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A PRIMER ON UNION SECURITY AGREEMENTS, STATE RIGHT-TO-WORK LAWS, AND RELATED SUBJECTS IN THE CONSTRUCTION INDUSTRY

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A PRIMER ON UNION SECURITY AGREEMENTS, STATE RIGHT-TO-WORK LAWS, AND RELATED SUBJECTS IN THE CONSTRUCTION INDUSTRY

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This paper is an update, in part, of a previous symposium paper presented at the 27th Annual Construction Labor Law Symposium in 2011. In this paper, as in the prior paper, the author explores a basic labor law subject that is both essential to the practice of labor law and frequently misunderstood: union security agreements – what, when, and how they are enforceable, and where they are not permitted. This paper will also discuss the special exception that applies to the construction industry, and also explores the recent increase in the number of state right-to-work laws and litigation related thereto. Finally, this paper will discuss two related subjects that are frequently associated with union security issues in the construction industry: (1) hiring halls, which were discussed in the 2011 paper, and (2) union contractual requirements that certain supervisors be included in bargaining units with rank-and-file employees and be subject to any union security provisions in the applicable collective bargaining agreement. Hopefully, this paper will serve as a basic outline of this subject for the beginning or occasional labor law practitioner or Chapter Executive, and provide, for experienced lawyers, a few helpful nuggets of information and the occasional nuanced thought that will make reading this paper worthy of their time.

I. UNION-SECURITY AGREEMENTS

"Union security" refers to those contractual arrangements found in collective bargaining agreements that make union membership during the term of the collective bargaining agreement compulsory. Under the National Labor Relations Act ("NLRA" or "Act"), such agreements are sanctioned pursuant to the first proviso to Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3),[1] as an

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[1] Section 8(a)(3) provides as follows:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer --

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and

exemption to Section 8(a)(3)'s prohibition on discrimination based on membership or lack of membership in a labor organization. The proviso was added as part of the Taft-Hartley amendments, which outlawed the so-called "closed shop." R. Gorman, *Basic Text on Labor, Unionization and Collective Bargaining* 641-642 (1976). A closed shop is an arrangement between a union and an employer which requires that an employee has to be a member of the union before the employer can hire the employee. *Id.* The practice of having closed shops was replaced by the standard union security clause that allows the union to require membership as a condition of an employee keeping his or her job with the employer, after 30 *calendar* days of employment. *Id.*[2] The employee must be given the full 30 days before the union may seek to obligate him or her under the union security clause.[3]

In the construction industry, under Section 8(f) of the Act, a contractor can negotiate a pre-hire agreement and include with that agreement a seven-day union security clause. 29 U.S.C. § 158(f)(2).[4] Under Section 8(f), a union with a valid prehire agreement under that section of the

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(ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement; *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership 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.

[2] Other lesser forms of union security, such as the agency shop and maintenance of membership were not affected. An agency shop requires a nonmember of the union to either pay the union dues as a financial core member or pay a service fee. The Board long ago upheld such arrangements to avoid the issue of nonmembers becoming "free riders." *American Seating Company,* 98 NLRB 800, 802 (1952). A maintenance of membership agreement is one that usually specifies that all employees who are members of the union on the day a labor contract is executed must remain members of the union for the duration of that contract; in addition, such an arrangement typically provides that anyone who becomes a member after the contract is signed must also remain a member for the duration of the agreement. *See e.g., Steelworkers (Asarco),* 309 NLRB 964 (1992); *Montgomery Ward & Co., Inc.,* 142 NLRB 650 (1963). However, while Congress permitted employers and unions to negotiate union security agreements, in a strange quirk of federalism, Congress added Section 14(b), 29 U.S.C. 164(b), to the Act allowing states to prohibit union security agreements.

[3] The statutory grace period only applies to employees who are not members of the union on the date a collective bargaining agreement with a union security clause is executed; employees who are already members must remain members so long as they are covered by the labor agreement. *Charles A. Krause Milling Co.,* 97 NLRB 536, 539-542 (1951). Nothing prevents the contracting party from negotiating a longer period that, for example, coincides with an employee's probationary period.

[4] **(f) Agreement covering employees in the building and construction industry**

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement

Act may begin enforcing the clause only *after* the seventh calendar day following the commencement of an employee's employment. *Id.*[5] This is a distinction from the 30-day grace period under Section 8(a)(3) of the Act. *J.W. Bateson Company, Inc.,* 134 NLRB 1654, 1655 n.3 (1961). In order to permit the execution of a prehire agreement encompassing a 7-day union security clause, three essential requirements have to be met: (1) an agreement must cover employees who are engaged in building and construction work; (2) the union representing such employees must be a labor organization in which building and construction employees are members; and (3) the employer executing the prehire agreement with a 7-day union security clause must be an employer that is, in the words of the statute, "engaged primarily in the building and construction industry." *Animated Displays Company*, 137 NLRB 999, 1020-1021 (1962). Despite a number of references to the "building and construction industry" in the Act, there is no definition of the term, and the Board has interpreted that to mean that Congress intended the term to be given its normal and customary meaning as used "in common parlance as well as the parlance of the industry." *Id*. at 1021.[6]

> requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[5] The employment of labor in the unionized construction industry differs significantly from most other unionized industries due to the temporary and seasonal nature of construction projects. As a result, unions and employers in the construction industry are permitted to enter into a binding pre-hire collective bargaining agreement under the National Labor Relations Act (the "Act"), 29 U.S.C. § 151, *et seq*. "Prehire agreements developed in the fluctuant ***construction trade*** because [of] the ***typically short duration and seasonal variation of employment."*** *Laborers' International Union of North America v. Foster Wheeler Energy Corp.,* 26 F.3d 375, 383 n.5 (3d Cir. 1994) (emphasis added). "A pre-hire agreement is a contact agreed to by an employer and a union *before* the workers to be covered by the contract have been hired." *Iron Workers, Local 3 v. National Labor Relations Board,* 843 F.2d 770, 773 (3d Cir. 1988), citing Roberts' Dictionary of Industrial Relations 562 (3d ed. 1986). In allowing employers and unions in the construction industry to enter into pre-hire agreements, Congress recognized ***"the uniquely temporary, transitory and sometimes seasonal nature of much of the employment in the construction industry."*** *Jim McNeff, Inc. v. Todd,* 461 U.S. 260, 266 (1983) (emphasis added). Section 8(f) of the Act completely immunizes such agreements between an employer and a union from attack under Section 8(a)(2) and Sections 8(b)(1)(A) and (2) of the Act, because they have entered into an agreement without proof of the union's majority status.

[6] For early applications of this standard, see *Carpet Linoleum and Soft Tile Local 1247 (Indio Paint and Rug Center)*, 156 NLRB 951, 953-959 (1966) and *Zidell Explorations*, 175 NLRB 887, 889 (1969); see also *Construction Building Materials and Miscellaneous Drivers, Local 83 (Associated General Contractors, et al.)*, 243 NLRB 328, 331 (1979). The question of whether an employer is one primarily engaged in the building and construction industry for purposed of Section 8(f) and whether an employer is an employer within the meaning of the construction industry proviso to Section (e) are clearly different issues. "[A]pplication of the construction industry proviso of Section 8(e), unlike Section 8(f), is not conditioned on an employer being *primarily* engaged in the construction industry." (Emphasis added.) *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714, 715 (1995). There, the Board found that the employer, a seller of office products, furniture, draperies, and contract design services, did not have to be a general contractor and did not have to actually employ installers to qualify as an

In the construction industry, where many employees work for different employers under the same multi-employer agreement, this raises the question: is an employee who moves from one employer to another entitled to a separate seven-day grace period with each new employer? Generally speaking, in the multi-employer bargaining unit situation, an employee is only entitled to one initial seven-day grace period.[7] However, where an employee works for different employers who sign the same union agreement, but who are not part of a multi-employee bargaining unit, the employee must be still given a separate grace period with each new employer for whom he or she works.[8]

What is the obligation to join the union under a lawful union security clause? The common misconception is that an employee subject to union security clauses must actually become a full member of the union, subject to its constitution and bylaws. In reality, as the Supreme Court made clear in its *General Motors* decision,[9] the obligation the Act imposes is no more than a financial one — the employee must pay dues and initiation fees uniformly charged to all members of the union, but the employee need not actually become a full member. In other words, membership in a union is "whittled down to its financial core."[10] Subsequently, in *Communication Workers v. Beck,* 487 U.S. 735, 762-763 (1988), the Court further explained that an employee who elected financial core status could also legitimately elect to refuse to pay any dues beyond the amount necessary for the union to conduct its legitimately representational duties. An employee who makes such an objection is referred to as a "*Beck* objector."[11]

In non-right-to-work states, a question often arises concerning the obligation of an employee to pay union dues if that employee resigns or is expelled from the union during the term of a labor agreement. In the case of the former, the Board has long held that a union may not place any restrictions on an employee's right to resign from union membership. *Machinist Local 1414 (Neufeld Porsche-Audi, Inc.),* 270 NLRB 1330, 1333-1334 (1984). The Supreme Court essentially adopted the Board's position in *Pattern Makers League v. NLRB,* 473 U.S. 95, 103-105 (1985).[12] Indeed, mere maintenance of such a provision restricting resignations in the union constitution or

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employer under Section 8(e), as long as it maintained control over its subcontractor's performance and some aspect of labor relations at various projects where floor covering which it sold was being installed.

7 *Mayfair Coat & Suit Co.,* 140 NLRB 1333, 1335 (1963); *Cf. Asbestos Workers, Local 5 (Insulation Specialties Corp.),* 191 NLRB 220 (1971), *enforced,* 464 F.2d 1394 (9th Cir. 1972).

8 *Carpenters Local 740 (Tallman Constructors),* 238 NLRB 159, 160-161 (1978).

9 *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963).

10 *General Motors Corp.,* 373 U.S. at 742. This essentially reduces union membership under the Act to no more than an agency fee or agency shop arrangement.

11 In *Marquez v. Screen Actors Guild,* 525 U.S. 33, 44 (1998), the Supreme Court put to rest whether certain language in a union security clause ran afoul of *Beck* and caused the union to violate its duty of fair representation to unit employees. The Court held that unions and employers do not violate the Act by negotiating union-security provisions requiring that unit employees become or remain members of the union, in good standing, as a condition of employment. Rather, the Court concluded that, by tracking the "membership" language in Section 8(a)(3), a union-security clause incorporates all the refinements and rights that have become associated with that language under *General Motors Corp., supra,* and *Beck, supra.*

12 The *Pattern Makers* court also reaffirmed the principles of voluntary unionism as explained in *General Motors Corp.,* 473 U.S. at 106 and n.16.

by-laws would be unlawful. *Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (Paramount Pictures),* 365 NLRB No. 30 (2017), slip op. at 3, including cases cited at n. 2. It is clear from the interrelation of these two principles that resignation from union membership does not relieve an employee of his or her financial core obligations under a valid union security clause, unless the language of the collective bargaining agreement expressly relieves him of that obligation. *Graphic Communications Local 735-5 (Quebecor Printing Hazelton, Inc.),* 330 NLRB 32, 34 (1999) *enforced sub nom. Quick v. NLRB,* 245 F.3d 231 (2001); *Steelworkers (Ascarco Inc.),* 309 NLRB at 967-968. The Board has also held that resignation from union membership during the term of collective bargaining agreement does not automatically revoke a previously executed checkoff authorization. *Electrical Workers IBEW Local 2088 (Lockheed Space Operations),* 302 NLRB 322, 324 (1991). The language of both the union security clause and the checkoff authorization must be examined to determine whether the act of resignation also severs any financial obligation to the union. *Id.* at 327-330. A union policy that requires an employee to appear in person at the union's hall or office to revoke a dues checkoff authorization is also unlawful. *Paramount Pictures,* 365 NLRB No. 30, slip op. at 3-4. There, the Board also held that a union lacks any authority under Section 302(c)(4) of the Act to modify the terms of a checkoff authorization. *Id*. at 4. [13]

[13] A dues checkoff authorization is simply a written document, executed by an employee, that authorizes his or her employer to withhold union dues from the employee's paycheck and remit to the union representing the employee. While the subject of checkoff of union dues is frequently considered in conjunction with union security, a checkoff clause in a collective bargaining agreement is not so much an agreement involving a union security arrangement as an agreement that facilitates union security because it enhances the union's ability to collect union dues, with a minimum of effort on the union's part, which of course makes it a high priority matter for most unions during bargaining. In connection with a checkoff provision's facilitation of union security, several basic points are specifically worth noting. First, an employee does not have to pay his/her dues by means of checkoff, and may not be coerced by the employer and/or the union who are parties to collective bargaining agreement containing union security and checkoff clauses to do so. *L.D. Kichler Co.,* 335 NLRB 1427, 1437 (2001) ("The Board has repeatedly held that dues-checkoff/authorization must be voluntary. An employee has the right, under Section 7 of the Act, to refuse to sign a dues-checkoff form."); *Longshoreman ILA Local 1575 (Puerto Rico Marine Management),* 322 NLRB 727, 729-730 (1996) (union may not compel union members to execute dues-checkoff authorizations as condition of their employment; execution of dues-checkoff authorization is entirely voluntary). Second, the employer *may not require* an employee to sign a checkoff request as part of a new employee's orientation or even allow it to appear to an "unsophisticated" applicant that signing such an authorization is "a routine part of the hiring process." *See Alaska Salmon Industry, Inc.,* 122 NLRB 1552, 1553-1555 (1959). In this regard, an employer, frankly should not be in the business of distributing checkoff authorizations for the union. Third, a checkoff authorization cannot be used to restart dues deduction when an employee severs his or her employment but later returns to work for the same employer. *Kroger Co.,* 334 NLRB 847, 849 (2001); *see also*, *Food and Commercial Worker Local 540 (Pilgrim's Pride),* 334 NLRB 852 (2001). Fourth, in a reversal of more than 50 years of precedent, the Obama Labor Board, in *Lincoln Lutheran of Racine,* 362 NLRB No. 188 (2015) held that a checkoff authorization survives the expiration of a collective bargaining agreement and an employer "must continue to honor a dues-checkoff arrangement established in [the expired contract] until the parties have reached a successor collective bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer. *Id.,* slip. op. at 9. Finally, an employee's resignation from full union membership during the term of a collective bargaining agreement with a valid security clause "does not automatically privilege [the] employee to make an untimely revocation of his checkoff authorization." *Auto Workers Local No. 1752 (Schweizer Aircraft)*, 320 NLRB 528, 531 (1995), *enforced sub nom*. *Williams v. NLRB* 105 F.3d 787 (2nd Cir. 1996). The language of the checkoff authorization controls, provided it otherwise complies with the revocability requirements of Section 302(c)(4) of the Act. *Id.* at 531-532. See also *Affiliated Food Stores, Inc*., 303 NLRB 40 (1991); *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991).

