Article

Complete Preemption Under the Railway Labor Act: Protecting Congressionally Created Grievance Arbitration Procedures

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Federal courts in the United States are courts of limited jurisdiction. Article III, Section 2 of the U.S. Constitution gives the judicial branch the power to decide cases "*arising under* this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."[1] In addition to this grant of jurisdiction,[2] Congress has expressly authorized defendants to remove cases from state court to federal court in "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right *arising under* the Constitution, trea-

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1. U.S. CONST. art. III, §2, cl. 1 (frequently known as the judicial branch's power to decide "federal questions").

2. 28 U.S.C. § 1331 (1988).

ties or laws of the United States."[3]

The scope of this removal authority as it intersects with the doctrine of federal preemption has been the subject of much debate.[4] Unfortunately, no "bright-line rule" exists for determining what cases "arise under" the Constitution, treaties or laws of the United States. The absence of a bright line rule has led to significant litigation.[5] Removal cases require courts to apply the U.S. Supreme Court's "well-pleaded complaint rule" and to determine if one of the exceptions to that rule—statutory preemption, field preemption, or complete preemption—provides a ground for federal court jurisdiction.[6] The lack of a bright line rule has become particularly problematic for courts faced with determining whether cases that raise state law claims that involve the interpretation or application of labor agreements governed by the Railway Labor Act ("RLA") are removable under principles of complete preemption.[7]

Part I of this article sets forth the basic principles of removal jurisprudence and the origin of the conflicts arising under the well-pleaded complaint rule and its exceptions. Part II examines the history of the preemption doctrine and the scope of ordinary preemption versus complete preemption, including the U.S. Supreme Court's recent analyses of complete preemption in *Beneficial National Bank v. Anderson*[8] and *Aetna Health Inc. v. Davila*.[9] Part III discusses the historical application of the complete preemption doctrine in RLA cases,[10] including the currently

3. 28 U.S.C. § 1441(b) (2002).

4. *See generally* Eric James Moss, *The Breadth of Complete Preemption: Limiting the Doctrine To Its Roots*, 76 VA. L. REV. 1601 (1990) (tracing the historical developments of federal question jurisdiction and arguing for a limit on the use of the complete preemption doctrine based on that history); Brianna J. Fuller, *Developments in the Law: Federal Jurisdiction and Federal Forum Selection: Federal Question Jurisdiction*, 37 LOY. L.A. L. REV. 1443 (2004) (exploring background and purpose of federal question jurisdiction); Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927 (1996) (lamenting the inconsistencies in the courts' complete preemption cases and advocating a more reasoned approach to complete preemption).

5. *See* Moss, *supra* note 4, at 1604.

6. *See generally* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 153 (1908).

7. Roddy v. Grand Trunk W. R.R., 395 F.3d 318, 326 (6th Cir. 2005); Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1357 (11th Cir. 2003); Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R., 858 F.2d 936, 943 (3d Cir. 1988).

8. 539 U.S. 1, 6-8 (2003).

9. 542 U.S. 200, 221 (2004).

10. The analytical application portions of this article focus solely on complete preemption involving cases impacting the interpretation or application of the terms of an RLA-governed collective bargaining agreement subject to the mandatory grievance and arbitration provisions of the RLA. The article does not deal with the line of complete preemption cases involving state claims that impliedly or expressly allege a violation of the RLA. Such claims are governed by *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), which expanded the preemption doctrine established in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239 (1959), to the RLA.

prevailing view that the RLA does not provide grounds for complete preemption reflected in the Eleventh Circuit's decision in *Geddes v. American Airlines, Inc.*;[11] the Third Circuit's decision in *Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie Railroad*;[12] the Sixth Circuit's decision in *Roddy v. Grand Trunk Western Railroad*;[13] and the Second Circuit's decision in *Sullivan v. American Airlines*.[14] Part IV argues that the Supreme Court's reasoning in *Beneficial National Bank* effectively overruled *Geddes* and its progeny and that state law causes of action implicating collective bargaining agreement disputes under the RLA are completely preempted. Finally, Part V provides additional considerations weighing in favor of applying complete preemption to the RLA.

I. INTRODUCTION

When a plaintiff files a lawsuit in state court, one of the first things a defendant normally does is evaluate whether or not the case can be removed to federal court. For a case to be removed, the case must be one that could have been filed initially in the federal court; that is, the federal court would have had subject matter jurisdiction over the case had it been filed in the federal court at the outset.[15] To determine if a case falls within the federal court's original jurisdiction, courts generally look no further than the face of the complaint.

A. THE WELL-PLEADED COMPLAINT RULE: THE ORIGIN OF THE CONTROVERSY

In 1908, the U.S. Supreme Court limited federal court jurisdiction and the removal procedure to cases in which the basis for federal jurisdiction appears on the face of the plaintiff's "well-pleaded complaint."[16] Under the well-pleaded complaint rule, a plaintiff is ordinarily the master

11. *Geddes*, 321 F.3d. at 1357.

12. *Pittsburgh & Lake Erie*, 858 F.2d. at 943.

13. *Roddy*, 395 F.3d at 326.

14. 424 F.3d 267, 277 (2d Cir. 2005).

15. Under the removal statute, 28 U.S.C. § 1441, *et seq.*, a case that has been filed in state court may be removed to federal court by filing a notice of removal in federal court, if the case originally could have been brought in federal court under either diversity jurisdiction or federal question jurisdiction. The notice of removal must be filed within thirty days following the service of a facially removable complaint or within thirty days following any event that gives rise to federal jurisdiction, such as the voluntary dismissal of non-diverse parties or an amended complaint stating a federal claim, but in no event may a notice of removal based on diversity of citizenship be properly filed more than one year following the filing of an initial complaint. 28 U.S.C. § 1446(b). With the exception of class actions, all defendants who have been served at the time of the notice of removal must consent to the removal. Plaintiffs generally must object to the removal by filing a motion to remand within thirty days of the notice of removal. 28 U.S.C. § 1447(c).

16. *Mottley*, 211 U.S. at 153.

of his or her claim and has the power to determine whether a state or federal court should preside over the case.[17] A defendant may remove a plaintiff's case from state court to federal court only if the face of the plaintiff's complaint establishes grounds for invoking the original jurisdiction of a federal court by satisfying the diversity requirement or by stating a federal question:[18]

> [Whether] a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.[19]

"For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law."[20]

As with any general rule, however, the well-pleaded complaint doctrine is not without exception. The primary exception to the well-pleaded complaint rule is the artful pleading exception. That exception arises when a plaintiff attempts to draft a complaint to avoid naming a federal statute and thereby to avoid creating an express federal question over which a federal court would obviously have original jurisdiction. If the plaintiff fails to name a federal statute but the complaint is in actuality based on a federal statute, the federal court will have jurisdiction.[21] In other words, even if state law is the sole apparent source of a plaintiff's claims as determined from the face of a state court complaint, the "case might still 'arise under' the laws of the United States if a well-pleaded complaint establishe[s] that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."[22]

Consequently, "it is an independent corollary of the well-pleaded

17. *See generally* Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L. J. 597 (1987) (discussing history and purpose of federal question jurisdiction).

18. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 10-11 (1983).

19. *Id.* at 10 (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)).

20. *Id.* at 10-11 (citing Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974); Pan Am. Petroleum Corp. v. Super. Court, 366 U.S. 656, 663 (1961); and Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112 (1936)). *See also Beneficial Nat'l Bank*, 539 U.S. at 6 ("As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.").

