (1977) (because Article VII, § 6(m) of the Illinois Constitution provides that "[p]owers and functions of home rule units shall be construed liberally," it "requires no strong

prism to see the breadth and depth of the powers of home rule units"). Accordingly, any time Congress gives "States" the authority to enact laws that federal law would otherwise preempt, and does not clearly manifest an intention to prevent states from delegating that authority to their political subdivisions, it effectively "requires" home-rule states to affirmatively legislate to prevent their local governments from exercising that authority. Indeed, *Mortier* provides an example of this. 501 U.S. at 602 (noting that the challenged ordinance "was enacted under [Wisconsin statutes that] accord village boards general police, health, and taxing powers"). So this situation is not "unheard of" at all in home-rule states and cannot be a basis for finding preemption.

III. The Unions' policy arguments do not establish a clear and manifest intent by Congress to preempt local Right-to-Work laws.

The Unions devote several pages of their response brief to what are essentially policy arguments about why, in the Unions' view, it would be better to allow Right-to-Work laws only on a statewide basis and not at the local level. (Plfs.' Resp. 10-13.) But the Unions' views on this question have no bearing on the relevant question: whether Congress has shown a clear and manifest intention to preempt local laws. And, in any event, the Unions' arguments are not compelling.

The Unions argue that it would be difficult to determine which employment relationships a local Right-to-Work ordinance governs. But there is no reason why this needs to be so. An ordinance could be specific on this point, or, to the extent that it is not, the courts could clarify the law, just as they clarify all types of laws where necessary. If the Unions are correct that the *Mobil Oil* "job situs" test for making this determination would not work as well at the local level as it does at the state level, courts could devise a different test to determine which local jurisdiction's law governs a given employment relationship. Defendants maintain, however, that

the test is appropriate because it is objective and helps ensure that jurisdictions do not regulate conduct outside their borders. *See Mobil Oil*, 426 U.S. at 418-19.

No doubt reasonable people could disagree about whether it is better for states to adopt Right-to-Work laws statewide rather than through their political subdivisions, and some would cite the Unions' arguments as reasons why a statewide law is preferable. But the relevant question for federal preemption analysis is whether *Congress* has taken a clear and manifest view on this question. The Unions have not provided any evidence that it has. Without such evidence, the Unions cannot show that Congress had a clear and manifest intent to preempt local laws on this subject when it enacted the NLRA, and its preemption argument therefore fails.

IV. The Unions have failed to rebut Defendants' arguments that federal law does not preempt the Ordinance's provisions on hiring halls and dues authorizations.

The Unions barely address, and fail to refute, Defendants' arguments on the legality of the Ordinance's provisions that respectively prohibit union hiring-hall arrangements and require union dues authorizations to be revocable at will. The Unions only allege that Defendants have not shown that these provisions "come[] within § 14(b)." (Plfs.' Resp. 13.) To the contrary, however, Defendants have specifically shown how Ordinance § 5 (on dues authorizations) protects workers from being forced to accept union membership as a condition of employment, which is precisely what states (including their subdivisions, as shown above) may protect workers from under § 14(b). (*See* Defs.' Mem. 22-24.) Defendants also have shown how a prohibition on hiring halls does not intrude upon the NLRB's jurisdiction and is not otherwise preempted by federal law. (Defs.' Mem. 21-22.)

V. The Unions have failed to refute Defendants' arguments regarding their lack of standing.

A. Even if one of the Unions has standing to bring a given claim, the Court must also determine whether the other Unions also have standing.

Although the Unions are correct that Local 399's standing to bring Counts I and III gives the Court jurisdiction to consider the validity of the Ordinance provisions those counts challenge (Plfs.' Resp. 1), the Court must nonetheless determine whether the other Unions have standing with respect to each count. The Unions' complaint seeks both damages and attorneys' fees under 42 U.S.C. § 1988 (Doc. 1, Complaint 7-9); accordingly, the Court must consider each plaintiff's standing with respect to each count to determine whether it is entitled to this relief.

B. Local 150 should not be allowed to introduce new evidence that it should have produced in discovery to establish its standing to bring Count I and II.

The Unions belatedly attempt to establish Local 150's standing to bring Count I by providing certifications from two workers Local 150 represents who claim that they spend most of their working hours at unionized Lincolnshire facilities, one of whom states that he was hired through a hiring hall. (Plfs.' Resp. 1 n.1; Doc. 57, Plaintiffs' Statement of Add'l Facts ¶¶ 1-2; Doc. 57-2, Declaration of Roberto Zavala; Doc. 57-3, Declaration of Mark Beinlich.) But this is information that Local 150 refused to provide in response to Defendants' Interrogatories Nos. 4(e) through 4(h), which requested that it "[i]dentify every individual represented by IUOE Local 150 who is currently performing, or has recently performed, work in Lincolnshire" and state: "the number of hours each individual has spent performing work in Lincolnshire for his or her respective employer in each month from January 2015 to the present"; "the number of hours each individual has spent performing work for his or her respective employer outside of Lincolnshire" for each month in the same timeframe; "the number of hours each individual is expected to perform work in Lincolnshire for his or her respective employer for each month for