When an employee is expelled from a union in a non-right-to-work state for a reason other than the failure to pay his or her union dues obligation, such as disloyalty, is the employee obligated to continue paying dues as a financial core member or as a *Beck* objector? In *Teamsters Local 89 (UPS)*, 361 NLRB 45, 46 (2014), the Board's General Counsel urged the Board to adopt the position that an employee who has been expelled by a union for reasons, other than the employee's failure to pay union dues, should be exempt from any dues obligation, even though the union must still represent him. The General Counsel argued that this result was mandated by the Board's decision in *Transportation Workers Local 525 (Johnson Controls World Services)* 326 NLRB 8 (1998). A unanimous Board rejected the General Counsel's argument based on *Johnson Controls.* 361 NLRB at 47. It went on to hold:

> Section 8(a)(3) authorizes unions and employers to negotiate union-security clauses that require membership in the union "as a condition of employment." *Johnson Controls II*,[14] the currently applicable precedent, applies that section, its Proviso B, and Section 8(b)(2) to bar a union and an employer from using a threat of discharge to enforce a union-security clause against an employee expelled from membership for disloyal misconduct. However, Section 8(a)(3) does not prohibit a union from attempting to collect dues or equivalent fees by any other lawful means from such an employee or from any other recalcitrant nonmember whom the union is required to represent. Similarly, Section 8(b)(2) echoes Proviso B in barring a union from causing an employer to discharge an employee for any reason "other than his failure to tender" dues. But as with Section 8(a)(3), neither Section 8(b) nor any other provision in the Act bars a union from seeking dues or core fees by other lawful means from an employee who remains in the represented bargaining unit.
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> The Supreme Court expressly acknowledged this policy in *Beck*, reaffirming that unions need not tolerate free riders and that "Congress [in the Taft-Hartley Act] 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.'" 487 U.S. at 748-749 (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-741 (1963)). Neither *Beck* nor its predecessor distinguished employees who had been lawfully expelled from their union from other employees who continue to receive representation by the union.
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> There is no question that an employee who has been lawfully expelled or disciplined by a union can – like a *Beck* objector who voluntarily resigns from or refuses to join the union – reduce his or her monetary obligation to the amount chargeable for representational expenses. However, the Act does not bar a union from seeking payment of core fees from such an employee, as the Union did here by threat of a collection lawsuit. We do not perceive any compelling policy reason

[14] This is a reference to *Transport Workers Local 525 (Johnson Controls Services)* 326 NLRB 8 (1988). That decision vacated an earlier NLRB decision involving the same parties (317 NLRB 402 (1995), which the Board refers to as "Johnson Controls I."

> for reading Proviso B in the expansive manner urged by the General Counsel; rather, we share the contrary policy concerns expressed by the D.C. Circuit in *Gilbert*.

Id. at 47-48 (footnotes omitted).[15]

A final question also emerges. What happens to any contractual obligations under the union security clause when a collective bargaining agreement expires, and is not extended during further negotiations or a labor dispute by the parties? It is axiomatic that union security clauses do not survive the expiration of a collective bargaining agreement. *Bethlehem Steel Co.,* 136 NLRB 1500, 1502 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615 (3d Cir. 1963), *cert. denied,* 375 U.S. 984 (1964). Thus, during a contractual hiatus period, a union generally may not require non-member employees to pay union dues, and it may not seek to collect such dues retroactively. *Teamsters Local 492 (United Parcel Service)*, 346 NLRB 360, 364 (2006). However, recent changes in the law concerning checkoff authorizations may still authorize the union to continue collecting union dues from employees even though the collective bargaining agreement has expired.[16] For employees whose checkoff authorizations have expired or who have never been on checkoff, a union may not distribute flyers to unit employees suggesting they are obligated to pay dues during a contractual hiatus period. *Service Employees International Union (SEIU) Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 236-237 (2010).[17]

As a result of the Supreme Court's *Beck* decision, and the Board's subsequent interpretation of it, the Board, in a pair of decisions issued the same day, clarified the obligations of a union seeking to obligate an employee pursuant to a union security clause. Thus, in *California Saw & Knife Works,* 320 NLRB 224, 231 (1995), *enforced sub nom. Machinists & Aerospace Workers v. NLRB,* 133 F.3d 1012 (7th Cir. 1998), *cert. denied,* 525 U.S. 813 (1998), the Board held that a union attempting to require bargaining unit employees to pay union dues and fees as a condition of their continued employment must, as part of its duty of representation, notify employees of both their *General Motors* and *Beck* rights. In this regard, the Board held that:

> When or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If the

[15] The Board's reference to the D.C. Circuit's opinion in *Gilbert* refers to *Gilbert v. NLRB*, 56 F.3d 1438 (D.C. Cir. 1995), *cert. denied,* 516 U.S. 1176 (1996). *See Boilermakers (Kaiser Cement Corp.)*, 312 NLRB 218 (1993).

[16] *See* n. 12 *supra.*

[17] In *Unite Here Local 5 (Hyatt Corp.)*, 364 NLRB No. 94 (2016), the Board declined to apply *Pomona Valley Hospital*, where the union inadvertently sent a notice intended for full membership to financial core members advising of them of the possibility of suspension from membership for dues arrearages of two months or more in response to a letter from the employer advising that once the contract expired, employees were no longer required to pay dues. A majority of the Board held the non-member who received the letter could reasonably have understood that the letter was mistakenly directed to them, and therefore, the union's inadvertent conduct, without more did not restrain or coerce employees in violation of Section 8(b)(A) of the Act. 364 NLRB No. 94, sl. op. at 2.

> employee chooses to object, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.

320 NLRB at 233 (footnote omitted).[18]

In the companion case, *Paperworkers, Local 1033 (Weyerhaeuser Paper),* 320 NLRB 349, 349-350 (1995), *rev'd on other grounds sub nom. Buzenius v. NLRB,* 124 F.3d 788 (6th Cir. 1997), *vacated,* 525 U.S. 979 (1998), the Board held that a union is also obligated to inform full union members of their *Beck* and *General Motors* rights, if such notice has not been previously given, "in order to be certain that they have voluntarily chosen union membership." *Accord, Teamsters, Local 492 (United Parcel Service),* 346 NLRB 360, 363 (2006).[19] The Board also held in *California Saw,* that financial information provided to *Beck* objectors must be audited. *Television Artists AFTRA (KGW Radio),* 327 NLRB 474, 476-477 (1999); 320 NLRB at 240-242. In *United Food & Commercial Workers Union Local 4 (Safeway Inc.)*, 363 NLRB No. 127 (2016) the Board recently reaffirmed its prior decisions in *KGW Radio* and *California Saw*.[20]

Pursuant to a valid union security clause, a union may seek the discharge of an employee only for nonpayment of dues and initiation fees, the so-called financial obligations of being a union member. However, in doing so, its obligation towards either a full member or a financial core member is fiduciary in nature. Thus, the Board long ago held that "a union seeking to enforce a union-security provision against an employee has a fiduciary obligation[21] to inform the employee

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[18] A complete explanation of what constitutes activities by a union that are not "germane" to a union's duties as an exclusive collective bargaining agent under Section 9(a) of the Act is simply beyond the scope of this paper.

[19] The union's failure to provide the required *General Motors* and *Beck* notices may result in a dues reimbursement and an inability to enforce a union security clause until the notices have been given. However, a *Beck* objector is *not* relieved of the obligation to pay the union's initiation fee. *Paperworkers Local 987 (Sun Chemical Corp. of Michigan),* 327 NLRB 1011, 1013 (1999). In addition, a union's failure to inform an employee of their *Beck* rights does not relieve the employee of their obligations as a financial core member to pay the dues required of such. *Carlon, A Lamson & Sessions Co.,* 328 NLRB 983, 984 (1999), *supplemented, In re International Brotherhood of Boilermakers,* 2002 WL 199536 (NLRB Feb. 1, 2002).

[20] As previously indicated, in *California Saw,* the Board created a notice process involving three separate stages. *Id*. 320 NLRB at 295. Stage one is considered the initial notice which consists of telling the employees about their *GM* and *Beck* rights. Stage two would consist of notifying an employee who exercises their *Beck* rights the amount of their dues reduction under *Beck*, how that was calculated, and the union's internal procedures for an employer's challenge to the union's calculation. *Id*. Stage three would consist of the challenge stage where the burden is on the union to prove that the challenged expenditures are charged to the non-member as assessed by the union. *Id.* There has been a serious dispute between the Board and the D.C. Circuit about what the initial notice of *Beck* rights should contain. *Food & Commercial Workers Local 700/Kroger Limited Partnership,* 361 NLRB 420, 428 (2014) *vacated sub nom. Sands v. NLRB,* 825 F.3d 778 (D.C. Cir. 2016). In the Board's view, contrary to the D.C. Circuit, it was sufficient that the initial notice simply explain the existence of *Beck* rights and it was not necessary to set forth the actual amount by which dues are reached for a non-member of *Beck* objector. 361 NLRB at 428. The Circuit Court declined to change its view, expressed in prior cases, that the initial notice must contain the precise amount of dues owed by a *Beck* objector and how it was calculated. *See Id.*, 825 F.3d at 781; *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *Abrams v. Comm. Workers of America*, 59 F.3d 1373 (D.C. Cir. 1995). As noted above, a detailed discussion of *Beck* concerning what information and in what format it must be produced and what union entities might be included is sufficiently complicated and detailed to be beyond the matters covered by this presentation. *See e.g., Teamsters Local 75 (Schreiber Foods)*, 365 NLRB No. 48 (2017).

[21] Prior to *Beck,* the Board, in *Western Publishing Co.,* 263 NLRB 1110, 1111-1112 (1982), explained that exercise of this fiduciary duty required that the Union "give the employees reasonable notice of the delinquency, including

of his obligations so that the employee may take the necessary steps to protect his job." *IBEW, Local 1260 (Western Telestation),* 239 NLRB 923, 926 (1978), *Rocket & Guided Missile Lodge 946, IAM (Aerojet – General Corporation),* 186 NLRB 561, 562 (1970), and *Philadelphia Sheraton Corp.,* 136 NLRB 888 (1962) *enforced sub nom. NLRB v. Hotel & Club Employees Union Local 568,* 320 F.2d 254 (3d Cir. 1963). In *Western Telestation*, the Board went on to state that a union's obligation herein was *not* affected by the fact that the employee may have obtained some knowledge of his or her obligations from some other source – only the employee's failure to carry out any duties imposed on it by the union security clause. 239 NLRB at 926.[22] An employer is obligated to comply with the union's request to discharge an employee for failure to pay his/her union dues and initiation fees, provided the employee has been given his *Beck/General Motors* notices and has also been apprised of the amount of his or her arrearage, advised how and when it must be paid, and has still failed to pay. [23] The employer must ascertain that the sole basis on which the union seeks the employee's discharge is related to his or her nonpayment of union dues and initiation fees. As discussed more fully below, a union may not use a union security clause as a device for attempting to collect the payment of internal union fines or the payment of special assessments not related to a union's 9(a) functions.[24]

Obviously, an employee subject to a union security clause can be compelled to tender the union initiation fee and period dues in order to keep his or her job with their employer. The provisos to Section 8(a)(3) and Section 8(b)(2)[25] require that the union dues and fees that are charged be "uniformly required" as a condition of an employee's acquiring or retaining

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a statement of the precise amount and months for which dues [are] owed, as well as an explanation of the method used in computing such amount." In addition, the union must specify when such payments are made and make it clear to the employee that discharge will result from failure to pay. *Id*. at 1112. This fiduciary responsibility to advise an employee regarding his dues obligation requires "positive action," without any concurrent obligation on the employer to provide notice. *Id.*

[22] Post-*Beck* decisions state the obligation in the same manner. *See e.g., Industrial Contractors Skanska, Inc.,* 362 NLRB No. 169 slip op. at 2 (2015); *L.D. Kichler Co.,* 335 NLRB 1427, 1431 (2001) ("Thus, when a union seeks to enforce a union-security clause, it 'has a fiduciary duty to deal fairly with the employee . . . . [T]he union must provide the employee with a *statement of the precise amount owed, the period for which dues are owed and the method by which the amount was computed,* and give the employee *an opportunity to make payment.*' In addition, "[o]nly actual notice, not constructive notice, will satisfy the union's fiduciary duty' [footnotes omitted. Ellipses, brackets and emphasis in original]."

[23] In these circumstances, an employer who refused to comply with a union's request to discharge a delinquent employee would, at a minimum, commit a violation of the union contract and would arguably make a unilateral change in violation of Section 8(a)(5) of the Act.

[24] *See* p. 11-12 *infra*, at n.22-25.

[25] 29 U.S.C. § 158(b)(2). Section 8(b)(2) provides as follows:

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents-

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

membership in the union.[26] In an early case following the passage of the Taft-Hartley Amendments in 1947 that added the provisos to Section 8(a)(3), *Union Starch & Refining Company,* 87 NLRB 779, 781 (1949), *enforced Union Starch & Refining Co. v. NLRB*, 186 F.2d 1008 (7th Cir. 1951), the Board decided the issue of "whether an employee who tenders to a union [having] a valid union shop contract an amount equal to the initiation fees and accrued dues thereby brings himself within the protection from discharge contained in the provisos of Section 8(a)(3) and in Section 8(b)(2) of the . . . Act." The Board, in reversing its Trial Examiner[27] and finding that both the employer and the union involved had violated the Act, held:

> As we read the statutory language, the provisos to Section 8(a)(3) spell out two separate and distinct limitations on the use of the type of union-security agreements permitted by the Act. Proviso (A) protects from discharge for nonmembership in the contracting union any employee to whom membership is not available for some discriminatory reason; i.e., any reason which is not generally applicable. Proviso (B) protects employees who have tendered the requisite amount of dues and initiation fees and been denied membership for *any other reason, even though* that reason be nondiscriminatory.
>
> At first blush the provisos appear to involve duplication. Indeed, the Respondent Company argues that such a reading of the statute, when applied to employees who have never been members of the contracting union, renders meaningless proviso (A), contending that any discriminatory reason for denying an employee membership would always be a reason other than his failure to pay dues or initiation fees. More careful analysis, however, readily discloses that provisos (A) and (B) have ample independent scope, and the elementary principle of statutory construction which favors giving some meaning to each part of a statue is thereby satisfied. Thus, for example, it is clear that proviso (B) requires a tender of dues and fees, whereas proviso (A) protects any employee discriminatorily excluded from membership whether or not such tender is made.
>
> We therefore read proviso (B) as extending protection to any employee who tenders periodic dues and initiation fees without being accorded membership. If the union imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job. Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop. Congress carefully limited the sphere of permissible union security, and even in that limited sphere accorded the union no power to effect the discharge of nonmembers except to protect itself against "free rides." (Footnotes omitted.)