21. Mikulski v. Centerior Energy Corp., 435 F.3d 666, 671-72 (6th Cir. 2006), *vacated*, 501 F.3d 555 (6th Cir. 2007).

22. *Franchise Tax Bd.*, 463 U.S. at 13.

complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint."[23] A plaintiff cannot avoid federal jurisdiction by crafting factual allegations purporting to support purely state-law causes of action when, in reality, the complaint is based on federal law.[24]

When state causes of action have been removed to federal court, and the defendant thereafter seeks to dismiss the suit on ordinary preemption grounds, the convergence of the well-pleaded complaint rule, the artful-pleading exception, and complete preemption doctrines frequently presents a challenge to a judge dealing with a motion to remand the case to state court.[25] When Congress has expressly decreed that federal courts shall have exclusive jurisdiction over a certain subject, and that state's suit involves such subject, even if it contains only state-law claims, may be removed to federal district court, the result is clear.[26] The complaint will be dismissed.

The result is much murkier, however, when Congress has not expressly provided for exclusive federal jurisdiction. In such cases, federal courts are left to guess about whether Congress so pervasively intended to preclude state court jurisdiction that it enacted a federal statute that "provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action."[27] Such is the case with complaints that implicate the interpretation or application of a collective bargaining agreement governed by the RLA.

These cases are further complicated when the defendant seeks to have the federal court dismiss the complaint based on principles of "ordinary preemption."[28]

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23. *Id.* at 22 (citing Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinist & Aerospace Workers, 376 F.2d 337, 339-40 (6th Cir. 1967)). *See also* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987), *superseded by statute*, 29 U.S.C. § 1056 (2006) ("One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.").

24. *Franchise Tax Bd.*, 463 U.S. at 22 ("[A] plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint . . .") (citing *Avco Corp.*, 376 F.2d at 339-40). *See also Metro. Life Ins. Co.*, 481 U.S. at 63-64. Some courts and commentators have noted that the artful-pleading exception is not clearly defined. *See* Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272 n.4 (2d Cir. 2005) (discussing Arthur R. Miller, *Artful Pleading: A Doctrine In Search Of Definition*, 76 TEX. L. REV. 1781 (1998) and noting discord among the circuit courts of appeal regarding coextensive nature of the artful pleading and complete preemption doctrines).

25. *See, e.g.*, Carlson v. Arrowhead Concrete Works, Inc., 445 F.3d 1046, 1051-52 (8th Cir. 2006), *dismissing appeal from* 375 F. Supp. 2d 835 (D. Minn. 2005).

26. *See* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 484 (1999) (holding tort actions arising out of nuclear accidents completely preempted by the Price-Anderson Act).

27. *Beneficial Nat'l Bank*, 539 U.S. at 8 (referring to § 301 of the Labor Management Relations Act and § 502 of the Employee Retirement Income Security Act of 1974).

28. *See* Miguel v. Inland Paperboard & Packaging, Inc., No. 05-16324, 2007 U.S. App.

B. Complete Preemption versus Ordinary Preemption: The Similarities Fuel the Controversy

The complete preemption doctrine was first recognized by the Supreme Court in 1968 when the Court considered the preemptive effect of § 301 of the Labor Management Relations Act ("LMRA").[29] Since that time, other substantive areas of federal law have been slowly, and sometimes reluctantly, added to the mix.[30] Lower courts have often struggled with application of the concept of complete preemption primarily due to its similarity to its closely related cousin: the doctrine of ordinary preemption.[31]

Ordinary preemption is typically asserted as an affirmative defense to the merits of a state claim and may be invoked in either state or federal

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LEXIS 1515, at *3-5 (9th Cir. Jan. 18, 2007); *Carlson*, 445 F.3d at 1049. As the Second Circuit noted: "The complete-preemption doctrine must be distinguished from ordinary preemption, also known as defensive preemption. . . . Many federal statutes - far more than support complete preemption - will support a defendant's argument that because federal law preempts state law, the defendant cannot be held liable under state law." *Sullivan*, 424 F.3d at 272-73 (internal citations omitted).

29. Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinist & Aerospace Workers, 390 U.S. 557, 560-562 (1968), abrogated by Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). *See generally* Eric James Moss, *The Breadth of Complete Preemption: Limiting the Doctrine to Its Roots*, 76 Va. L. Rev. 1601, 1611-14 (1990) (detailing the history of the complete preemption doctrine).

30. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974) (holding state claim regarding the right to possession of Indian tribal lands necessarily "arises under" several federal laws and treaties); *Metro. Life. Ins. Co.*, 481 U.S. at 65-67 (holding state contract and tort claims completely preempted by the Employee Retirement Income Security Act of 1974); *Beneficial Nat'l Bank*, 539 U.S. at 11 (holding state law usury claims against national banks completely preempted by the National Bank Act). *See also* Hall v. N. Am. Van Lines, Inc., 476 F.3d 683, 688-89 (9th Cir. 2007) (holding 1906 Carmack Amendment to the Interstate Commerce Act of 1886 completely preempts state law claims for breach of an interstate shipping contract and for common law fraud and conversion); Miles v. Okun, 430 F.3d 1083, 1091 (9th Cir. 2005) (complete preemption of state tort claims by bankruptcy law); PCI Transp. Inc. v. Ft. Worth & W. R.R., 418 F.3d 535, 545 (5th Cir. 2005) (complete preemption under the Interstate Commerce Commission Termination Act of 1995); Hoskins v. Bekins Van Lines, 343 F.3d 769, 778 (5th Cir. 2003) (holding complete preemption under the Carmack Amendment to the Interstate Commerce Act); Briarpatch Ltd., LP v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004) (holding complete preemption under the Copyright Act); Lundeen v. Canadian Pac. Ry., 447 F.3d 606, 615 (8th Cir. 2006), *vacated*, 532 F.3d 683 (8th Cir. 2008), *reh'g denied* 532 F.3d 683 (8th Cir. 2008), *superseded by statute*, 49 U.S.C. § 20106(b) (2006) (holding complete preemption under the Federal Railroad Safety Act).

31. Blab T.V., Inc. v. Comcast Cable Commc'n, Inc., 182 F.3d 851, 854-55 (11th Cir. 1999). *See also* McKeon v. Belt Ry., No. 05-C4311, 2006 U.S. Dist. LEXIS 63798 (N.D. Ill. 2006) (evaluating complete preemption claim, but relying on ordinary preemption cases, and finding no subject matter jurisdiction over state tort suits); Pittari v. Am. Eagle Airlines, Inc., 468 F.3d 1056, 1060 (8th Cir. 2006) (utilizing the term "complete preemption" although discussing principles of ordinary preemption); Wall v. CSX Transp., Inc., 471 F.3d 410, 423 n.11 (2d Cir. 2006) (noting the defendants' apparent confusion of the term complete preemption with ordinary preemption).

court as a ground for dismissing the plaintiff's complaint.[32] Under the well-pleaded complaint rule, however, an affirmative defense interposed by a defendant is not enough to give a federal court original jurisdiction, even in situations in which the defense shows it is "very likely, [that] in the course of the litigation, a question under the Constitution would arise . . . ."[33] Put another way, "a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby."[34]

Ordinary preemption thus only provides grounds for dismissal in whatever court the lawsuit was initially filed. It does not provide a basis for removal jurisdiction.

In contrast, complete preemption is jurisdictional in nature and is not pleaded as an affirmative defense to a claim under state law.[35] Complete preemption provides a procedural basis to remove a state court case to federal court even though no federal claim is pleaded or would be present if the complaint were well-pleaded. Complete preemption emanates from those areas of federal substantive law for which Congress or the courts have decreed that a federal law completely supplants state law, such that federal jurisdiction is created merely by pleading a state claim that implicates subject-matter of the federal statute.