the remainder of 2016 and 2017"; and "the number of hours each individual is expected to work for his or her respective employer outside of Lincolnshire for each month for the remainder of 2016 and 2017." (*See* Doc. 59, Defendants' Response to Plaintiffs' Rule 56.1(b)(3)(C) Statement of Additional Facts ¶¶ 1, 2; Doc 59-2, Tab 1, Local 150's Answers to Defendants' Interrogatories ("Int. Answers") at 3-4.) Defendants also requested documentation supporting the answers (that Local 150 did not provide) to these interrogatories. (Doc. 59-3, Tab 2, Local 150's Response to Village of Lincolnshire's First Requests for Production at 7.) Local 150 refused to produce such evidence, however, on the ground that it was "irrelevant" and "cumulative and overly burdensome" given that Local 150 had "provid[ed] the names of employers located in the Village of Lincolnshire who are signatory to collective bargaining agreements with Local 150" and had "identified employees who regularly work in Lincolnshire on a daily basis subject to current union security, dues check-off and hiring hall provisions." (*See* Int. Answers at 4-5.) Because Local 150 insisted that information pertaining to the hours its members worked in Lincolnshire was not relevant and refused to produce it in discovery, Local 150 should not be allowed to establish its standing by producing and relying on it now. *See* Fed. R. Civ. P. 37(c)(1); *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, 2004 U.S. Dist. LEXIS 20845, at *6 (N.D. Ill. Oct. 14, 2004) ("Defendant should not be permitted to introduce evidence at trial that it refused to produce during discovery"); *Cassise v. Tape & Label Graphics Sys.*, No. 95 C 432, 1997 U.S. Dist. LEXIS 17938, at *7-8 (N.D. Ill. Nov. 7, 1997) ("[W]here [a party] has . . . failed to produce evidence," it is appropriate to issue "an order precluding [that party] from offering evidence at trial on the issue as to which it has withheld discovery.").

C. Local 150 has not established its standing to bring Count II.

Local 150 also has failed to otherwise establish its standing to bring Count II. The Unions reject the view that *Mobil Oil*'s job situs test (discussed above) should apply to hiring hall agreements. (Plfs.' Resp. 4.) But with hiring hall prohibitions, as with Right-to-Work laws generally, the job situs test makes sense because it ensures that a jurisdiction will not control an employment relationship primarily involving work that occurs outside of its borders. *See Mobil Oil*, 426 U.S. at 418-19. Local 150 asserts that it would satisfy the test anyway because of its referrals to Lincolnshire jobsites, but it does not cite any evidence to support that claim apart from a single worker's certification stating that he was hired through a hiring hall and works most of his hours in Lincolnshire, which should be excluded because of Local 150's refusal to provide the information it contains in discovery, as discussed above. (Plfs.' Resp. 4.)

D. Laborers District Council and Carpenters Regional Council have not established their standing.

As Defendants showed in their primary brief, Plaintiff Construction and General Laborers' District Council of Chicago and Vicinity, Laborers International Unions of North America, AFL-CIO ("Laborers District Council") lacks standing to bring Counts I and III because it has not shown that it represents a single worker who actually spends most of his or her working hours in Lincolnshire. (Defs.' Mem. 7-8.) And Plaintiff Chicago Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America ("Carpenters Regional Council") lacks standing to bring Count I and III because it has not shown that it represents any worker who has ever performed any work in Lincolnshire. (Defs.' Mem. 8.) In their response, Plaintiffs have identified no evidence to refute this. Accordingly, the Court must enter judgment against Laborers District Council and Carpenters Regional Council with respect to Count I for lack of standing.

In addition, Plaintiffs Laborers District Council and Carpenters Regional Council have not presented any evidence that either of them has entered into any hiring hall agreements and therefore lack standing to bring Count II. (Defs.' Mem. 8.)

VI. Plaintiffs fail to state a claim under 42 U.S.C. § 1983

The Unions' response to Defendants' argument that they have failed to state a claim under 42 U.S.C. § 1983 fails to contend with Defendants' actual argument: that the NLRA does not guarantee an individual right to enter into a union security clause because it explicitly contemplates that states may prohibit such clauses, and that a prohibition on union security clauses therefore cannot give rise to a claim under § 1983. (Defs.' Mem. 24-25.) The Supreme Court has recognized, in the cases that the Unions cite, that not every claim of NLRA preemption necessarily gives rise to a claim under § 1983; in particular, the Court has recognized that a preemption claim may not give rise to a cause of action under § 1983 where the dispute concerns only *which* governmental body has the authority to infringe upon the alleged "right." *See Livadas v. Bradshaw*, 512 U.S. 107, 133 n.27 (1994) (noting that a preemption claim about whether a particular matter is within the jurisdiction of the NLRB or the states is "fundamentally different" from a claim that no governmental body may violate a protected individual interest, and this "might prove relevant to cognizability under § 1983") (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 110 (1989)).

CONCLUSION

For all the reasons stated above and in Defendants' memorandum in support of their motion for summary judgment, Defendants respectfully request that this Court grant their motion for summary judgment.

Dated: August 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, certify that on August 18, 2016, I served Defendants' Reply in Support of Their Motion for Summary Judgment on all counsel of record by filing it through the Court's electronic case filing system.

/s/ Jacob H. Huebert