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[26] In addition, Section 8(b)(5), 29 U.S.C. 158(b)(5), makes it an unfair labor practice for a union to require an employee to pay an initiation fee which is excessive or discriminatory. Although the case law under Section 8(b)(5) is not extensive, it is more appropriately covered as a separate subject.

[27] The Trial Examiner had held that the employer had *not* violated the Act when the union had threatened to engage in a work stoppage if the employer did not discharge two employees who had supported a rival union during the organizing campaign, but nevertheless had tendered the amount of dues and initiation fees required. The tender had been rejected by the union because the employees had refused to become full members of the union. The Trial Examiner had reasoned that union membership was not being denied to the two employees. 87 NLRB at 783. Accordingly, the employer had not violated Section 8(a)(3), and the union had not violated Section 8(b)(2). *Id*.

Id. at 783-784.[28]

While it is patently clear that under a valid union security clause an employee's continued employment may be conditioned upon the payment of periodic union dues and initiation fees, a union that is party to a union security clause may not require payment of such dues during any period of time in which the employee was not obligated to pay dues, but it can compel the payment of back dues or arrearages, upon penalty of discharge, where the back dues accrued during any time when the employee was obligated to pay them.[29] A union may also collect certain reinstatement fees pursuant to a union security clause,[30] but it may not collect any internal union fines,[31] money for a strike fund,[32] or assessments,[33] pursuant to the same clause.[34] Obviously,

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[28] This decision, however, foreshadowed the development of the "belated tender" doctrine: An employee who tenders his/her dues and initiation fee *after* the union has requested his/her discharge is not protected from discharge as long as it is clear that the only basis the employee's discharge is being sought is for non-payment of dues and/or initiation fees. *General Motors Corp.,* 134 NLRB 1107, 1109 (1961).

[29] *Carpenters Local 17 (A&M Wallboard),* 318 NLRB 196 (1995); *Intl. Union of Operating Engineers, Local 139 (Camosy Construction Co., Inc.),* 172 NLRB 173, 174 (1968).

[30] *See Steelworkers Local 14940 (Voyager Emblems),* 215 NLRB 840, 842 (1974); *Longshoremen (ILA), Local 1418 (Lykes Bros. S.S. Co.),* 195 NLRB 8, 11 (1972). *But compare Autoworkers Local 1853 (Saturn Corp.),* 333 NLRB 291, 292 (2001) (In right-to-work state, union may require payment of reinitiation or reinstatement fees for employees who seek to rejoin, and may draw distinctions between employees who resign from union while still employed in the unit (a "dishonorable withdrawal") and those who leave the union because they previously left the bargaining unit on an "honorable basis," with cases where the Board held that "[i]t is a violation of Section 8(b)(1)(A) for a union to require employees who have resigned from the Union to pay a 'reinitiation fee' when a financial core obligation arises when a union-security clause springs into effect," relying principally on *California Saw & Knife Works,* 320 NLRB 224, 247-248 (1995), *enforced sub nom. International Assn. of Machinists v. NLRB,* 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom. Stang v. NLRB,* 525 U.S. 813 (1998); *Office Employees Local 2 (Washington Gas),* 292 NLRB 117 (1988), *enforced sub nom. NLRB v. Office Employees, Local 2,* 902 F.2d 1164 (4th Cir. 1990); *Professional Engineers Local 151 (General Dynamics),* 272 NLRB 1051 (1984).

[31] *See Painters District Council 9 (Creative Finishes),* 336 NLRB 674 n.2 (2001) (union refusal to accept an expelled member's dues until he made restitution and paid a union imposed fine, and filing a grievance against an employer under a union security clause for employment of a "nonunion man" which caused his termination, violated Sections 8(b)(1)(A) and (2) of the Act); *Teamsters Local 287 (Airborne Express),* 307 NLRB 980 (1992).

[32] *Newspaper Guild Local 82 (Seattle Times),* 289 NLRB 902, 911-912 (1988), *enforced in part, remanded sub nom. Pacific Northwest Newspaper Guild, Local 82 v. NLRB,* 877 F.2d 998 (D.C. Cir. 1989), *dec. after remand,* 1991 WL 1283168 (NLRB Aug. 6, 1991).

[33] *Oklahoma Fixture Co.,* 305 NLRB 1077, 1079 (1992) (one time building assessment not "periodic dues"); *Teamsters Local 439 (Shippers Imperial),* 281 NLRB 255, 258 (1986) (building fund assessment not periodic dues). *But see Welsbach Electric Corp.,* 236 NLRB 503, 515 (1978) ("work assessments" were in fact "dues" and were subject to collection provided there was valid checkoff authorization).

[34] Consider whether an assessment to cover the legal fees of a local union is collectible under a valid union security clause. In *NLRB v. Food Fair Stores, Inc.,* 307 F.2d 3, 11 (3d Cir. 1962), the court held that "assessments" were not "periodic dues" within the meaning of Section 8(a)(3) and 8(b)(2) of the Act. The Court stated:

> It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefit to be derived from membership to be made at fixed intervals for the maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues."

neither an employer nor a union may apply a union security clause to employees who are not members of the bargaining unit.[35]

In the construction industry, the question of whether so-called "market recovery" dues for union job targeting programs may be required pursuant to a valid union security clause has been the subject of litigation before the Board and courts. In *Electrical Workers Local 48 (Kingston Constructors),* 332 NLRB 1482, 1497 (2000), *modified by* 333 NLRB 963 (2001), *enforced*, *NLRB v. International Brotherhood of Electrical Workers, Local 48, AFL-CIO*, 345 F.3d 1049 (9th Cir. 2003), the Board held that a union could, pursuant to a union security clause, attempt to collect market recovery program dues that were based on an employee's earnings from employment on projects that were *not* covered by the Davis-Bacon Act. However, the union was found to have violated Section 8(b)(1)(A) by threatening employees with discharge for failing to pay market dues that were calculated based on their earnings on Davis-Bacon projects. *Id*. at 1502. In doing so, it upheld its prior decision in *Detroit Mailers Local 40 (Detroit Newspaper Publishers Association),* 192 NLRB 951, 952 (1971), which held that dues may be required "under a union security contract" so long as they "are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy."[36]

While finding that a union could legitimately collect market recovery dues from full members of the union pursuant to a union security clause, the Board in *Kingston Constructors* declined to decide "whether payments that support job targeting programs, such as the MRP, can be required of *Beck* objectors." 332 NLRB at 1496. In this case there was no employee whom the union sought to obligate to pay under union security who was also a *Beck* objector. *Id*. The Board went on to explain that market recovery dues could not be extracted from union members working on public Davis-Bacon projects because it would have violated public policy. 332 NLRB at 1496-1502. The Court of Appeals for the Ninth Circuit enforced the Board's order.[37]

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[35] *See e.g., Sheet Metal Workers Local 104 (Lux Metals, Inc.),* 322 NLRB 877, 878 (1997); *United Parcel Service,* 303 NLRB 326, 327 (1991), *enforced sub nom, Teamsters Nat. United Parcel Svc. Neg. Comm. v. NLRB,* 17 F.3d 1518 (D.C. Cir. 1994); *Brewery Delivery Employees Local Union 46 (Port Distributing Co.),* 236 NLRB 1175, 1178 (1978) (Where parties had an "oral agreement" not to apply union-security clause to casuals, union violated the Act by later attempting to apply clause to casuals even though it had not done so in the past for approximately 12 years.). Consider the implication of this point of law in light of the Board's recent decision in *Miller & Anderson, Inc.,* 364 NLRB No. 39 (2016), returning to the earlier Board precedent in *M.B. Sturgis, Inc.,* 331 NLRB 1298 (2000) of including temporary agency employees in bargaining units with regular employees, after a temporary hiatus in *Oakwood Care Center* (343 NLRB 659), which the Board found to have a practical effect "precisely the opposite of what Congress intended". 364 NLRB No. 39. slip op. at 8.

[36] The Board agreed with its ALJ that *Detroit Mailers* had impliedly overruled the Board's earlier decision in *Teamsters Local 959 (RCA Service Co.),* 167 NLRB 1042, 1045 (1967), which had defined the term "periodic dues" as it appears in the statute. 332 NLRB at 1495.

[37] *NLRB v. IBEW, Local 48, AFL-CIO,* 345 F.3d 1049 (9th Cir. 2003). The Ninth Circuit has also held that state legislative enactments barring "market recovery" or "job targeting" are preempted by the NLRA. *Idaho Building and Construction Trades Council, AFL-CIO v. Inland Pacific Chapter of Associated Builders and Contractors, Inc.* 801 F.3d 950 (9th Cir. 2013).

II. SECTION 14(b) AND STATE LAWS PROHIBITING UNION SECURITY AGREEMENTS

When Congress outlawed the closed shop, as part of the Taft-Hartley Amendments to the Act, and permitted parties under federal law to enter into "union shop" agreements, it also carved out, in Section 14(b) of the Act, an exception allowing for states or territories to enact legislation barring use of union security agreements within their boundaries.[38] 29 U.S.C. § 164(b). Section 14(b) provides that "Nothing in this subchapter 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."

Laws passed by the various states or territories banning union security agreements are referred to in the vernacular of labor laws as "right-to-work" or "open shop" laws. As of today, 28 states now prohibit union security agreements with Missouri having become the most recent one to do so.[39]

In dealing with issues arising under Section 14(b), our focus is often on federal preemption issues, although Congress has expressly insured, in Section 14(b), that state right-to-work laws are not preempted by federal law. Thus, the relevant areas of inquiry are usually the following: (1) what sort of arrangements qualify as union security agreements under 14(b); (2) what is the governing law; (3) which employers and their employees under the NLRA might nevertheless be exempt from state regulation under 14(b); (4) may political subdivisions of a state enact their own right-to-work laws; and (5) when do states under the guise of enacting state right-to-work legislation exceed their authority under 14 (b).

While, at first blush, the foregoing questions would appear to suggest that the law in the area of Section 14(b) is complicated and unsettled, it has, until recently, been fairly stable and unremarkable. The Supreme Court held that lesser forms of union security, such as an agency shop, are subject to regulation by the states under Section 14(b);[40] the NLRB does not have exclusive jurisdiction to determine if a state law falls within Section 14(b) and state courts are courts of competent jurisdiction to make such a determination;[41] and that in determining whether

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[38] At the time 14(b) was passed, there were already a number of states with either statutes or constitutional prohibitions. Such statutes were declared constitutional by the Supreme Court in a series of cases decided after the effective date of Section 14(b); the Court did not address the constitutionality of 14(b) itself. *See Lincoln Federal Labor Union, et al. v. Northwestern Iron & Metal Co. et al.,* 335 U.S. 525 (1949); *American Federation of Labor et al. v. American Sash & Door Co. et al.,* 335 U.S. 538 (1949). In the cited cases the Supreme Court rejected claims that state right-to-work laws violated the First Amendment of the U.S. Constitution.

[39] *See* Senate Bill 19 (SB191; 2/6/17). However, prior to the law's effective date on August 28, 2017, a coalition of labor organizations and their allies were successful in a petition drive to put the matter to a public vote. That vote, it now appears, will not occur until November of 2018. The other 27 states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

[40] *NLRB v. General Motors Corp,* 373 U.S. 734 (1963) (agency shop); *Retail Clerks v. Schemerhorn,* 373 U.S. 746 (1963) (*Schemerhorn I*) (agency shop).

[41] *Retail Clerks v. Schemerhorn,* 375 U.S. 96 (1963) (*Schemerhorn II*).

a particular state's right-to-work law is applicable to particular employers and their employees, the courts are to look to the predominant job site where the employees work and perform the majority of their tasks, not the state where they were initially hired.[42] However, in recent years, there have been some cracks in the law. One area is the power of Indian reservations to enact right-to-work type laws on their reservations and the power of political subdivisions of states to enact such legislation.

With respect to Native American reservations, in *NLRB v. Pueblo of San Juan,* 276 F.3d 1186 (10th Cir. 2002), the Court of Appeals for the Tenth Circuit affirmed the district court's denial of a declaratory judgment action[43] brought by the Board challenging the legality of a tribal government's ordinance prohibiting union security agreements for companies engaged in commercial activities on tribal lands. The court reasoned that tribal reservations are akin to federal enclaves where state right-to-work statutes have no play. 276 F.3d at 1191. That being the case, federal law is applicable, and the issue for the court is whether the sovereign authority of Native American tribes, which did not derive from the United States, was "divested" by Congress when it passed the NLRA. *Id.* at 1192-1193. The Court held that tribal statutes are entitled to a presumption of non-preemption by federal law and a federal court should conclude that Congress did not intend to divest tribes of their sovereignty absent a clear intent by Congress to do so. *Id.* at 1195. In short, the Tenth Circuit equated Native American tribes as akin to states and therefore entitled to comity. *Id.* Accordingly, the Native American tribe involved was entitled to enact and enforce a tribal law prohibiting union security agreements that were applicable to non-tribal employees of a non-tribal owned company performing commercial activities exclusively on the tribe's lands. *Id.* at 1196-1200.