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32. "[O]rdinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court." *Blab T.V.*, 182 F.3d at 855. Ordinary or defensive preemption takes three common forms: express preemption, field preemption and conflict preemption. Express preemption occurs when Congress explicitly states that state law is preempted, such as § 514 of ERISA. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 106-08 (1983), *abrogated by* Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). Field preemption arises when Congress occupies the entire field, leaving no room for the operation of state law, such as the Natural Gas Act. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1985). *See also* Wis. Cent. Ltd. v. Shannon, 539 F.3d 751, 765 (7th Cir. 2008), *aff'd.* 516 F. Supp. 2d 917 (N.D. Ill. 2007) (Adamson Act governing hours of service on railroads bars the states from regulating railroad overtime wages under field preemption analysis). Conflict preemption occurs when it is impossible for a party to comply with both federal and state law or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

33. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10 (1983) (quoting Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908)).

34. Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 116 (1936). *See also Franchise Tax Bd.*, 463 U.S. at 14 ("[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of [ordinary] preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.").

35. The Second Circuit has opined that a more accurate term for complete preemption would be "jurisdictional preemption." Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 272 n.5 (2d Cir. 2005).

C. Complete Preemption Under the RLA: A Question at the Forefront of the Controversy

Cases involving rail or air carrier collective bargaining agreement disputes subject to the RLA[36] are one area in which the confusion between complete preemption and ordinary preemption reigns supreme. Under the RLA, disputes arising from the application or interpretation of collective bargaining agreements are termed "minor disputes" and fall within the exclusive jurisdiction of Congressionally created boards of adjustment.[37] When a plaintiff files an action against a RLA carrier, and resolution of the case would require a court to interpret or apply the terms of a collective bargaining agreement, ordinary preemption dictates that neither a federal court nor a state court has jurisdiction to hear the case because of the preemptive effect of the exclusive and plenary jurisdiction of the boards of adjustment.[38]

When a plaintiff sues a rail or air carrier in state court and pleads only state law causes of action that arguably require the application or interpretation of a collective bargaining agreement, the first question that typically arises is *not* whether the case should be dismissed under traditional principles of "ordinary" preemption. Clearly, if a case presents a "minor" dispute under the RLA, the case should be dismissed for resolution through the RLA's mandatory arbitration provisions.[39] In the large majority of such cases, rather than litigating the preemption issue in state court by a motion to dismiss, the defendant carrier attempts to remove the case to federal court on the grounds that the case is governed by the

36. Railway Labor Act of 1926, 45 U.S.C. §§ 151-188 (2006).

37. Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 303-04 (1989).

38. Bloemer v. Nw. Airlines, Inc., 401 F.3d 935, 939 (8th Cir. 2005) (dismissing case under theories of ordinary preemption); Crayton v. Long Island R.R., No. 05CV1721, 2006 U.S. Dist. LEXIS 93919 (E.D.N.Y. Dec. 28, 2006) (relying on Brown v. Ill. Cent. R.R., 254 F.3d 654, 668 (7th Cir. 2001) to preclude Title VII claim that was dependent upon an analysis of the terms of the governing collective bargaining agreement); Parker v. Metro. Transp. Auth., 97 F. Supp. 2d 437, 445-48 (S.D.N.Y. 2000) (precluding suit under ADA and ADEA because dispositive issues would have required court to interpret RLA collective bargaining agreement); Moss v. Norfolk W. Ry., No. 0274237, 2003 U.S. Dist. LEXIS 13566, at *14-15 (E.D. Mich. July 22, 2003) (precluding race discrimination case that would have required court to interpret RLA collective bargaining agreement); Everette v. Union Pac. R.R., No. 04C5428 2006 U.S. Dist. LEXIS 68427, at *11-12 (N.D. Ill. Sept. 5, 2006) (precluding Title VII claim that required court to interpret duties under a RLA collective bargaining agreement).

39. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 261-63 (1994) (in case solely involving questions of ordinary preemption, the Court noted "where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is preempted.") Nevertheless, the scope of ordinary preemption under the RLA is also often at issue. *See generally* Kristine Cordier Karnezis, *Preemption of State-Law Wrongful Discharge Claim, Not Arising From Whistleblowing, By Railway Labor Act*, 191 A.L.R. Fed 239 (2004) (collecting cases); Gregory G. Sarno, *Preemption, by Railway Labor Act of Employee's State-law Action for Infliction of Emotional Distress*, 104 A.L.R. Fed. 548 (1991-2005) (same).

RLA and, consequently, is completely preempted by federal law.[40] Following removal, the question that arises in federal court, usually on a motion to remand to state court, is whether the federal court has jurisdiction in the first instance to determine if the particular dispute implicated by the state claim is a "minor" dispute under the RLA.[41] If the RLA completely preempts state law, that answer is "yes," and the removing defendant has properly invoked the original jurisdiction of the federal court to decide the underlying preemption question.[42]

Federal courts, however, are split on the question of whether the RLA gives rise to complete preemption.[43] Based on the U.S. Supreme Court's 2003 decision in *Beneficial National Bank v. Anderson*,[44] the history of the RLA, and notions of judicial fairness, this article argues the complete preemption doctrine should apply to cases involving RLA collective bargaining agreement disputes.

II. WHAT IS PREEMPTION?

Preemption is a judicially created doctrine "holding that certain matters are of such a national, as opposed to local, character that federal laws pre-empt or take precedence over state laws."[45] Federal preemption arises "where federal law so occupies the field that state courts are pre-

40. Anderson v. Am. Airlines, Inc., 2 F.3d 590, 595 (5th Cir. 1993) (remanding case to state court, finding worker's compensation retaliation suit not completely preempted by RLA because interpretation of collective bargaining agreement not required).

41. *See* Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1345 (7th Cir. 1986) ("Indeed, asking whether federal law provides a defense or occupies the field may just be another way of asking whether the issue of federal preemption shall be decided by a state or a federal court, and perhaps that question should be asked directly, without taking the essentially question-begging step of asking whether the federal statute occupies the field. If the federal statute is deemed merely to create a defense, the state court decides whether it is a good defense; if it is deemed to occupy the field, the federal court decides whether the plaintiff has a cause of action.").

42. *See id. See also* Navarro v. Servisair, LLC, No. C08-02716MHP, 2008 U.S. Dist. LEXIS 62513 (N.D. Ca. 2008) (denying motion to remand).

43. *Compare* Gore v. Trans World Airlines, 210 F.3d 944, 949-52 (8th Cir. 2000) (finding complete preemption under RLA), *cert. denied* 532 U.S. 921 (2001), *and Graf*, 790 F.2d at 1349 (same), *with* Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1356-57 (11th Cir. 2003) (no preemption), *cert. denied* 540 U.S. 946 (2003). *See also* Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 278 n.9 (2d Cir. 2005) (collecting cases); Wray v. United Air Lines Inc., No. 05-4272, 2006 U.S. App. LEXIS 14226, at *2 (2d Cir. June 6, 2006) (rejecting complete preemption based on *Sullivan*, 424 F.3d at 276-77). A number of circuits have assumed complete preemption exists without discussion. *See, e.g.*, Adames v. Executive Airlines, Inc., 258 F.3d 7 (1st Cir. 2001); Ertle v. Cont'l Airlines, Inc., 136 F.3d 690 (10th Cir. 1998); Kollar v. United Transp. Union, 83 F.3d 124 (5th Cir. 1996); Holman v. Laulo-Rowe Agency, 994 F.2d 666 (9th Cir. 1993). *See also* Sw. Airlines Employees Ass'n v. Sw. Airlines Co., Civ. Action No. 3:05-CV-1192-N (N.D. Tex. 2005) (relying on *Kollar*, 83 F.3d at 125-26, to find complete preemption by the RLA).

44. 539 U.S. 1, 8-11 (2003).

45. BLACK'S LAW DICTIONARY 1060 (5th ed. 1979).

vented from asserting jurisdiction."[46] In short, preemption is "a court-created doctrine that gives Congress the ability to replace state laws in a particular area when this area falls within Congress's authority under Article I" of the U.S. Constitution.[47]

A. Ordinary Preemption versus Complete Preemption—A Closer Look

If a case involves "ordinary" preemption, federal law provides the defendant with a substantive affirmative defense to the plaintiff's state law claims. The Supreme Court has summarized the doctrine of ordinary preemption as follows:

> It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[48]

In essence, in cases involving ordinary preemption, the defense can argue the state court should dismiss the state law claims for failure to state a claim upon which relief could be granted because the only available remedy stems from a federal statute not invoked by the plaintiff.[49]

Ordinary preemption merely provides a defense that can be raised by the defendant; it does not, under the well-pleaded complaint rule, pro-

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46. *Id.* at 551.

47. Patricia L. Donze, *Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?*, 4 N.Y.U. J. Legis. & Pub. Pol'y 239, 242 (2001) (exploring on-going federalism issues with federal legislation overtaking areas of traditionally local regulation).

48. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (quoting Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), and Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (internal quotations omitted))).

49. *See, e.g.*, Am. Tel. & Tel. Co. v. Cent. Office Tel. Inc., 524 U.S. 214, 227-28 (1998) (Federal Communication Act); Wright v. Allstate Ins. Co., 415 F.3d 384, 390-91 (5th Cir. 2005) (National Flood Insurance Act); Dreamscape Design, Inc. v. Affinity Network, Inc., 414 F.3d 665, 673-74 (7th Cir. 2005) (Federal Communication Act).

vide a basis for removal jurisdiction.[50]

Complete preemption, in contrast, is not an affirmative defense. Instead, complete preemption is a jurisdictional principle the defendant can use to remove purportedly state law claims to federal court on the grounds the case "arises under" federal law.[51] After removal, a federal court can then determine whether (1) the case should be dismissed based on the principles of ordinary preemption, (2) leave should be granted for the plaintiff to re-plead his or her claims invoking the appropriate federal law or seeking the appropriate federal remedy, or (3) the case should be remanded to state court for lack of federal jurisdiction.[52]

As a practical matter, the real distinction between principles of "ordinary" preemption and "complete" preemption is not the ultimate question of whether the plaintiff can state a claim under state law in the face of a potentially conflicting federal statute. Instead, the true distinction turns on which court—federal or state—has the opportunity to decide whether the plaintiff has stated a viable state law claim:[53]

> [A] federal law may substantively displace state law under ordinary preemption but lack the extraordinary force to create federal removal jurisdiction under the doctrine of complete preemption. If no other grounds for federal jurisdiction exist in such cases, then it falls to the state courts to assess the merits of the ordinary preemption defense.[54]

If a federal statute completely preempts state law, a federal court has jurisdiction to determine whether the case should be dismissed under principles of ordinary preemption.[55] If the federal statute does not com-

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50. *See generally* Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geir v. American Honda Motor Co. Eradicate the Presumption Against Preemption*, 17 BYU J. PUB. L. 1 (2002) (discussing standard for ordinary preemption); Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105 (2001) (discussing both ordinary and complete preemption principles in the context of ERISA); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002) (providing history of primary preemption cases and arguing recent Court decisions create presumption in favor of preemption).

51. *See generally* Jay Lechner, *Recent Trends in the Eleventh Circuit: Removal Jurisdiction & Procedures in Employment Law Litigation*, 28 NOVA L. REV. 351 (2004) (noting employer perception that federal courts are more experienced and neutral in employment law cases and explaining grounds and procedure for removal of those cases).

52. Under the RLA, of course, the appropriate federal remedy is arbitration thus requiring a district court to dismiss the suit entirely or, in the alternative, refer the case to arbitration and retain jurisdiction for award enforcement purposes. *See, e.g.,* Miller v. Am. Airlines, Inc., 525 F.3d 520, 524-25 (7th Cir. 2008) (affirming grant of summary judgment for employer after district court referred case to arbitration as a "minor dispute").

53. As discussed in more detail below, the deciding court is often outcome-determinative. *See also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that the choice of forum between state and federal court is often outcome-determinative).

54. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1353 (11th Cir. 2003).

55. *See* Levine v. United Healthcare Corp., 402 F.3d 156, 159-67 (3d Cir. 2005) (holding

pletely preempt the state claim, the claim's viability remains in the hands of the state court.[56]

B. Evolution of the Complete Preemption Doctrine in the U.S. Supreme Court

"Determining whether a state law claim is completely preempted turns on Congressional intent."[57] In the thirty-seven years since the U.S. Supreme Court's first "complete preemption" case,[58] the question of what Congressional intent warrants complete preemption remains unsettled. With each new complete preemption case in the absence of Congress' "express" complete preemption,[59] the Supreme Court's standard continues to evolve.

1. Congressional Intent to Completely Preempt an Area of Law: Avco Corp. v. Machinists Aero Lodge No. 735 – In *Avco*, Avco Corporation and Aero Lodge No. 735 were parties to a collective bargaining agreement covering the production and maintenance workers at Avco's Nashville plant.[60] The collective bargaining agreement contained a "no strike" clause, prohibiting bargaining unit employees from striking during the life of the contract. Despite the no-strike pledge, union workers nevertheless engaged in a series of work disruptions and, eventually, a plant-wide strike.

Avco Corp. filed an action in the Chancery Court for Davidson County, Tennessee,[61] against Aero Lodge to enjoin the union's strike and enforce the terms of the collective bargaining agreement. The Tennessee state court issued an *ex parte* injunction against the union and the union subsequently removed the action to the Middle District of Tennessee.[62] The district court ruled that "all claims founded upon collective bargaining agreements in industries affecting interstate commerce arise under federal law" and, therefore, fell within the original jurisdiction of the fed-

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state law subrogation claims completely preempted by ERISA giving federal court jurisdiction and affirmed district court's dismissal of case based on principles of ordinary preemption).

56. *See* Lontz v. Tharp, 413 F.3d 435, 442-44 (4th Cir. 2005) (holding wrongful discharge claim was not completely preempted by National Labor Relations Act, but expressing no view on whether claims were preempted on the merits by federal labor law because ordinary preemption is a question for the state court to resolve).

57. Robinson v. Nw. Airlines, Inc., No. 04-650 ADM/AJB, 2004 U.S. Dist. LEXIS 17368 (D. Minn. 2004).

58. Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinist & Aerospace Workers, 390 U.S. 557, 561-62 (1968).

59. *See supra* text accompanying note 30.

60. Avco Corp. v. Machinists Aero Lodge No. 735, Int'l Ass'n of Machinist & Aerospace Workers, 263 F. Supp. 177, 178 (M.D. Tenn. 1966).