The D.C. Circuit reached a contrary decision in *San Manuel Indian Bingo and Casino,* 475 F.3d 1306 (D.C. Cir. 2007). There, the court upheld the NLRB's assertion of jurisdiction over a Native American-owned casino, finding that the NLRA was applicable to such operations, even though owned by the tribe and operated exclusively on its reservation. 475 F.3d at 1314-1318. The court noted that operation of a casino is not a traditional governmental function and that most of the employees were non-Native American, and that the casino primarily catered to non-Native Americans. *Id.* at 1318-1319.[44]

With respect to the issue of whether political subdivisions of a state can enact right-to-work laws that apply solely within their jurisdiction, a panel of the Court of Appeals for the Sixth Circuit held, for the first time, that Hardin County, Kentucky could enact an ordinance prohibiting private employers subject to the NLRA from entering into collective bargaining agreements containing

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[42] *Oil, Chemical & Atomic Workers International Union, AFL-CIO, et al. v. Mobil Oil Corp., et al.,* 426 U.S. 407 (1976). In *Mobil Oil,* the Supreme Court held that the Texas right to work law did not apply to merchant seamen working on the high seas, even though most of these seamen were hired in Texas and resided in Texas. Following the Supreme Court's decision in *Mobil Oil,* federal courts held that state right-to-work laws may not be applied to private employers and their employees working exclusively on federal enclaves located within the state involved. *Lord v. Local Union No. 2088 Broth. Of Electric Workers,* 646 F.2d 1057 (5th Cir. 1981).

[43] 30 F. Supp. 2d 1348 (D.N.M 1998).

[44] The above discussion concerning tribal sovereignty may become moot if Congress passes the "Tribal Labor Sovereignty Act of 2017" (H.R. 986) which was passed by the House of Representatives on January 12, 2018 but failed to pass the Senate, on April 16, 2018, by a vote of 55 to 41.

union security provisions, even though Kentucky was not a right-to-work state at the time of the litigation. *UAW v. Hardin County Kentucky, et al.,* 842 F.3d 407 (2016).[45] *cert. denied,* 138 S.Ct. 130 (2017). The Court held that Hardin County, as a political subdivision of the State of Kentucky was included under 14(b)'s use of the term "state." *Id.* at 417. The opposite result was reached in a Seventh Circuit district court. *International Union of Operating Engineers, Local 399 et al. v. Village of Lincolnshire, Illinois et al.,* 228 F. Supp. 3d 824 (N.D.Ill. 2017).[46]

The last area of consideration involving state action are recent cases where the issue is whether a state, in enacting right-to-work legislation, has exceeded its authority under Section 14(b) of the Act by attempting to regulate matters within either the exclusive jurisdiction of the NLRB or of the federal courts. In *NLRB v. North Dakota,* 504 F. Supp. 2d 750 (D.N.D. 2007), the NLRB filed a declaratory judgment action against the State of North Dakota seeking a determination that a North Dakota statute requiring unions to charge nonmembers for grievance processing was preempted. North Dakota was and remains a right-to-work state that prohibits employers and unions from entering into union shop agreements. Yet, as part of the same statutory scheme which forbids any form of compulsory union membership, a companion section required that unions charge employees who elected not to either join the union or pay dues to the union representing their bargaining unit for any expenses incurred in representing the employee in processing grievances, including the expense of arbitration. 504 F. Supp. 2d at 752-753.[47] Given a union's statutory obligations under federal law to fairly represent both union members and nonmembers equally,[48] the district court agreed with the Board that the North Dakota statutory section at issue was preempted by federal law under the *Garmon* doctrine.[49] *Id.* at 755. The Court reasoned the North Dakota statute's requirement that unions collect "fair share" costs of grievance processing either actually or arguably trammeled on rights protected by Section 7 of the Act. Thus, in a right-to-work state, any form of compulsory unionism is prohibited. Requiring a union to charge nonmembers such fees would violate an employee's right, under Section 7 of the Act, to refrain from joining a union or supporting it financially except on a voluntary basis, and would force the employees to join the union. *Id.* at 756-758.

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[45] The District Court found that a local right-to-work ordinance was preempted. 160 F. Supp. 3d 1004 (W.D.Ky. 2016). The decision is arguably moot now that Kentucky became a right-to-work state in January of 2017.

[46] The Village of Lincolnshire appealed the case to the Seventh Circuit Court of Appeals on February 13, 2017, where the case is presently pending (Case No. 17-1320 and 1325). The appeal in that case was argued before a Seventh Circuit panel on March 27, 2018. *International Union of Operating Engineers, Local 399 et al. v. Village of Lincolnshire, Illinois et al.* No. 17-1325 Dkt. #41 (7th Cir. March 27, 2018).

[47] The legality of agency shops and other "fair share" agreements have been discussed previously at note 2 *supra.*. Interestingly, in *Service Workers 1192 (Buckeye Florida Corp.),* 362 NLRB No. 187 (2015) at n.1, the Board sought briefs from both the parties and amici on the issue of whether it should overrule its prior decision in *Machinists, Local 697 (The H.O. Canfield Rubber Co.),* 223 NLRB 832, 834-835 (1976) and its progeny, which held that it was an unfair labor practice for a union to refuse to process the grievance of a nonmember unless he agreed to pay the union the costs of processing his grievance further. In *H.O. Canfield,* the nonmember employee worked in a right-to-work state. Despite raising the issue presented by the free rider issue again, the case in *Buckeye Florida Corp.* was settled and withdrawn by the parties, thus preventing the Board from opining on the issue again.

[48] *See Electrical Workers (IBEW) v. Foust,* 442 U.S. 42, 47 (1979).

[49] *San Diego Bldg. Trades Council, et al. v. Garmon,* 359 U.S. 236 (1959). Under *Garmon,* a state statute or ordinance is preempted under the NLRA if it attempts to regulate conduct which is arguably protected or arguably prohibited by the NLRA. *Id.* at 244-245.

Very recently, in *Village of Lincolnshire,* a federal district court struck down a local ordinance that allowed employees to revoke a prior checkoff authorization at any time, and prohibited an employer and union from entering into a hiring hall provision[50] on various federal preemption grounds. 228 F.Supp.3d 824. Thus, the court found that the provision requiring that an employee checkoff authorization be revocable at will was preempted by federal law. Section 302(c)(4) of the Labor-Management Relations Act of 1997 specifically provides that an employee's written checkoff authorization shall be in writing but "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. 186(c)(4). The Court decided *Village of Lincolnshire* on "conflict preemption" grounds. 228 F.Supp.3d 824. It found that the local ordinance was in direct conflict with the express provisions of federal law in an area involving labor relations which, the Court said, was sufficient to preempt state regulations, citing *Patriotic Veterans, Inc. v. Indiana,* 736 F.3d 1041, 1049 (7th Cir. 2013) (compliance with both federal and state regulations is not physically possible). *Id*. Also central to the court's reasoning was the court's legally correct view that a checkoff authorization is not a form of compulsory unionism and is therefore not a union security device that is subject to regulation by a state or territory under Section 14(b).[51] In the Court's words:

> The LMRA does not require employees to use a check-off provision for [payment] of union dues – it merely enables them to do so. Employer's cannot deduct the dues automatically but instead must have written authorization from each employee. Thus check-off arrangements do not compel employees to unionize; they simply make it easier for those who are union members to pay their dues . . . giving an employee the choice whether to enter into a dues check-off arrangement, and permitting the arrangement to be irrevocable for a certain period of time, does not amount to compulsory unionism.

Id. at 839-840. The court concluded that the local ordinance "imposes more stringent requirements than federal law" and therefore "conflicts with the LMRA," a conflict not authorized by Section 14(b). *Id*. at 840.

With regard to the anti-hiring hall provision, the court also found that hiring hall arrangements do not constitute a form of "compulsory unionism," which is the only area in the field of labor relations that states are expressly authorized to regulate for employers and unions subject to the NLRA. *Id*. at 838. Thus, aside from the fact that the Village, as a political division, lacked any authority to regulate union security agreements under 14(b), it certainly had no authority to regulate collective bargaining agreement provisions that are permissible under federal law and that do not constitute a form of union security agreement.[52]

The Court of Appeals for the Sixth Circuit earlier reached the same result on state regulation of checkoff and hiring hall arrangements as the district court did in *Village of*

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[50] A hiring hall arrangement is a form of referral system in which a union serves as a source for the referral of qualified applicants for employees using the hall. It is not, legally speaking, a form of union security agreement. See discussion in Section III.A., *infra*.

[51] *See Shen-Mar Food Products,* 221 NLRB 1329, 1330 (1976) (dues checkoff authorizations are exclusively a matter of federal law and therefore state law is preempted).

[52] 228 F. Supp. 3d 824, 839.

Lincolnshire. In *UAW v. Hardin County,* the same ordinance which that court upheld with respect to legality of prohibiting union security arrangements within the county was deemed preempted by federal law with respect to the regulation of both checkoff and hiring hall provisions in collective bargaining agreements between an employer and union subject to the NLRA. 842 F.2d at 420-422. The Court's reasoning was based on what is commonly referred to as field preemption for federal constitutional purposes – that Congress enacted the NLRA for the purpose of creating a uniform scheme of federal regulation in a particular field of law. 842 F.3d at 412.[53] That scheme consists essentially of three parts: (1) protection of certain activities, when not accompanied by violence; (2) prohibition of other conduct or practices; and (3) conduct that Congress intended to be left to the "free play of economic forces." *Id.* The former two categories fall under the *Garmon* doctrine, and the third category is commonly referred to as *Machinists*[54] preemption. The Sixth Circuit, unlike the district court in *Village of Lincolnshire*, appears to strike down the prohibition of hiring hall and checkoff provisions on field preemption, rather than applying the *Garmon* doctrine and conflict preemption as discussed in *Village of Lincolnshire*.

It seems clear, at least in the courts, that the public has not heard the end of the debate on what 14(b) reaches. There may yet be a constitutional challenge to 14(b) itself.[55] Of course, given the makeup of the current Congress, and the potential power of the current president to appoint more than the one Supreme Court justice he has previously appointed, it is entirely possible that the language of 14(b) may be amended or that Section 8 of the NLRA will be amended to eliminate all forms of union security, and any doubts about its constitutionality will be resolved favorably by the courts.

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[53] As the court correctly noted, there are three types of federal preemption all of which turn on Congressional intent. Those are: (1) express or explicit language in a federal statute; (2) field preemption based on pervasive federal regulation of a particular field; and (3) conflict preemption as discussed earlier. *Id.* at 418.

[54] *Machinists Lodge 76 v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 140 (1976).

[55] In *Sweeney v. Pence,* 767 F.3d 654, 671 (7th Cir. 2014), the Court of Appeals for the Seventh Circuit, over a strong dissent by Chief Judge Wood, rejected a union's challenge to Indiana's newly-enacted right-to-work law on federal constitutional grounds. Chief Judge Wood argued that the new law constituted an unlawful taking of property under the 5th Amendment of the U.S. Constitution. *Id*. at 683-684. Judge Wood charted a road map for making such challenges. The argument under the takings clause is that 14(b), in essence, amounts to the use of governmental power to force a union, as a private party, to provide services or benefits having a monetary value to another private party without compensation. *Id.* at 674-684. At least one state court, using the same analysis, struck down the newly-enacted Wisconsin right-to-work law. In *Int'l Assoc. of Machinists Dist. 10 and its Local Lodge 1061, et al.* (Dane County Cir. Ct. Case No. 15CV628), the plaintiffs challenged the entirety of Act I as a violation of the takings clause of the Wisconsin Constitution. The circuit court granted a motion for summary judgment in favor of the plaintiffs on April 15, 2016, and enjoined the state, the attorney general and the Wisconsin Employment Relations Commission from enforcing the statute. The Wisconsin Court of Appeals lifted the stay, pending resolution of the state's appeal, on May 24, 2016. *Int'l Assoc. of Machinists Dist. 10* 2016AP820 (order lifting stay). On September 19, 2017, the Court reversed the judgment and remanded the case. 903 N.W.2d 141 (2017). This theory is also being tested in the Kentucky Supreme Court. *Zuckerman v. Bevin, 2018-SC-000097.*

III. MATTERS IN THE CONTRUCTION INDUSTRY CLOSELY RELATED TO UNION SECURITY

Whenever the discussion of union security is raised in the construction industry, several closely related subjects come to mind. One is the subject of union hiring halls and the other is the continued inclusion, in construction industry bargaining units, of those who often qualify as supervisors under Section 2(11) of the Act and the application of union security to them. These subjects are discussed immediately below.

A. UNION HIRING HALLS AND OTHER REFERRAL ARRANGEMENTS

"In ... industries in which employment is characterized by a succession of jobs of short duration – for example, the construction and the maritime industries – hiring is commonly done through a hiring-hall referral system in which the employer relies upon the union to refer craft or industry employees on an as-needed basis." John E. Higgins, Jr., *The Developing Labor Law* 26-63 (7th ed. 2017). As indicated above, this was clearly contemplated by Congress when it gave the construction industry the exemptions from the Act that are codified in Section 8(f) of the Act. *See* Section 8(f)(3 and (4). Hiring halls were, however, suspect from the very beginning as promoting and perpetrating discrimination on the basis of union membership. Nevertheless, the Supreme Court upheld their legality under the Act and held that neither the Board nor the courts should presume that they operated in a discriminatory manner absent proof of actual discrimination. *Teamsters Local 357 v. NLRB,* 365 U.S. 667, 675 (1961). *See also, NLRB* v. *News Syndicate Co.,* 365 U.S. 695, 702 (1961) (Affirming finding that there was no discrimination in actual hiring and that "hiring system in general…[did not]] encourage union membership.") Thereafter, it has been an institutional given under the Act that hiring halls and other types of referred arrangements perform a legitimate function in the unionized construction industry for both employers and unions:

> [T]he [National Labor Relations Board] reaffirmed the legitimate function of hiring halls as employment agencies, particularly in fields 'characterized by short-term hirings of individual work[ers] who form a general pool of employees serving a large number of separate employers…The Board thus endorsed the hiring hall as a means 'to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual work[ers] and haphazard uneconomical searches by employers.'

Pittsburgh Press Co. v. *NLRB,* 977 F.2d 652, 656 (D.C. Cir. 1992) (citations omitted).