61. *Id.*

62. *Avco Corp.*, 390 U.S. at 558.

eral courts.[63] The district court then granted the union's motion to dissolve the state court injunction; a decision that was affirmed on appeal by the Sixth Circuit.[64]

The U.S. Supreme Court granted the petition for certiorari to decide whether a claim under a collective bargaining agreement is a claim "arising under the 'laws of the United States' within the meaning of the removal statute."[65] The Supreme Court held that such claims fall within the original jurisdiction of the federal courts and are, therefore, removable under 28 U.S.C. § 1441.[66]

Although the *Avco* petitioner only pleaded a claim for relief under state law and only sought a state law remedy,[67] the court found the claim arose[68] under § 301 of the LMRA.[69] Relying on the 1957 decision in *Textile Workers Union v. Lincoln Mills of Alabama*,[70] the Supreme Court held that claims involving collective bargaining agreements (in private industries other than rail and air) are controlled by federal substantive law; the remedies available arise solely under federal law; and state law cannot create "an independent source of private rights" in this area.[71] As such, claims under a LMRA collective bargaining agreement arise under the laws of the United States and are removable.[72]

While the reasoning underlying *Avco* is less than clear from the language of the original opinion, the Court later explained the *Avco* holding in *Franchise Tax Board v. Construction Laborers Vacation Trust*:[73]

> The necessary ground [for the *Avco*] decision was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope

63. *Avco Corp.*, 263 F. Supp. at 179.

64. Avco Corp. v. Machinists Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 376 F.2d 337, 339-43 (6th Cir. 1967).

65. *Avco Corp.*, 390 U.S. at 560.

66. *Id.* at 560-62.

67. *Avco Corp.*, 376 F.2d at 339-41.

68. *Id.* at 343.

69. 29 U.S.C. § 185(a) (West Supp. 2009).

70. 353 U.S. 448 (1957).

71. *Avco Corp.*, 390 U.S. at 559-60.

72. *Id.* at 560-61. However, state law claims that do not require the interpretation of a collective bargaining agreement are not completely preempted. *See, e.g.*, Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 406-08 (1988); Brittingham v. Gen. Motors Corp., 526 F.3d 272, 277-82 (6th Cir. 2008); Carlson v. Arrowhead Concrete Works, 375 F. Supp. 2d 835, 839-43 (D. Minn. 2005).

73. 463 U.S. 1 (1983).

of the federal cause of action necessarily "arises under" federal law.[74]

2. Congressional Intent to Create a Federal Cause of Action: Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California – In Franchise Tax Board, a California tax board filed suit in the Superior Court of Los Angeles County to enforce tax levies issued against funds held in trust by the Construction Laborers Vacation Trust for taxpayers who were delinquent in their state income tax payments.[75] The trust removed the case to the United States District Court for the Central District of California on the grounds that the case was preempted by the Employee Retirement Income Security Act ("ERISA"),[76] and the tax board moved to remand.[77] The district court denied remand holding that the state tax levy was not preempted by ERISA.[78] The Ninth Circuit reversed.[79]

Recognizing the importance of the issue between the parties, namely whether ERISA "permits state tax authorities to collect unpaid state income taxes by levying on funds held in trust for the taxpayers under an ERISA-covered vacation benefit plan,"[80] the Court determined that the federal district court lacked jurisdiction in the first instance to decide the ERISA-related issue and thus held that the case was improvidently removed from state court.[81]

In its analysis of the propriety of removal, the Court first noted that the original complaint included two causes of action: the first was a claim under California's tax code to enforce a tax levy and the second claim sought a declaration of the parties' respective rights under California's Declaratory Judgment Act.[82] The Court further noted that:

> [T]he "law that creates the cause of action" is state law, and original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is "really" one of federal law.[83]

In determining whether the two causes of action were questions of

74. *Id.* at 23-24; *See also* Franchise Tax Bd. Of S. Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 23-24 (1983). *See also* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 7 (2003) (discussing the "unusually 'powerful' preemptive force of § 301 . . . .").

75. Brief for the United States as Amicus Curiae Supporting Affirmance at 6, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983) (No. 82-695).

76. Employee Retirement Income Security Act, 29 U.S.C. § 1001 (2006) PL 93-406, 88 Stat 820 (codified as amended in scattered sections of 20 U.S.C. (2006)).

77. *Franchise Tax Bd.*, 463 U.S. at 7.

78. *Id.*

79. *Id.*

80. *Id.* at 3-4.

81. *Id.* at 4.

82. *Id.* at 13.

83. *Id.*

federal law dressed as state law claims, the Court examined whether either claim required "resolution of a substantial question of federal law . . . ."[84] With respect to the appellant's claim to enforce the state tax levy, the Court held the well-pleaded complaint rule precluded federal jurisdiction because "California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced . . . ."[85] Consequently, "federal law becomes relevant only by way of a defense to an obligation created entirely by state law . . . ."[86] A defense, even the defense of preemption, is not grounds for removal.[87]

The tax board's second claim—"[t]hat the court declare defendants legally obligated to honor all future levies by the Board upon" the trust[88]—was more problematic for the Court because, even though the tax board had anticipated the defendants' ERISA-preemption defense, the question of ERISA preemption was nonetheless a "necessary element" of the appellant's state law-based declaratory judgment claim.[89] In the declaratory judgment claim, "the only question[s] in dispute" was the rights and duties of the trust fund's trustees *under ERISA*.[90] Consequently, the face of the complaint evidenced that the plaintiff could not obtain the relief it sought "without a construction of ERISA and/or an adjudication of its pre-emptive effect and constitutionality—all questions of federal law."[91]

The Court noted that ERISA grants trustees of ERISA plans the right to petition a federal court for injunctive relief when the trustees' "rights and duties under ERISA are at issue."[92] Thus, if the trustees had brought suit for declaratory judgment to determine if they were allowed to pay the tax levy under ERISA, the suit clearly would have arisen under federal law.[93] Nevertheless, because the "express grant of federal jurisdiction in ERISA is limited to suits brought *by* certain parties" rather than "suit[s] *against* such parties,"[94] the "[s]tate's suit for a declaration of the validity of state law is sufficiently removed" from the question of federal law that original jurisdiction is not appropriate in federal court.[95]

The trustees argued "that ERISA, like § 301, was meant to create a

84. *Id.*
85. *Id.*
86. *Id.* at 13.
87. *Id.* at 13-14.
88. *Id.* at 14.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 19-20.
93. *Id.*
94. *Id.* at 21.
95. *Id.* at 21-22.

body of federal common law, and that 'any state court action which would require the interpretation or application of ERISA to a plan document 'arises under' the laws of the United States.'"[96] The Supreme Court rejected the trustees' argument. Noting that ERISA contains "a series of express causes of action" for specific parties involved in ERISA-covered plans (namely, participants, beneficiaries and fiduciaries), the Court found that the state causes of action filed by the Franchise Tax Board did not come within any of ERISA's specific causes of action.[97] The state's suit was not brought by a participant, beneficiary or fiduciary and, therefore, did not "arise under" ERISA.[98]

Moreover, the Court reasoned that, unlike § 301 of the LMRA, § 514(b)(2)(A) of ERISA[99] clearly states that ERISA is not designed to preempt every state cause of action relating to ERISA-covered plans.[100] The Court also noted that § 301 created a federal remedy for the *Avco* plaintiff, while ERISA did not supply the Franchise Tax Board with a "federal cause of action to replace" the pre-empted state claims.[101] Consequently, because ERISA did not create a federal cause of action for the claims at issue, the Court held that the state's suit did not "arise under" federal law for purposes of removal.[102]

Thus, the *Franchise Tax Board* decision required the lower courts to evaluate whether Congress intended to create a federal cause of action for the particular claims at issue as the predicate for complete preemption. Arguably, *Franchise Tax Board* also required lower courts to evaluate whether the federal statute at issue created a federal remedy for the plaintiff's alleged injury.