Hiring halls[56] essentially come in two varieties: exclusive and non-exclusive hiring halls. The former has been, to date, the most common type in the construction industry. In the exclusive hiring hall, the union serves as the exclusive or sole source for all referrals for hire. An employer bound to use a hiring hall through its labor agreement with a union must hire all of its employees through the union's hiring hall and, generally speaking, must exhaust the hall's resources before it is free to hire employees from other sources. *NLRB* v. *Local 334*, *Laborers Int'l Union,* 481 F.3d 875, 880 (6th Cir. 2007) ("When a collective agreement calls for an exclusive hiring hall, under which an employer exclusively hires employees referred by the union, the employer or union may

[56] The term "hiring hall" is used to broadly connote any type of referral services operated by a union.

enforce the terms of the agreement against a union member unless the hiring hall is administered in a discriminatory or arbitrary fashion. Conversely, when no collective agreement for a hiring hall exists, the employer or union cannot require a prospective employee to use the hiring hall because there is no agreement to enforce" (citations omitted)). An exclusive hiring hall may be shown by express contract language (which is normally the case) or by practice. *Laborers Local 334 (Kvaerner Songer),* 335 NLRB 597, 599 (2001).

Whether it is an unfair labor practice proceeding, a lawsuit under the anti-discrimination laws, or a lawsuit concerning a union's duty of fair representation, the burden is on the person or party asserting that an exclusive hiring hall exists to prove its case. *Kvaerner Songer, supra; Carpenters Local 537 (E.I. Dupont),* 303 NLRB 419, 429 (1991). That the employer has the right to request individuals by name or to hire employees directly, if the union is unable to refer an employee after a specified period of time has elapsed since the employer's request, does not detract from the existence of an exclusive hiring hall arrangement. *Id.* Ultimately, the determination of whether the arrangement between an employer and a union constitutes an exclusive hiring hall, or a nonexclusive hiring hall "is determined by looking at the totality of the circumstances present in the case, including the contract between the union and employer, the interpretation of that contract by the parties, and the hiring practices followed by the union and employer." *NLRB* v. *Local 334*, *Laborers Int'l Union, supra,* 481 F.3d at 881.

With the operation of an exclusive hiring hall comes the responsibility to operate it in a nondiscriminatory manner. *IATSE Local 838 (Freeman Decorating Co.)*, 364 NLRB No. 81 (2016) slip op. at 4 (when union operates an exclusive hiring hall, it has a duty of fair representations to all applicants using the hiring hall, regardless of union membership; duty of fair representation includes the duty to operate the exclusive hiring hall in a fair and impartial manner, including the use of referral rules that are neither arbitrary nor discriminatory) (citing *Boilermakers Local 374 (Combustion Engineering),* 284 NLRB 1382, 1383 (1987) *enforced, Boilermakers Local 374 v. NLRB,* 852 F.2d 1353 (D.C. Cir. 1988)). This simply means that the union cannot refuse to refer employees for employment based on lack of union membership,[57] or

[57] Nor can a union give priority in referrals based on the length of union membership, and an employer's acquiescence in an unlawfully determined seniority system that forms the basis for recalls or referrals to employment violates the Act. *Reading Anthracite Co.,* 326 NLRB 1370, 1371 (1998). However, an employer and union in the construction industry do not violate Section 8(a)(3) and Sections 8(b)(1)(A) and (2) in the operation of an exclusive hiring hall which grants preferences in referrals based on length of service with an employer signatory to a collective bargaining agreement with the union or residency in a geographic area. *Interstate Electric Co.,* 227 NLRB 1996, 1998 (1977); *Local Union No.* 68, *IBEW (Howard Electric Company),* 227 NLRB 1904, 1905 (1977). The Tenth Circuit has specifically disagreed with the Board's views in *Interstate Electric* and *Howard Electric*. *Paul H. Robertson v. NLRB*, 597 F.2d 1331 (10th Cir. 1979). Nonetheless, the Board continues to adhere to its position in those cases. *Construction Building Materials & Misc. Drivers Loc. 83 (Associated General Contractors of Arizona, et al.)*, 243 NLRB 328, 330 n.8 (1979); *Local Union 469, Plumbers, et al. (Mackey Plumbing Co.)*, 228 NLRB 298, 322 (1977).

on arbitrary or invidious considerations such as race or sex,[58] family relationship,[59] personal animosity,[60] internal union political opposition,[61] or in violation of the contractual requirements[62] it has negotiated with employers who are party to the collective bargaining agreement and who are contractually required to use the hiring hall.[63] Indeed, the Board has held that when a union deliberately "departs from the rules governing the operation of its hiring hall . . . [s]uch a deliberate departure constitutes arbitrary, discriminatory, or bad faith conduct in violation of the duty of fair representation, and violates Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function." *Electrical Workers Local* 48 *(Oregon-Columbia Chapter of NECA),* 342 NLRB 101, 105 (2004), *recons. granted in part, modified in part,* 344 NLRB 829 (2005). *See also, Carpenters Local 1507 (Perry Olsen Drywall, Inc.)* 358 NLRB 1, n.1 (2012)*; Steamfitters Local* 342 *(Contra Costa Electric),* 336 NLRB 549, 550, *petition for review denied sub nom. Jacoby* v. *NLRB,* 325 F.3d 301 (D.C. Cir. 2003). The Board in *Oregon-Columbia* held that making an exception in the hiring hall's dispatch rules for union salts was not necessary to the effective performance of the union's representative function. 342 NLRB at 105-107. Compare, however, the Board's decision in *Oregon-Columbia* with its decision in *Sheet Metal Workers Local* 27 *(Sheet Metal Constructors Ass'n),* 316 NLRB 419, 422 (1995), which upheld a departure from hiring hall rules, which had been collectively bargained, that authorized the union to take whatever steps were necessary "in order 'to capture' work for its members."

What about those situations where the failure to refer is due to inadvertence or negligence? The Board's current position is that an inadvertent or negligent failure to dispatch an individual employee, *i.e.,* the dispatch of an employee with lower priority in referral in violation of the hiring hall's specific rules does not violate the Act. *Steamfitters Local 342 (Contra Costa Electric),* 329

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[58] *Stagehands Referral Service, LLC,* 347 NLRB 1167, 1170 (2006) ("Discrimination for invidious, capricious or arbitrary reasons (such as race, sex, citizenship, or other protected classifications) also violates Section 8(b)(1)(A) and (2)."); *Painters Local 1066 (W.J. Siebenoller, Jr. Paint Co.),* 205 NLRB 651 (1973) (race); *Pacific Maritime Association,* 209 NLRB 519 (1974) (sex). Very recently, the Board remanded a case involving a female charging party because the ALJ, in making credibility resolutions, relied in part on sex stereotyping to discredit the charging party's testimony. *Longshoremen's Ass'n Local 28 (Ceres Gulf, Inc.)*, 366 NLRB No. 20 (2018).

[59] *Local 521 (Huntington Plumbing),* 301 NLRB 27 n.2 (1991), *enforced,* 958 F.2d 368 (4th Cir. 1992).

[60] *Operating Engineers Local 150 (Wi/bros Energy),* 307 NLRB 272, 276 (1992); *Ironworkers Local 15 (Gateway Industries, Inc.),* 291 NLRB 369, 371-372 (1988).

[61] *Local 808, Carpenters (Building Contractors Assn.),* 238 NLRB 735, 741 (1978).

[62] *See e.g., Teamsters Local 186 (Associated General Contractors),* 313 NLRB 1232, 1234 (1994) (placing former union's business agent at the top of referral list and referring him ahead of other registrants violated Section 8(b)(2) of the Act). Moreover, operation of an exclusive hiring hall carries with it the obligation to provide registrants with information and access to job referral lists. *See Plumbers Local* 32 *(Anthony Construction Co.),* 346 NLRB 1095, 1096 (2006), and cases cited therein.

[63] In addition, the union cannot refuse to refer an employee for failure to pay any internal union fee or assessment. *Ironworkers Local* 433 *(Steel Fabricators Assoc.),* 341 NLRB 523, 524-525 (2004), *enforcement denied in part,* 2007 WL 186293 (9th Cir. Jan. 19, 2007). However, the Board has upheld a union's right to maintain an attendance rule that conditioned the right of employees using the hiring hall on payments of assessment to the union for failure to comply with the rule. *IATSE Local 838 (Freeman Decorating)* 364 NLRB No. 81 (2016), slip op. at 5.

NLRB 688, 689 (1999),[64] *enforcement denied sub nom. Jacoby* v. *NLRB,* 233 F.3d. 611 (D.C. Cir. 2000).[65]

Lastly, in determining referrals, a union may use objective criteria[66] such as skill and experience[67] or proficiency tests,[68] provided they are not applied discriminatorily. A union operating an exclusive hiring hall may change its rules governing referrals, but must make a good faith effort to provide timely notice of the changes to reach all those using the hiring hall. *Sheet Metal Workers Local 19*, 321 NLRB 1147 (1996); *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). The union must also supply sufficient information to hiring hall users to determine their respective place on the referral list, or to determine whether the hiring hall is being operated on a nondiscriminatory basis. This may include such information as names, addresses, telephone numbers of list registrants, dispatch records, dates of referral and out-of-work lists. *Teamsters Union No. 200 (Bechtel Construction Co.)*, 357 NLRB 1844, 1851 (2011).

A union may lawfully charge a permit fee to nonmembers for use of the hiring hall, as long as the fee is properly chargeable to the operation of the exclusive hiring hall and the policy of existing contracts. *See, e.g.*, *NLRB v. Local 138, International Union of Operating Engineers, AFL-CIO* 380 F.2d 244 (2nd Cir. 1967). The same general rule of law applies in right-to-work states. *Simms v. Local 1752, Int'l Longshoremen Ass'n*, 838 F.2d 613 (5th Cir. 2016). However, the fee must represent the nonmember's pro-rata share of operating the hiring hall. *J. J. Hagerty, Inc.,* 153 NLRB 1375, 1377 (1965), *enforced,* 385 F.2d 874 (2nd Cir. 1967), *cert. denied sub. nom. Operating Engineers Local 138 v. NLRB,* 391 U.S. 904 (1968). *See also, Morrison Knudsen Co., supra.* n. 66 at 251-252.

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[64] The Board overruled *Iron Workers Local 118 (California Erectors),* 309 NLRB 808 (1992), and other cases that held to the contrary.

[65] The Court of Appeals initially denied enforcement of the Board's decision and remanded the case to the Board for reconsideration of the Court's position that the Act imposed a "heightened duty" of fair representation in the exclusive hiring hall context. On remand, the Board reaffirmed its earlier view that inadvertent mistakes in a union's operation of an exclusive hiring hall that are the result of mere negligence do not violate a union's duty of fair representation. *Steamfitters Local* 342 *(Contra Costa Electric),* 336 NLRB 549, 552 (2001). Nevertheless, the Board made clear that gross negligence - conduct which shows a deliberate or reckless indifference to an employee's interest - could be a breach of the duty of fair representation. *Id*. at 553 n.9.

[66] *Stagehands Referral Services LLC*, 347 NLRB at 1170 ("A union commits an unfair labor practice if it administers an exclusive hiring hall arbitrarily or without reference to objective criteria, even absent a showing of animus against non-members.") Such written criteria may be set forth in writing within the applicable collective bargaining agreement, but also may be based on oral understandings or a course of conduct or past practice between the parties to a collective bargaining agreement. *See Teamsters Union No. 200 (Bechtel Construction Co.)*, 357 NLRB 1844, 1852 (2011), and cases cited therein.

[67] In *Morrison Knudsen Co.,* 291 NLRB 250 (1988), a union that referred applicants on the basis of their skills and experience "as determined in the subjective judgment" of a union representative did not violate the Act. Rather, the Board held that while "[t]hese practices may lend themselves to abuse, allowing a union to disguise favoritism or patronage in referrals; they are not, however, sufficient in themselves to prove such abuse."

[68] *Local* 367, *IBEW/National Electrical Contractors,* 134 NLRB 132, 135 (1961) (local union's requirement of proficiency examination administered by union for higher priority in referral not unlawful where applied to all employees uniformly).

In contrast, in a nonexclusive hiring hall arrangement, the union is not the exclusive source for new hires and its members are free to solicit work on their own; the employer is free to hire whomever it wants and has no obligation to hire employees referred to it by the union. *See NLRB v. Local 334 Laborers Int'l Union, supra,* 481 F.3d at 882; *Brenner* v. *Local 514*, *United Brotherhood of Carpenters and Joiners of America,* 927 F.2d 1283, 1286 n.2 (3d Cir. 1991). No duty of fair representation attaches to a union's operation of a nonexclusive hiring hall. *Teamsters Local 460 (Superior Asphalt),* 300 NLRB 441 (1990). The rationale for this finding is that a union, in operating a nonexclusive hiring hall, "lacks the power to put jobs out of the reach of workers." *Id.* Moreover, the union is not required to make referrals in a non-discriminatory manner or to follow objective criteria in making referrals. *Stage Employees IATSE, Local 142 (SMG Worldwide)*, 361 NLRB 1398, 1401 (2014).

A union violates Section 8(b)(1)(A) of the Act in the operation of a nonexclusive hiring hall when it denies referrals to employees for engaging in activities protected by Section 7 of the NLRA. *Laborers' Int'l Union of North America, Local Union No. 91 (Council of Utility Contractors, Inc., et al.),* 365 NLRB No. 28 (2017) (removal of employee from union's referral list unlawful where based on the employee's protected internal union activities); *Carpenters Local* 687 *(Convention & Show Services),* 352 NLRB 1016, 1017 (2008), *enforcement denied, Mich. Reg. Council of Carpenters, Local 687,* 2010 WL 6835345 (D.C. Cir. 2010); *Carpenters Local 370 (Eastern Contractors Ass'n),* 332 NLRB 174 (2000). In addition, a union also violates Section 8(b)(1)(A) and (2) of the Act when it insists that an employer terminate or refuse to hire an employee or employees, and replace them with individuals referred by the union. *Kvaerner Songer, Inc.,* 343 NLRB at 1346 (2004); *Carpenters Local 1456/Underpinning and Foundation Constructors, Inc.,* 306 NLRB 492, 494 (1992), *enforced*, 993 F.2d 1533 (2nd Cir. 1993).[69] If the employer involved acquiesces to the union's demands, it violates Section 8(a)(1) and (3) of the Act. *Id.* In this regard, it is not necessary that a union threaten or coerce an employer into refusing to hire a particular employee or group of employees; it is enough that the union makes the request and the employer complies with the union's request for both to violate the Act. *Kvaerner Songer, Inc.*, 335 NLRB at 600. *See also Crouse Nuclear Energy Services, Inc.,* 240 NLRB 390, 395 (1979).