3. Congressional Intent to Permit Removal: Metropolitan Life Insurance Co. v. Taylor – In 1987, the U.S. Supreme Court revisited the question of complete preemption under ERISA.[103] In *Metropolitan Life*, Arthur Taylor was a salaried engineering analyst for General Motors

96. *Id.* at 24 (quoting Br. for Appellees 20-21).

97. *Id.* at 24-25.

98. *Id.* at 26-27.

99. 29 U.S.C. § 1144(b)(2)(A) (2006).

100. *Franchise Tax Bd.*, 463 U.S. at 25. "[N]othing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities." *Id.* at 26 (quoting 29 U.S.C. § 1144 (2009) (codified with some differences in language at 29 U.S.C. § 1144(b)(2)(A))). "Unlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is not of central concern to the federal statute." *Franchise Tax Bd.*, 463 U.S. at 25-26.

101. *Id.* at 26. "[E]ven though the Court of Appeals may well be correct that ERISA precludes enforcement of the State's levy in the circumstances of this case, an action to enforce the levy is not itself preempted by ERISA." *Id.*

102. *Franchise Tax Bd.*, 463 U.S. at 27-28.

103. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). *See also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (holding state law claim for improper processing of benefits

Corporation ("GM").[104] During the course of his employment, Taylor took a leave of absence for severe emotional problems. Initially, Metropolitan Life Insurance Co. ("Met Life") paid Taylor disability benefits under a GM employee benefit plan, but required Taylor to submit to periodic psychiatric examinations to determine continued eligibility for benefits. After Met Life's designated psychiatrist determined Taylor could return to work, Met Life ceased paying benefits. Taylor then sought the continuation of disability benefits based on a physical impairment, but benefits were again denied following a medical examination in which an orthopedist determined no medical problem precluded Taylor's return to work.[105] Nevertheless, Taylor refused to return to work and he eventually was terminated by GM as a "voluntary quit."[106]

Taylor sued GM and Met Life in Wayne County, Michigan, Circuit Court alleging Met Life breached its insurance contract by refusing to award Taylor disability benefits.[107] Taylor sought "compensatory damages for money contractually owed Plaintiff, compensation for mental anguish caused by breach of this contract, as well as immediate reimplementation of all benefits and insurance coverages Plaintiff is entitled to."[108] GM, with the concurrence of Met Life,[109] removed the case to the Eastern District of Michigan alleging federal question jurisdiction stemming from the claim for benefits from an ERISA plan.[110] The district court found the case properly removable and granted summary judgment to GM and Met Life on the merits.[111] The Sixth Circuit reversed, holding that the district court lacked removal jurisdiction because the face of Taylor's complaint stated only state law causes of action to which ERISA preemption was merely a defense.[112]

The U.S. Supreme Court granted certiorari and reversed.[113] The issue before the Court was "whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by [ERISA] § 502(a)(1)(B) as an action arising under federal law."[114] The Court held that Taylor's suit, which on its face

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were preempted by ERISA under principles of "ordinary" preemption and also decided on the same day as *Metro. Life Ins. Co.*).

104. *Metro. Life Ins. Co.*, 481 U.S. at 60.
105. *Id.* at 60-61.
106. Taylor v. Gen. Motors Corp., 588 F. Supp. 562, 564 (E.D. Mich. 1984).
107. *Id.* at 563.
108. *Metro. Life Ins. Co.*, 481 U.S. at 61.
109. *Taylor*, 588 F. Supp. at 563.
110. *Metro. Life Ins. Co.*, 481 U.S. at 61.
111. *Id.* at 61-62.
112. *Id.* at 62 (citing Taylor v. Gen. Motors Corp., 763 F.2d 216 (6th Cir. 1985)).
113. *Id.* at 62.
114. *Id.* at 64.

stated only state law claims for breach of contract, was different from the state tax collection suit at issue in *Franchise Tax Board.* Unlike the issues in *Franchise Tax Board* for which no ERISA corollary existed, Taylor's suit was a suit by a beneficiary to recover benefits from an ERISA plan and, therefore, a suit directly within the provisions of ERISA § 502(a)(1)(B), "which provides an exclusive federal cause of action for resolution of such disputes."[115] The Court noted "the policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."[116]

Relying on the similarities in the jurisdiction language in § 301 of the LMRA and ERISA § 502 and the legislative history of ERISA, the Court found a "clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA."[117] Rejecting various arguments raised by Taylor, the Supreme Court opined that "the touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense *but the intent of Congress.*"[118] Specifically, in ERISA Congress "clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) *removable to federal court.*"[119]

Thus, in *Metropolitan Life*, the Supreme Court shifted from the *Franchise Tax Board*'s focus on intent to create a federal cause of action to a Congressional manifestation of the intent to make a cause of action "*removable.*"

4. Congressional Intent to Provide a Federal Remedy is not Required for Removal: Caterpillar Inc. v. Williams – Two months after the Taylor decision, the U.S. Supreme Court released its decision in Caterpillar.[120] The plaintiffs in Caterpillar were employees initially hired into the collective bargaining unit of Caterpillar Tractor Company ("Caterpillar"). Each of the plaintiffs moved into managerial positions outside the scope of the collective bargaining agreement. During their tenure as managers, the tractor company allegedly promised them lifetime employment and

115. *Id.* at 62-63.

116. *Id.* at 64-65 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) ("ordinary" preemption case in which the Court ruled ERISA preempted state law tort claims)). *See also* Valles v. Ivy Hill Corp., 410 F.3d 1071 (9th Cir. 2005).

117. *Metro. Life Ins. Co.*, 481 U.S. at 66.

118. *Id.* (emphasis added).

119. *Id.* (emphasis added). The Court's reasoning is interesting because it seemingly ignores the argument that the state court will dismiss an exclusively federal claim on ordinary preemption grounds.

120. Caterpillar Inc. v. Williams, 482 U.S. 386 (1987).

transfers to other Caterpillar facilities if the company ever closed its doors. After these promises were made, each of the plaintiffs was demoted back into the bargaining unit. When the facility closed, the plaintiffs were all discharged pursuant to the terms of the applicable collective bargaining agreement.[121]

The plaintiffs sued in California state court alleging "breach of an employment contract, breach of a covenant of good faith and fair dealing, intentional infliction of emotional distress, and fraudulent misrepresentation" under California state law.[122] Caterpillar removed the suit to the Northern District of California arguing the plaintiffs' breach of contract claims were completely preempted by § 301 of the LMRA.[123] The district court ruled removal was proper and dismissed the case when the plaintiffs refused to amend their complaint to state a claim under § 301.[124] The Ninth Circuit reversed, holding that the plaintiffs' claims were not based on any alleged breach of a collective bargaining agreement and resolution of the individual employment contract claims did not require interpretation of a collective bargaining agreement.[125] Therefore, the plaintiffs' breach of individual contract claims did not fall within the scope of § 301.[126] The U.S. Supreme Court granted certiorari and affirmed the decision of the Ninth Circuit.[127]

The issue before the Court was whether a complaint alleging only state common-law breach of individual employment contract claims was completely preempted by § 301 of the LMRA if the claims are asserted by employees who also possess rights under a collective bargaining agreement.[128] The Court held:

> [T]he presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.[129]

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121. *Id.* at 389.

122. Williams v. Caterpillar Tractor Co., 786 F.2d 928, 930 (9th Cir. 1986), *aff'd sub nom.* Caterpillar Inc. v. Williams, 482 U.S. 386 (1987).

123. Caterpillar contended "that removal was proper because any individual employment contracts made with respondents 'were, as a matter of federal substantive labor law, merged into and superseded by the . . . collective bargaining agreements.'" *Caterpillar Inc.*, 482 U.S. at 390 (quoting Pet. for Removal, App. A-36).

124. *Id.*

125. *Williams*, 786 F.2d at 935-36.

126. *Id.*

127. *Caterpillar Inc.*, 482 U.S. at 391.

128. *Id.* at 388.

129. *Id.* at 398-99.

Consequently, if a plaintiff alleges entitlement to a right created by a collective bargaining agreement, "the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option."[130] Where, however, the plaintiff chooses not to enforce a right under a collective bargaining agreement and, instead, seeks enforcement of rights existing outside a collective bargaining agreement, removal is improper.[131] Thus, under the reasoning of *Franchise Tax Board*, the plaintiffs' individual employment contract claims were not removable because the state cause of action did not fall within the scope of the federal cause of action under § 301.[132]

The *Caterpillar* decision did clarify one point of law left open by *Franchise Tax Board*: the Court expressly rejected any requirement that the federal cause of action on which removal is based provide the plaintiff with a remedy.[133] The Court noted that "[t]he nature of the relief available after jurisdiction attaches is . . . a distinct question from whether the court has jurisdiction over the parties and the subject matter."[134]

Because the *Caterpillar* Court drew on both *Franchise Tax Board* and *Metropolitan Life*, but failed to discuss fully the standards enunciated in those decisions, lower courts were left to their own devices in deciding whether to search for a congressional intent to create a federal cause of action under *Franchise Tax Board* or a congressional intent to permit removal under *Metropolitan Life*. The result was a distinct split in the circuits, particularly in cases seeking complete preemption under the RLA.[135]

5. Congressional Intent to Create an Exclusively Federal Cause of Action: Beneficial National Bank v. Anderson – In Beneficial National Bank, Marie Anderson and 25 other customers sued Beneficial National Bank ("Beneficial") in the Circuit Court of Barbour County, Alabama, alleging that the bank's interest rates were usurious under "the common law usury doctrine" and an Alabama usury statute.[136] No federal claims were made in the state law complaint and only state law remedies were

130. *Id.* at 399.

131. *Id.*

132. *Id.* at 393-95, 399.

133. *Id.* at 391 n.4. *Cf.* Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J. concurring) (advocating revisiting the breadth of ERISA preemption because "'virtually all state law remedies are preempted but very few federal substitutes are provided'" (quoting DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 456 (3d Cir. 2003))).

134. *Caterpillar Inc.*, 482 U.S. at 391 n.4 (quoting Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 561 (1968)).

135. *See* Sullivan v. Am. Airlines, 424 F.3d 267, 278 n.9 (2d Cir. 2005) (collecting cases).

136. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 3-4 (2003); Anderson v. H&R Block, Inc., 132 F. Supp. 2d 948, 949 (M.D. Ala. 2000), *rev'd sub nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

sought by the plaintiffs.[137] Nevertheless, Beneficial and the other defendants[138] removed the case to the Middle District of Alabama "based upon the presence of a federal question through complete pre-emption under the National Bank Act."[139] Beneficial argued that the National Bank Act[140] "is the exclusive provision governing the rate of interest that a national bank may lawfully charge, that the rates charged to respondents complied with that provision, that [the Act][141] provides the exclusive remedies available against a national bank charging excessive interest," and, therefore, removal under 28 U.S.C. § 1441 was appropriate.[142]

The Middle District of Alabama agreed with Beneficial and denied Anderson's motion to remand the case to state court.[143] The Eleventh Circuit reversed, holding that the "well-pleaded complaint" rule prohibited removal "unless the complaint expressly alleges a federal claim"[144] and the "complete preemption doctrine" did not apply because there was "no clear congressional intent to permit removal" in the National Bank Act.[145]

The U.S. Supreme Court granted certiorari to resolve the conflict between the Eleventh Circuit's decision and the Eighth Circuit's decision in Krispin v. May Dept. Stores Co.,[146] which found complete preemption under the National Bank Act. The question before the Court was "whether an action filed in a state court to recover damages from a national bank for allegedly charging excessive interest in violation of both 'the common law usury doctrine' and an Alabama usury statute may be removed to a federal court because it actually arises under federal law."[147] Answering the question in the affirmative, the U.S. Supreme Court held that the National Bank Act did completely preempt state law usury claims because federal law definitively defines what constitutes usury by a national bank and created a federal cause of action that was exclusive; thereby precluding any state-law claim of usury against a na-

137. *Beneficial Nat'l Bank*, 539 U.S. at 4; *Anderson*, 132 F. Supp. 2d at 950.

138. The plaintiffs also sued H&R Block, Inc. and Beneficial Tax Masters, Inc., the tax preparation services that arranged for the loans to the plaintiffs. *Anderson*, 132 F. Supp. 2d at 949.

139. *Id.* at 949-950.

140. 12 U.S.C. § 85 (2009).

141. 12 U.S.C. § 86 (2009).

142. *Beneficial Nat'l Bank*, 539 U.S. at 4-5.

143. *Id.* at 5.

144. *Id.* (citing Anderson v. H&R Block, Inc., 287 F.3d 1038, 1048 (11th Cir. 2002), *rev'd sub nom.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003).

145. *Anderson*, 287 F.3d at 1048.

146. *Beneficial Nat'l Bank*, 539 U.S. at 5-6 (citing Krispin v. May Dept. Stores Co., 218 F.3d 919, 924 (2000) (holding National Bank Act preempted state law claims for excessive fees on department store charge cards)).

147. *Id.* at 3-4.

tional bank.[148] As a result, the National Bank Act provides an exclusive federal remedy for usury such that any cause of action for usury brought against national banks "only arises under federal law."[149]

In reaching the conclusion that the preemption doctrine applies to state law actions against national banks, the Court carefully examined the interplay between the "well-pleaded complaint" rule and removal of claims "arising under" federal law.[150] The Court noted that under the "well-pleaded complaint" rule: "absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim."[151] Exceptions to the well-pleaded complaint rule arise when Congress expressly pre-empts state law claims in a federal statute[152] or "when a federal statute wholly displaces the state-law cause of action through complete pre-emption."[153]

"When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that [statute], even if pleaded in terms of state law, is in reality based on federal law."[154] In analyzing whether the National Bank Act completely preempted state law usury claims, the Court noted that the two statutes the Court previously had held completely preempted state law (the LMRA and ERISA), "provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action."[155]

To determine if a federal law, such as the National Bank Act, provides "the exclusive cause of action,"[156] the Court directed lower courts to focus "on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable."[157] Recognizing the "special nature of federally chartered banks" and the need for "[u]niform rules limiting the liability of national banks,"[158] the Court found that the provisions of the National

148. *Id.* at 11.

149. *Id.*

150. *Id.* at 6.

151. *Id.* (citing Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); *see* Taylor v. Anderson, 234 U.S. 74 (1914); Rivet v. Regions Bank of La., 522 U.S. 470 (1998); and Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1 (1983)).

152. *Beneficial Nat'l Bank*, 539 U.S. at 6 (citing the Price-Anderson Act, 42 U.S.C. § 2014(hh) (2009)).

153. *Id.* at 8 (citing cases arising under the Labor Management Relations Act, 29 U.S.C. § 185 (2009) and the Employee Retirement Income Security Act, 29 U.S.C. §1001 (2009)).

154. *Id.* at 8.