A hybrid version of a hiring hall/referral system that purports to give control over initial hiring to the employer is a mobility clause provision. Such clauses allow the employer to directly hire as many employees in the signatory craft, other than foremen or job stewards, as it wants, without resorting to the use of the union, out-of-work list, or referral service, provided all those hired are members of the union. If the employer declines to do so, or fails, then the remaining employees must be hired through the union's referral service. The Board has consistently condemned such clauses as violative of Section 8(b)(1)(A) of the Act and 8(a)(3) of the Act. *The Cement League*, 363 NLRB No. 117, (2016) slip op. at 2-3; *Carpenters Local 43 (McDowell Building & Foundation)*, 355 NLRB 632 (2010); *Bricklayers Local 1 (Denton's Tuckpointing)*, 308 NLRB 350, 351 (1992); *Plasterer's Local Union No. 32 (McCray and Co.)*, 223 NLRB 486, 491 (1976). In *Cement League, supra*, the Board invalidated the parties' mobility clause, even

[69] In *Laborers' Local 190 (VP Builders, Inc.),* 355 NLRB No. 90 (2010) the Board rejected the Administrative Law Judge's conclusion that the Union had violated this principle of law because the employer was not bound by a project labor agreement ("PLA") that required the union to be the exclusive source of all referrals. The Board's opinion is worth reviewing on the issue whether an employer without a union contract can be bound to an exclusive hiring hall through the auspices of a PLA.

though the clause was approved by a federal judge overseeing a consent decree imposed on one of the unions in the case pursuant to the Racketeer Influenced and Corrupt Organizations ("RICO") Act. The Board reasoned that it was not bound by the federal judge's approval of the collective bargaining agreement with the disputed provision because the Board was not part of the RICO proceeding, and further held that its invalidation of the unlawful clause did not interfere with the federal court's anti-corruption objectives.

The foregoing sets forth the general labor law principles surrounding a union's maintenance of various types of hiring or referral services. These principles provide a reasonable analogue for analysis of issues in the broader field of employment discrimination.[70] It is self-evident that where a union and employer have agreed in a collective bargaining agreement to a term or provision that is discriminatory on it face, both will be liable for its effects on a protected class. Today both unions and employers are sophisticated, and well-advised legally, so as to avoid such outright risks. Nevertheless, other facially neutral terms that an employer and union jointly negotiate may give rise to joint liability. *See, e.g., Donnell* v. *General Motors Corp.,* 576 F.2d 1292, 1297-1298 (8th Cir. 1978) (jointly-established apprenticeship program that imposed a high school diploma requirement for entrance into the program had adverse impact on minorities and women), *aff'd,* 676 F.2d 705 (8th Cir. 1981); *EEOC* v. *Local 350 Plumbers and Pipefitters,* 998 F.2d 641, 643-646 (9th Cir. 1993) (reversing summary judgment for defendant union where hiring hall prohibited referral of retirees currently receiving retirement benefits in order to enhance work opportunities for employees with dependents and greater financial needs).

As discussed above, when a union causes an employer to discriminate under the NLRA, in the operation of a hiring hall, both the union and the employer may be liable. While such liability is normally joint and several, these are situations where only the union may be liable. Thus, for years, the Board imposed a rule of strict liability in exclusive hiring hall situations, reasoning that when an employer delegates hiring to a union by utilizing a union referral system to obtain its employees, it was legally responsible if the union operated the system in a discriminatory manner. This was so even if the employer had *no* actual knowledge of the union's discrimination. *Frank Mascali Construction GCP Co.,* 251 NLRB 219, 222 (1980), *enforced,* 697 F.2d 294 (2d Cir. 1982); *Q.V.L. Construction Inc.,* 260 NLRB 1096 (1982).

In *Wolf Trap Foundation,* 287 NLRB 1040, 1041 (1988), *decision supplemented,* 289 NLRB 760 (1988), the Board held that it would no longer hold employers jointly liable for hiring hall violations where the employer has ***no*** actual knowledge of a union's discriminatory conduct. However, even where the employer has no actual knowledge of a union's unlawful conduct, liability will still be imposed where the employer is "reasonably charged with notice thereof." *Id.* Thus, while the hiring hall arrangement in *Wolf Trap* was facially lawful, the union was maintaining an unlawful closed shop arrangement in the labor agreement. This was sufficient for certain employers to be charged with notice that the union, in operating a hiring hall, "might be preferring its own members to the exclusion of nonmembers." *Id.*

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[70] *See e.g., Daniels* v. *Pipefitters Local Union No. 597*, 945 F.2d 906, 914-921 (7th Cir. 1991) (Duty of fair representation and Section 1981 claim for racial discrimination in referrals and retaliation); *Pennsylvania* v. *Local 542*, *Operating Engineers,* 469 F.Supp. 329, 339 (E.D. Pa. 1978), *aff'd per curiam,* 648 F.2d 922 and 648 F.2d 923 (3d Cir. 1981), *rev'd on other grounds, Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (racial discrimination in referrals).

Obviously, *Wolf Trap* makes clear that when the employer is fully aware that a union's exclusive hiring hall is being run on a discriminatory or unlawful basis, the employer will also be liable to the employee for the union's unlawful conduct. The question is, where does that leave the employer if - at the employer's request - the union refuses to change its operation of the hiring hall? Does the employer then have the right, perhaps even the obligation, to abrogate its agreement to use the hiring hall? As discussed below, labor law does not give an employer the right to unilaterally repudiate the terms of its labor agreement based on a claim of discrimination by the union. In *Handy Andy,* 228 NLRB 447 (1977), and subsequent cases, the Board has declined to entertain claims of union discrimination based on race or other factors as a defense to an employer's unfair labor practice. *See Chicago Tribune Company,* 298 NLRB 1082, 1084 n.2 (1990) ("It is well settled that allegations of racial and other types of discrimination are properly cognizable under the duty of fair representation and must be adjudicated under Sec. 8(b) of the Act and cannot constitute a defense to an 8(a)(5) proceeding.")[71] As the Board further stated in *Heavy Lift Services, Inc.,* 234 NLRB 1078, 1079 (1978), *enforced, NLRB* v. *Heavy Lift Services, Inc.,* 607 F.2d 1121 (5th Cir. 1979):

> For reasons fully explained in [earlier] cases, we have concluded that the Board is not under a constitutional mandate to consider allegations about a union's discriminatory practices in either a representation proceeding or when raised by a Respondent as an affirmative defense to a complaint charging it with violating the Act by refusing to bargain with the collective bargaining representative of its employees.

Despite the Board's previously expressed view, at least several circuits have indicated that sufficient evidence of a union's discrimination along racial lines would serve as a defense in a refusal to bargain case under the NLRA. *See NLRB* v. *Chicago Tribune Co., supra; NLRB* v. *Heavy Lift Servs., Inc., supra; NLRB* v. *Mansion House Mgmt. Corp.,* 473 F.2d 471 (8th Cir. 1973). It can be argued that these cases are, on their facts, limited to refusal to bargain cases arising out of representation case proceedings under Section 9(a) of the Act.[72]

Where employment discrimination claims arise beyond the NLRA, the results may be different. *See*, *e.g., Guerra* v. *Manchester Terminal Corp.,* 498 F.2d 641 (5th Cir. 1974) overruled on other grounds, *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) (Both union and employer violated Title VII in discriminatory transfer of employee, but the union was required to pay all back pay because the transfer of the plaintiff employee was procured at its insistence).

Obviously, where the union operates a nonexclusive hiring hall, two issues present themselves: (1) can the union be held liable for the employer's discriminatory actions in refusing to hire employees on the basis of race or even age, including those referred by the union but rejected by the employer; and (2) can the employer be liable for the union's operation of a discriminatory nonexclusive hiring hall? With regard to the former question, the current status of the law is that a union that has ***no*** control over the hiring process, as is the case with a nonexclusive

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[71] The Board's decision in *Chicago Tribune* was enforced on appeal. *NLRB* v. *Chicago Tribune Co.,* 943 F.2d 791, 798 (7th Cir. 1991).

[72] 29 U.S.C. § 159(a).

hiring hall, probably should not be liable for the employer's discriminatory acts in the hiring process, unless it can be shown that the union either actively supported or instigated the discriminatory conduct. *Thorn* v. *Amalgamated Transit Union,* 305 F.3d 826, 832-833 (8th Cir. 2002). By the same token, it seems apparent that an employer utilizing a nonexclusive hiring hall context will only be liable if it acquiesces in union referrals that it knows are unlawful or discriminatory.

B. UNION SECURITY AND THE INCLUSION OF SUPERVISORS IN BARGAINING UNITS IN THE CONSTRUCTION INDUSTRY

Even before the passage of the NLRA, supervisors were members of various unions and the bargaining units they represented in the construction industry. Indeed, even after the Act's passage, and "[b]efore the enactment of the Taft-Hartley Law, the Board included foremen in the same unit with production and maintenance employees when such inclusion was customary in the industry." *Nassau and Suffolk Contractor's Ass'n, Inc.*, 118 NLRB 174, 181 (1957) and cases cited therein at note 23.[73]

In 1947, Congress passed the Taft-Hartley Act amendments to the NLRA, specifically enacting Section 2(11) of the Act, which defines those individuals who qualify as "supervisors" under the Act, and amending the definition of employee in Section 2(3) of the Act to exclude "supervisors." Congress also added Section 14(a) which provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S.C. § 164(a). The import of these sections is to exclude supervisors from a bargaining unit certified by the Board[74] and to allow an employer to refuse to bargain with any labor organization concerning terms or conditions of employment for supervisors[75] while at the same time allowing supervisors to remain members of their labor

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[73] "[I]n quite a number of industries foremen are members of the same union and are included in the same bargaining contract as rank-and-file production workers. This is particularly true in the building trades." 118 NLRB at 180. In a 1943 Department of Labor Bulletin cited by the Board, the DOL found that nearly all building trade unions require foremen to be union members. *Id.* at n. 21-22.

[74] According to the Supreme Court, the legislative history behind the enactment of both Sections 2(3) and 14(a) of the Act was a response to the Board's decision in *Packard Motor Car Co.*, 61 NLRB 4, 7, 26 (1945), finding that various foremen, even though supervisory, were employees within the definition of "employee" under Section 2(3) of the Act and directing an election in a separate unit of supervisory employees. The Board's decision was affirmed by the Supreme Court in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). *See Florida Power and Light v. Electrical Workers Local 641, et al.*, 417 U.S. 790, 809 n.19 (1974). Obviously, the holding in *Packard Motor Car Co.* was superceded by the passage of Section 2(11) of the Act.

[75] The Board has long held that a union may not insist to impasse on including supervisors in a bargaining unit or strike to obtain a clause requiring that all foremen be union members or be selected from among members of the unit represented by the Union. *Int'l Typographical Union, Local 38 (Haverhill Gazette Co.)* 123 NLRB 806, *modified Int'l Typographical Union v. NLRB*, 278 F.2d 6 (1st Cir. 1960); *Portland Stereotypers', etc.*, *Union No. 48 (Journal Publishing Co., et al.)* 137 NLRB 782, 787 (1962). As the Board said in *Deaton Truck Lines, Inc.*, 143 NLRB 1372, 1378 (1963), an employer is under no duty to bargain for a unit that includes supervisors. *Accord*, *J.D. Lunsford Plumbing*, 237 NLRB 128, 130 (1978). Moreover, such foremen selection or promotion clauses violate both Section 8(b)(1)(A) and 8(b)(1)(B) of the Act. *See e.g.*, *New York Typographical Union No. 6 (The New York*

organizations following their elevation to that position. However, the Board has not interpreted the Act as prohibiting "employers and union from voluntarily including supervisors in bargaining units." *Nassau and Suffolk Contractor's Ass'n, Inc.*, 118 NLRB at 181, n.23. That the parties may voluntarily include supervisors in a unit, and contractually require them to be members of the union representing the unit involved, creates both conflicts of interest and divided loyalty that ordinarily should not exist, and presents the following issues: (1) to what extent are foremen or other supervisors who are required to be union members by the labor agreement, or who wish to maintain their union membership for reasons of economic advantage, allowed to participate in the affairs of their union; and (2) to what extent are contractual union security provisions enforceable against supervisory members.

1. The Permissible Role of Supervisors in Unions

Obviously, an employer does not have to allow his supervisors to retain their prior membership in a union and he may legally discharge them for refusing to refrain from union activities. Conversely, rank and file employees promoted to supervisory status have no statutory right to remain union members or participate in the affairs of a union. *NLRB v. Employing Bricklayers' Ass'n*, 292 F.2d 627, 639 (3d Cir. 1961). However, where supervisory employees are permitted by both the employer and the union to maintain their membership, how does an employer avoid the argument of taint by employer control over collective bargaining, or in some cases, actual unlawful domination of the union in violation of Section 8(a)(2) of the Act. If Section 14(c) permits supervisory employees to remain members of the very union that their employer must negotiate with, the legal as well as practical question is what is the permissible range of supervisory participation in the affairs of the union without violating the Section 7 rights of employee members of the organization. *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1, 6 (3rd Cir. 1969).

Fortunately, the foregoing question was initially, and largely, answered by the Board in *Nassau and Suffolk Contractors' Association*, *supra*. In the cited case, a contractors' association (the "Association") negotiated a multi-employer collective bargaining agreement with a local union of the Operating Engineers ("Union"). The principal allegation of the complaint alleged that Association and its members had "dominated, assisted, contributed to the support of and interfered with the administration of [the union] by causing its supervisors to become and remain members of the [u]nion, to attend and participate in general membership and executive board meetings of the [u]nion, and to assume and retain official positions on the [u]nion's executive board and in other official positions of a policymaking, executive, and governing nature." 118 NLRB at 177. These various allegations related primarily to the role played in the union by certain supervisors, primarily the master mechanics. *Id.* As framed by the Board in its decision, the three specific issues were as follows: (1) Did the fact that certain officers and supervisors of various Association members had voted at union membership meetings constitute unlawful interference in the administration of the union; (2) Did the fact that two master mechanics of certain employer members had participated in labor negotiations as part of the union's negotiating committee constitutes both interference with and domination of the affairs of the union; and (3) Were other

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News, Inc.), 237 NLRB 1241, 1244 (1978); *Plasterers' Local 908 (Kaiser Engineers)*, 185 NLRB 879, 880 (1970). Provisions in a collective bargaining agreement that would prevent an employer form selecting his individual supervisors by name are non-mandatory subjects of bargaining. *Electrical Workers IBEW Local 428 (Kern Chapter NECA)*, 277 NLRB 397, 410 (1985).

members of the Association "equally responsible for the conduct" set forth in issue (2) alone? *Id*. at 178.

In resolving these various issues, the Board focused especially on the role of the master mechanics in the Union who were found to be long-time union members who were also active in union affairs. *Id.* Under the Association's collective bargaining agreement with the union, an employer member who employed five or more operating engineers was required to employ a master mechanic; the Board found that in this role the master mechanics were supervisors under the Act. *Id*. at 178-179 and n. 16. Some master mechanics always worked for the same employer; some shifted from project to project. *Id.* at 179. Lastly, the master mechanics were included in the unit by the governing collective bargaining agreement and required to be members of the Union. *Id*.[76] Although other company executives and supervisory personnel maintained membership in the Union, such membership was not required of them.[77]

In the case of the master mechanics, the Board observed that these individuals owed allegiances to both other employers and the Union, and were agents of both. *Id*. at 182. Moreover, as is particularly true in the construction industry, "the impetus for requiring foremen to be members of the rank-and-file union has come from the latter." *Id*. In such a setting, "it is totally unrealistic to attribute automatic responsibility to an employer for the role played by the foreman in *his* union." *Id.* (emphasis in original). As the Board noted, the situation is distinguishable from where foremen actively organize for a new union or against a rival union on behalf of their employer, and where, as in *Nassau and Suffolk*, foremen are simply active in the affairs of the union because of their long-time membership in the trade and the union. *Id.* Accordingly, the Board did not find that the master mechanics' participation in the affairs of the Union by attending Union meetings and voting in Union elections, absent direct "encouragement" by their employer, constituted interference in violation of Sections 8(a)(1) and (2) of the Act. *Id*. at 183. However, the Board found that voting in Union meetings by high-ranking company supervisors or executives constituted unlawful interference in the administration of the Union's affairs. *Id.* at 184.

With respect to the Board's finding that two master mechanics had participated in labor negotiations with the Association as members of the Union's bargaining committee, the Board rejected the Trial Examiner's finding that such conduct constituted both unlawful interference with, and domination of, the Union, finding only evidence of the former. *Id.* at 184. That these two individuals participated, as part of a twelve man union committee, without objection was not enough to establish domination of the Union. *Id.* at 185. These facts were critical to this finding: (1) each individual was a long-time Union member; (2) they were both Union stewards; (3) the labor agreement required them to be members of the Union; and (4) on their employer's respective project, they were only master mechanics because of the Union's approval and referral of them, and were also subject to union discipline. *Id.* In what can best be described as a *realpolitik* view of the situation, the Board believed that rank-and-file employees were not likely to believe that

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[76] In what can only be described as evidence of union control over the employers in the Association, the union placed the master mechanics on most jobs, and at the same time, the master mechanics served as the union steward on the job. 118 NLRB at 179.

[77] These individuals were those who acquired membership in the union as rank-and-file employees in the construction industry and sought to retain their membership for certain perceived advantages in union benefits, and to be able to work in the trade. 118 NLRB at 180.

their Union was controlled by the employers but more likely to believe the employers were dominated by the union. *Id.*[78] The Board went on the say:

> We are not willing to hold that the voluntary inclusion of foremen in a bargaining unit of nonsupervisory employees is *per se* proof of employer domination and justifies disestablishment of the union representing such unit. And to require the employer to exercise some sort of veto power over the appointment of foremen to official positions within the union to avoid the charge of domination would seem to involve interference in the affairs of the union, which is precisely what Section 8(a)(1) of the Act is designed to prevent.

118 NLRB at 186. Nevertheless, the Board did find that the Association's members had interfered with the administration of the Union by failing to object to the presence of two master mechanics employed directly by Association members, who represented the Union as part of its negotiating committee, because "[e]mployees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests." *Id.* at 187 (alterations in original). Indeed, the Board held that the Association was under a duty "to protest the composition of the [Union's] committee and to refuse to deal with it because it was tainted with an apparent employer interest." *Id.*

From the Board's decision in *Nassau and Suffolk* and subsequent cases relying on its holdings, one can extrapolate several guiding principles. In the construction industry, lower level supervisors may belong to a union and participate in the affairs of the union to include attending meetings and voting in union elections;[79] however, they may not serve on union negotiating committees or as officers involved with labor negotiations where their own employers are involved.[80] For some period of time the Board, relying on *Nassau-Suffolk* held that supervisors above that level[81] and officers, management representatives and executives may retain their

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[78] "[I]t seems clear to us that in some industries, particularly construction, unions are strong enough to compel employers to relinquish control of their supervisors to the union." 118 NLRB at 186.

[79] *Allied Chemical Corp.*, 175 NLRB 974, 978 (1969) (Labor foremen who actively participated in union affairs and was vice-president of the union did not, by such activities, interfere in the affairs or administration of the union); *Beach Electric Co.*, 174 NLRB 210, 214 (1969) (Employers, all contractors in the electrical construction industry whose foremen worked intermittently, as both supervisors and journeymen electricians, did not violate Section 8(a)(2) of the Act, even though these individuals also hold various union offices; same result as to General Foreman who served as union president and worked intermittently but for the same employer).

[80] *Western Exterminator Co.*, 223 NLRB 1270 (1976) (By permitting lower level supervisor who served as president of local union, and recognizing and dealing with him as union officer or agent in negotiating and administrating labor agreement, employers interfered with the administration of local union).

[81] Obviously, there is not a bright line test for distinguishing between lower level supervisors and higher level supervisors. *See e.g.*, *Ditzler Mechanical Contractors*, 259 NLRB 610, 612 (1981) (Board found that a superintendent for all of employer's projects in a portion of state was "high-level" supervisor and his employer violated the Act by permitting him to serve as the president of the union with whom the employer had a collective bargaining agreement); *Welsbach Electric Corporation*, 236 NLRB 503, 508-510 (1978) (Superintendent in charge of all employer's operating personnel and general foremen reporting to him were "high level" supervisors; employer interfered with the administration of the union's affairs by permitting them to hold various union officer positions; their required inclusion in the contractual bargaining unit not dispositive of whether they were high level supervisors); *Detroit Ass'n of Plumbing Contractors*, 132 NLRB 658, 659-660 (1961) (supplemental decision) (On remand from court of appeals, Board determined that general heating foreman, with 6 to 10 foremen reporting to

membership in the union and receive various economic or social benefits, but generally may not vote in union elections that determine who will administer the affairs of the union,[82] or hold any position within the union,[83] or engage in contract negotiations on behalf of the union.[84] Finally, it became clear, despite some early confusion in the law,[85] that the question of whether there have been unlawful interference in the affairs of a union based on the role of supervisory members must be decided on a case-by-case basis and is not dependent on whether the supervisor whose activities are in question is included in the bargaining unit, but primarily whether the supervisor was a low level or high level supervisor.[86]

However, in 1988, the Board adopted a different approach and abandoned the low level-high level distinction as a controlling factor with respect to certain *Nassau and Suffolk* issues. In *Power Piping Co.*, 291 NLRB 494 (1988), the Board reversed its long held position on "high level" supervisors voting in internal union elections. The employer in *Power Piping* was engaged in

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him, and responsibility for 40-60 employees, who was not in the bargaining unit but whose union benefits were paid by the employer, was "high-ranking supervisor" with a "permanency of such position," as opposed to holding a "transitory" supervisory position).

[82] *Masonry Contractors Association of Houston*, 245 NLRB 893, 894 (1979); *Employing Bricklayers' Ass'n of Delaware Valley*, 134 NLRB 1535, 1536-1537 (1961) (Executive Secretary of multiemployer bargaining association, and long-time union member insisted on voting in election to elect delegates to parent international union's convention; such conduct went beyond his right as a member of the union to participate in its affairs, and constituted unlawful intrusion into the union's affairs); *Bottlefield-Refractories Co., et al.*, 127 NLRB 188, 191 (1960), *enforced*, *NLRB v. Employing Bricklayers' Assn. of Delaware Valley*, 292 F.2d 627 (3rd Cir. 1961) (Mere act of voting in union election for officers and committee members by officers and management representatives of various members of multi-employer association constitutes unlawful interference in the affairs of the union; irrelevant whether the association or its members encouraged or authorized such voting, or whether they conspired to have such persons vote, or that their votes were or were not decisive); *Detroit Association of Plumbing Contractors*, 126 NLRB 1381, 1383 (1960), *enforced in part Local 636 of United Ass'n of Journeymen v. NLRB*, 287 F.2d 354 (D.C. Cir. 1961) (Supervisors who were long time union members who had moved well past journeyman status, into the supervisory hierarchy, and were no longer in the bargaining unit may not actively participate in the affairs of their union, even though their participation was concededly done in good faith, and their participation, such as voting in union elections, constitutes unlawful interference).

[83] *Detroit Association of Plumbing Contractors*, *supra*, n. 80; *see also*, cases cited at n. 79 *supra*.

[84] *Detroit Association of Plumbing Contractors*, *supra*

[85] *See e.g.*, *Anchorage Businessmen's Association (Drugstore Unit)*, 124 NLRB 662, 664 (1959) (Pharmacist stockholders and pharmacist supervisors covered by union contract and required to be members of the union as a condition of employment had some right to engage in intra-union activities as rank-and-file pharmacists but not permitted to attend union meetings to vote on wage demands, because of their close relationship to management).

[86] See *Schwenk Incorporated*, 229 NLRB 640, 641 (1977) (Plant manager and project manager occupied managerial and high level supervisory positions; their attendance at union meetings, their voting in union elections, and their holding of union office constituted unlawful interference by their employer in the internal affairs of a labor organization). *A.L. Mechling Barge Lines, Inc.*, 197 NLRB 592, 597 (1972) (Inclusion or exclusion from the employee bargaining unit is not controlling when determining whether an employer is to be held legally responsible for supervisors voting in union meetings; most important determination is whether the supervisors are lower level supervisors or whether they are owners, executives, high ranking supervisors or management representatives). Earlier decisions in *Banner Yarn Dyeing Corp.*, 139 NLRB 1018 (1962) and *National Gypsum Company*, 139 NLRB 916 (1962) had previously clarified that a supervisor's inclusion in the bargaining unit was not a defense and that *Anchorage Businessmen* and *Nassau and Suffolk* were not inconsistent, and that in *Anchorage Businessmen*, the Board in fact had found a violation based on the supervisory position in the managerial hierarchy of the employer involved. *Anchorage Businessmen* was enforced by the Ninth Circuit. *NLRB v. Anchorage Businessmen's Association*, 289 F.2d 619 (9th Cir. 1961).

mechanical contracting and piping installation work on a large power plant construction project. It hired a number of skilled pipefitters from the local union's hiring hall. The first pipefitter referred became the head general foremen on the project. The applicable CBA required the presence of a foreman for approximately every 10 journeyman, and at least one general foreman on the project. The parties stipulated that the general foreman were Section 2(11) supervisors and were also included in the contractual bargaining unit and covered as to wages and benefits. The job superintendents, who also appeared to be union members, had their wages and benefits determined by the employer. During 1984, the union involved held an internal election and three of the employer's general foremen voted in the election. None of these general foremen had ever held union office and none were candidates for any union office or position at the time of the 1984 election. 291 NLRB at 494-499.

The ALJ found a violation based on his finding that the general foreman were high level supervisors and pursuant to existing Board precedent, their voting in an internal union election constituted unlawful interference with the administration of their union. *Id*. at 495.

The Board disagreed with the ALJ, finding that the general foremen were not high level supervisors. After reviewing the Board's prior decisions under *Nassau and Suffolk*, the Board decided to reaffirm the all factor test of [sic] *Nassau and Suffolk* and to look at each case where the issue of voting in internal union elections was raised on a case by case basis. *Id*. at 497. It expressly stated that it was abandoning any attempt to limit [its] analysis by assigning controlling weight to any one factor. *Id*. The Board then stated that it would look to the following considerations, albeit not exclusively, citing to a three factor analysis by the District of Columbia Circuit:

> (1) The nature of the supervisory position and how completely the responsibilities of the particular position identify the holder of the position with management. Careful reference should be made to § 2(11) bearing in mind that the definition therein contained was not intended to include straw bosses and lead men. Such consideration is necessary because of the infinite possible variations in responsibilities enumerated in § 2(11)
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> (2) Apparent permanence of the supervisory position[,] how long the position has been held[,] [and] how high it is in the company[']s hierarchy of supervisors. This is important because the degree of possibility of the employees [sic] being hired later as a journeyman should have a direct bearing on his immediate right to participate in union affairs
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> (3) The extent to which his position is properly included in or excluded from the bargaining unit.

Plumbers Local 636 v. NLRB (Detroit Plumbing Contractors) 287 F2d 354, 362 (D.C. Cir. 1961). *Id*. at 497. The Board also states that it would "examine the nature of the supervisor's alleged participation in intraunion affairs in determining whether unlawful interference exists." *Id*.

Looking at the relevant factors, it first rejected the ALJ's finding that the three general foremen were "high level" supervisors. As to the head general foremen, the Board found that it was reasonable to expect that he, as a member of the unit whose wages and benefits were tied to the collective bargaining agreement, would cast his vote in an internal union election and that his

fellow union members, as employees, would see his participation in the election as the result of his union and unit membership and not because of his management role. *Id*. at 498. The Board found an even less compelling case for the other general foremen who were more transitory in their positions – referred by the union in a supervisory role, returned to the hiring hall, and later referred as a journeyman. Given their inclusion in the unit under the labor agreement, and their exercise of relatively few management functions, the Board held that their voting in an internal union election would not lead their fellow union members to think they were acting for management. In sum, in this case, the mere act of voting was not enough, absent evidence that the employer had encouraged, authorized or ratified their conduct. *Id*.

In a post-*Power Piping* case, the Board reiterated that in cases involving supervisory participation, it would "no longer ascribe controlling weight" to the determination of whether an individual, whose participation in internal union affairs was at issue, has a "high level" or "low level" supervisory position, and would look at all of the circumstances in each case. *Hoyt, Brumm & Link, Inc.*, 292 NLRB 1060, 1061 (1989). *See also*, *General Steel Erectors*, 297 NLRB 723, n.1, (1992), *enforced*, *NLRB v. General Steel Erectors, Inc.* 933 F.2d 568, 570 (7th Cir. 1997) (Employer violated Section 8(a)(2) when it allowed its Job Superintendent to serve as the local union president, chairman of the union's executive board, chairman of its examining committee, union trustee of a welfare fund, and union trustee of a joint apprenticeship committee; *Power Piping* test was not applicable since superintendent's union activities clearly extended "beyond purely internal union affairs.")[87]

2. Enforcement of Union Security Agreements Involving Statutory Supervisors

Obviously, it is clear that inclusion of supervisors in a bargaining unit with non-unit employees is a non-mandatory subject of bargaining. If so, why does it continue to occur with such frequency in the construction industry? Suppose an employer decided not to apply the union security clause to its contractually covered supervisors or ceased the checkoff of union dues for them. Under existing law, an employer's repudiation of a non-mandatory subject of bargaining contained in a collective bargaining agreement does not constitute an unfair labor practice. *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 188. The duty to bargain under Section 8(d) of the Act applies only to mandatory subjects. *Id*. at 186-188. A party to a collective bargaining agreement, "[b]y once bargaining and agreeing on a permissive subject . . . naturally, do[es] not make the subject a mandatory topic of future bargaining." *Id*. at 187. Rather, "[t]he remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract . . . not in an unfair-labor-practice proceeding." *Id*. at 188 (footnote omitted).

As a practical matter, given the power of construction unions over time to compel the inclusion of supervisors (ranging from foremen, general foremen, and job superintendents) in craft bargaining units, it is unlikely that most established unions and contractors will seek a change in

[87] A union may also violate Section 8(b)(1)(A) and the Section 7 rights of its employee members when it appoints a statutory supervisor to serve on a joint apprenticeship and training committee established pursuant to a collective bargaining agreement *ESI, Inc*, 296 NLRB 1319, 1320 (1989) (Supervisor was assistant field superintendent; *Power Piping* not discussed).

the status quo. The harder question derives from attempts by individual supervisors to resign from the union, or attempts by their union to expel them from membership.

In *Pattern Makers v. NLRB*, 473 U.S. 95, 108-112 (1985), the Supreme Court upheld the Board's position that the proviso to Section (8)(b)(1)(A) of the Act did not permit unions to impose any restriction on the right of employees to resign from full union membership. The Board[88] and the Supreme Court[89] have also long held that the proviso to Section 8(b)(1)(A) only applies to employees within the meaning of the Act. So where does this leave supervisors who do not wish to become union members or continue to remain members? Do terms like "financial core status" and "*Beck* objector" have any meaning in the context of supervisors who are subject to contractual union security clauses? Do supervisors who are either included in or excluded from a bargaining unit have a right to resign from their respective union? As shown below, there is a dearth of law in this area.

Initially, prior to *Pattern Makers* and the Supreme Court's subsequent adoption of the Board's view of the law – that any restriction on *an employee's* right to resign was unlawful – the Board held that a union's refusal to give effect, pursuant to an internal union rule, to the resignation of several supervisory members violated Section 8(b)(1)(B), without any explanation for why the union's actions were actually violative of that Section of the Act. *Typographical Union (Register Publishing)*, 270 NLRB 1386, 1387 (1984).[90] Subsequently, the Board overruled *Register Publishing* in *Birmingham Printing Pressmen's Local 55 (Birmingham News)*, 300 NLRB 1 (1990). In *Birmingham News*, the union refused to recognize the resignations from membership of two statutory supervisors pursuant to an internal union rule.[91] Relying on the Board's earlier decision in *Register Publishing*, the Administrative Law Judge found that the union's actions were violative of Section 8(b)(1)(B). 300 NLRB at 1. The Board, in overruling *Register Publishing*, noted that the violations of Section 8(b)(1)(A) and 8(b)(1)(B) were addressed to different matters and protected different rights. 300 NLRB at 2. Thus, 8(b)(1)(A) protects the rights of employees to resign from union membership – a statutory right that is broad and must be unfettered in order to protect the principle of voluntary unionism. Section 8(b)(1)(B), however, "prohibits fundamentally different conduct (restraint or coercion of an *employer*) rather than the conduct prohibited by Section 8(b)(1)(A) (restraint or coercion of *employees*). Furthermore, statutory supervisors, unlike statutory employees, do not have a right protected by the Act to resign from union membership." *Id*. at 2. (emphasis in original) (footnote omitted). The Board further held that the union's conduct in refusing to honor the resignation of the two supervisors could only

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[88] *Toledo Lithographers (the Toledo Blade)*, 175 NLRB 1072, 1080 (1969) *enforced*, *NLRB v. Toledo Local Nos. 15-P and 272 Lithographers and Photo-Engravers Int'l*, 437 F.2d 55 (6th Cir. 1971).

[89] *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175 (1967).

[90] The internal union rule provided that "No member may resign except upon written application, stating the reasons therefor, addressed to the local union of which he or she is a member, and with the consent of the Local union." 270 NLRB at 1386 (alteration in original).

[91] The union's rule provided that: "A member may resign from membership, upon approval of the Local Executive Board, only if he is in good standing and has ceased to be engaged as an employee or in a supervisory capacity in an industry within the jurisdiction of the International Union, as defined in Article II, Section 6, Jurisdiction." 300 NLRB at 4.

violate 8(b)(1)(B) if it could be shown that such action interfered with the employer's right to select a particular supervisor as its 8(1)(B) representative. *Id*. at 3.

In a companion case, *Graphic Communications Local 458 (Noral Color)*, 300 NLRB 7 (1990), the Board, reviewing the identical rule involved in *Birmingham News*, also declined to find a violation of Section 8(b)(1)(B) in the union's mere refusal to accept the resignations of two supervisors because it did not have, or reasonably might have, an adverse effect on the performance of their 8(b)(1)(B) duties. *Id.* at 9. In addition, the Board also found that the union's expulsion of the supervisors based on their non-payment of union dues after they resigned, did not violate Section 8(b)(1)(B) of the Act. The Board viewed the expulsion as based on a "purely an internal union matter." *Id.* at 11. The Board noted that the union had not sought any further efforts at collection of post-resignation dues, following expulsion, and that it had, on its own, withdrawn prior letters requesting discharge of the supervisors. *Id.* at 11-12.

Both decisions, *Birmingham News* and *Noral Color,* respectively, relied on a prior Board decision in *Sheet Metal Workers Local 68 (The De Moss Co.)*, 298 NLRB 1000 (1990), which was decided shortly prior to their issuance by the Board. The facts in *DeMoss* are particularly important because they illustrate the difficult line between when the union's actions against a supervisor for attempting to resign from union membership are or are not violative of the law. In *DeMoss*, the employer's project manager, and five job superintendents who reported to him, submitted written resignations from membership in the respondent union, following the expiration of the collective bargaining agreement. *Id*.[92] The union then commenced a strike. *Id.* The employer's project manager and five superintendents worked during the strike, and with the exception of the project manager, all did some bargaining unit work. All six men were charged, tried and fined by the union for two different sets of internal union violations – one involving various acts of disloyalty and the other involving working for an employer engaged in sheet metal work that did not have a collective bargaining agreement with the employer. *Id*. at 1000-1001. Subsequently, the union suspended the six supervisors for failure to pay dues, after the date they had resigned, but did not expel them. *Id*. at 1001.

Since, the union was charged with having violated Section 8(b)(1)(B), the Board found, in agreement with the Administrative Law Judge, that all six supervisors were 8(b)(1)(B) representatives of the employer. *Id*. at 1002-1004. It is in passing on the merits of the case that the Board's comments are the most useful, and as far as can be determined, the most cogent on the issue of supervisors and resignation from union membership. The ALJ considered the fines for "strike breaking" on the basis that they were imposed for post-resignation conduct, a legal construct that stems from Board and Supreme Court[93] jurisprudence involving Section 8(b)(1)(A). The ALJ concluded that even though the case law he relied on concerned only statutory "employees," he reasoned that it was "unjustifiable to regard *Neufeld Porsche-Audi*, *supra*, otherwise than as signifying that *all* union members-whether rank-and-file or supervisory or unemployed-may resign from a union at any time without restriction." 298 NLRB at 1014. The Board rejected the ALJ's reasoning as such:

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[92] The resignations of all six supervisors complied with the union's rules on resignation from membership and were done prior to the commencement of the strike. *Id.* at n. 7.

[93] *NLRB v. Granite State Joint Board*, 409 U.S. 213, 217-218 (1972).

> This reading of *Neufeld Porsche-Audi* is incorrect. The holding of that case, which was essentially approved by the Supreme Court in *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), was based on the *employees'* Section 7 right to refrain from union activities and their right to voluntary unionism implicit in Section 8(a)(3). *Neufeld Porsche-Audi*, 270 NLRB at 1333; *Pattern Makers*, 473 U.S. at 104-105. The Supreme Court has repeatedly interpreted the Taft-Hartley amendments as removing supervisors from the protections accorded employees by the Act. 'Specifically, Congress in 1947 amended the definition of 'employee' in Section 2(3), 29 U.S.C. 152(3), to exclude those denominated supervisors under Section 2(11), 29 U.S.C. 152(11), thereby excluding them from the coverage of the Act.' *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790, 807 (1974). *Accord: Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 654 (1974). Thus, Section 8(b)(1)(A) does not protect the right of the supervisors in this case to resign from the Respondent. Hence, the fines imposed on the project manager and the five superintendents can be deemed unlawful *only* if it is shown that the fines were calculated to coerce and restrain DeMoss in the selection of its 8(b)(1)(B) representatives. As the Supreme Court observed in *Electrical Workers Local 340*, 481 U.S. at 594: 'The statute itself reveals that it is the employer, not the supervisor-member, who is protected from coercion by the statutory scheme.'

Id. at 1004. The Board also stated in this same vein:

> As explained above, the judge was mistaken in believing that Section 8(b)(1)(A), as construed in *Pattern Makers*, granted supervisors any right to resign union membership in the face of union restrictions on resignation. The Supreme Court in dictum in *Electrical Workers Local 340*, supra, seems to have made a similar erroneous statement. Nonetheless, the Court's express reliance on the assurance that such a right to resign existed, requires us to consider whether, at least under some circumstances, a union's attempt to restrict resignations of individuals possessing grievance adjustment or collective-bargaining authority may indeed coerce the employer within the meaning of Section 8(b)(1)(B).

Id. at 1005.

A majority of the Board did find, however, under the circumstances of the particular facts of *DeMoss*, that the fines imposed on the employer project manager and five other supervisors violated Section 8(b)(1)(B) because the "fines imposed for resignations and for the post-resignation conduct of working for [their employer] during the strike– will adversely affect the performance by the project manager and the five superintendents of grievance-adjustment duties. Accordingly, we find that those fines, considered together, constituted restraint and coercion of the Employer within the meaning of Section 8(b)(1)(B) of the Act."[94] *Id*. at 1006.[95]

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[94] A detailed discussion of Sections 8(b)(1)(B) is beyond the purview of this paper but is discussed here only because it offers the only, albeit limited, possible avenue of statutory relief for the individual supervisor.

[95] In a concluding footnote, the Board majority rejected dissenting member Cracraft's views that only the fines leveled at the project manager, who performed no bargaining unit work during the strike, were unlawful. The majority

DeMoss, although cited frequently, appears to be the most definitive statement on the status of supervisors in the context of whether they can resign from union membership. Where supervisors are not included in a bargaining unit pursuant to a recognition clause, and the labor agreement's union security clause does not touch them, then it is unlikely that the union has any practical or legal means to compel a supervisor's continued membership in the union, as long as he or she complies with the provisions of any internal union provision on resignation. Where there is a collective bargaining agreement concerning a bargaining unit in which supervisors, at a certain level, are included and the agreement's union security clause is applied to them, the notion of involuntary unionism applicable to employees is inapplicable to them.

Section 14(a) plainly creates a "Catch 22." Congress, aware that certain significant industries like construction, maritime, and printing had substantial cadres of supervisory members, was unwilling to prohibit the unions who represented such members from being required to exclude them from membership, yet said, in the same section of the Act, that an employer would not be required to bargain, under any federal state or local law, with any labor organization seeking to represent its supervisory employees. In theory, this gives the employer a complete out from having to share its supervisor's loyalties with anyone. In reality, in the construction industry, this is certainly far less true. If a contractor wants skilled and reliable foremen and above, it must suffer the fact that they will likely insist on remaining union members as the price of accepting the responsibility of supervision. For those supervisors covered by a collective bargaining agreement, financial core membership is not an option, unless the union allows it or desires it, and compulsory rather than voluntary union membership becomes the norm, because the supervisor has no ability to resign as long as his or her employer maintains a collective bargaining agreement requiring him to maintain his membership in the union. The reality is that both the employer and the union, for different reasons, do not desire to change the status quo.

IV. CONCLUSION

As shown, above, union security has wide implications for both employers and unions in the construction industry, particularly as the number of right-to-work states increases, and competition for bargaining unit jobs continues. In the 21st century, students of labor law must answer continuing questions about the labor relations structure of the industry: should hiring halls persist and should employers continue to allow their supervisors to belong to and participate in the affairs of their unions?

WBIII

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stated that "contrary to the dissent's implication, we do not hold that 'any' discipline imposed on an employer's representative for grievance adjustment after he resigns violates Sec. 8(b)(l)(B). Rather, it is the particular combination of conduct present in this case that we find unlawful-treating the representatives' resignations as nullities and then fining them both for attempting to resign and for working for their Employer in any capacity. In these circumstances, we cannot agree with the dissent's conclusion that the 'fines were not related to the superintendents' performance of grievance adjustment duties.'" *Id.* at 1006, n. 18. Member Cracraft's dissent highlights the "plight" of supervisors who attempt resignation, and who are disciplined by their union for non-8(b)(1)(B) activities – the Act simply does not provide supervisors with a right to resign. *Id.* at 1007-1009.