155. *Id.* (citing 29 U.S.C. § 1132 (2009) (setting forth procedures and remedies for civil claims under ERISA) and 29 U.S.C. § 185 (describing procedures and remedies for suits under the LMRA)).

156. *Id.* at 9.

157. *Id.* at 9 n.5.

158. *Beneficial Nat'l Bank*, 539 U.S. at 10.

Bank Act "supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law."[159] Thus, because the National Bank Act provided the "exclusive cause of action for such claims," they were removable as arising under federal law.[160]

6. Integrated System of Procedures for Enforcement: Aetna Health Inc. v. Davila – In 2004, the United States Supreme Court again visited the question of complete preemption under ERISA.[161] The Court focused on ERISA's "integrated system of procedures for enforcement,"[162] finding that system to be "a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans."[163] The Court found "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."[164]

III. Application of the Complete Preemption Doctrine in Cases Involving the Railway Labor Act

A. Brief History of the RLA

The history of railroads at the end of the nineteenth century is filled with labor strife.[165] The Great Strikes of 1877 and the Pullman Strike of 1894 are among some of the country's best known and most violent examples of labor-relations at its worst. Between 1881 and 1905, there were 509 rail strikes that idled 218,393 workers.[166] Because the primary means of moving people and goods from one place to another was the rails, each work stoppage had a direct impact on the economic stability of the

159. *Id.* at 11.

160. *Id.*

161. Aetna Health Inc. v. Davila, 542 U.S. 200, 204 (2004).

162. *Id.* at 208 (quoting Mass. Mut. Life, Ins. Co. v. Russell, 473 U.S. 134, 147 (1985)).

163. *Id.*

164. *Id.* at 208-09. If, however, there are rights independent of the ERISA plan, a state claim will not be preempted. Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health and Welfare Trust Fund, 538 F.3d 594, 601 (7th Cir. 2008) (rejecting complete preemption under ERISA in negligent misrepresentation suit brought by medical provider against health plan).

165. The overview of the basic requirements of the RLA is based upon the 1926 Act and subsequent amendments. This article does not attempt to delineate which of the current RLA provisions are original to the 1926 Act and which arose in subsequent amendments. *See* Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 372 U.S. 682, 685-89 (1963) (outlining some of the changes made to the RLA in subsequent amendments).

166. Frank N. Wilner, *The Railway Labor Act: Why, What, and for How Much Longer—Part I*, 55 Transp. Prac. J. 242, 262 n.114 (1988) [hereinafter Wilner, *Part I*] (citing Florence Peterson, Bureau of Labor Statistics, U.S. Dep't of Labor, Bull No. 651, Strikes in the U.S. 30 table 5 (1938).

country.[167]

Consequently, the U.S. Congress passed a series of laws designed, at least in part, to relieve the labor-relations pressures in the railroad industry. The Congressional efforts culminated in the passage of the Railway Labor Act in 1926, which "followed a half-century of worker agitation, social turmoil and congressional experimentation."[168] The Act was the first legislation—federal or state—to guarantee workers the right to organize, bargain collectively through employee-chosen representatives, and freedom from employer interference.[169] "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes."[170]

The Act has as its basic premise that "[t]he nation cannot tolerate a work stoppage that threatens to deprive any section of the country of essential transportation services."[171] To this end, Section 1[172] of the Act sets forth five basic purposes:

1. To avoid any interruption to commerce;
2. To ensure an unhindered right of employees to join a labor union;
3. To provide complete independence of organization by both parties to carry out the purposes of the RLA;
4. To assist in the prompt and orderly settlement of disputes covering rates of pay, work rules, or working conditions; and
5. To assist in the prompt and orderly settlement of disputes growing out of grievances or out of the interpretation or application of existing contracts covering the rates of pay, work rules or working conditions.[173]

The current language of Section 2[174] propounds the duties of both the carrier and employees under the Act, extolling both sides to "exert every reasonable effort to make and maintain agreements . . . to avoid any interruption to commerce or to the operation of any carrier growing

167. *Id.* "During the Pullman strike of 1894, the *Chicago Daily Tribune* warned that a paralysis of the railroads would return the nation to 'very wretched and primitive conditions' and 'cut down to zero the earning power of the whole people.'" (quoting *How the Strike Could be Quickly Settled*, CHI. DAILY TRIB., July 6, 1894, at 6)).

168. Frank N. Wilner, *The Railway Labor Act: Why, What and For How Much Longer—Part II*, 57 TRANSP. PRAC. J. 129, 130 (1990) [hereinafter Wilner, *Part II*]. *See generally* Charles M. Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries, in* THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES 1, 1-6 (Nat'l Mediation Bd. 1976) (detailing the various statutes preceding the passage of the Railway Labor Act).

169. Wilner, *Part I, supra* note 166, at 278-79.

170. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) (citing Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 562 (1987)).

171. Wilner, *Part II, supra* note 168, at 131 (noting, however, that "[r]ailroad strikes no longer threaten intolerable economic dislocations.").

172. Railway Labor Act, 45 U.S.C. § 151(a) (the "General purposes" provision).

173. Wilner, *Part I, supra* note 166, at 281; Rehmus, *supra* note 168, at 9.

174. Railway Labor Act, 45 U.S.C. § 152 (2006) (the "General duties" provision).

out of any dispute between the carrier and the employees thereof."[175] Sections 3[176] and 4[177] then create two mechanisms designed to assist carriers and employees in fulfilling their statutory duties to settle disputes without interrupting commerce: the National Railroad Adjustment Board and the National Mediation Board.

In *Burley*,[178] the U.S. Supreme Court adopted the vocabulary used by rail management and labor to distinguish between the two types of disputes governed by Section 2 of the RLA: major and minor disputes. A major dispute arises under Sections 2 Seventh and 6 of the RLA and concerns the formation of collective bargaining agreements or attempts to amend or modify provisions of those agreements.[179] In contrast, minor disputes are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation"[180] and arise from Sections 2 Sixth and 3 First, "which set forth conference and compulsory arbitration procedures for a dispute arising or growing 'out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'"[181] In short, "major disputes seek to create contractual rights, minor disputes to enforce them."[182]

Settlement of major disputes requires the parties "to undergo a lengthy process of bargaining and mediation."[183] If the parties cannot reach an agreement through the normal collective bargaining process, the dispute may then be mediated under the auspices of the National Mediation Board. If the mediator determines the parties are "hopelessly deadlocked," the National Mediation Board will declare impasse and proffer binding arbitration, which either party may reject. If arbitration is rejected, the parties begin a 30-day "cooling off" period during which neither side may utilize self-help. If no agreement is reached during the cooling-off period, the National Mediation Board can notify the President of the United States of a possible threat to commerce and the President may appoint a Presidential Emergency Board ("PEB") to review the stalemate and make recommendations for resolving the stalemate. If the President fails to appoint a PEB or a party rejects the recommendations

175. 45 U.S.C. § 152 at First (2009).

176. 45 U.S.C. § 153 (2009).

177. 45 U.S.C. § 154 (2009).

178. Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 723-24 (1945).

179. *See generally* Wilner, *Part I, supra* note 166, at 281-82. Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 302 (1989) (quoting *Burley*, 325 U.S. at 723).

180. *See generally* Wilner, *Part I, supra* note 166, at 281. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 253 (1994) (quoting Bhd. of R.R. Trainmen v. Chi. River and Ind. R.R., 353 U.S. 30, 33 (1957)).

181. *Consol. Rail Corp.*, 491 U.S. at 303.

182. *Id.* (citing *Burley*, 325 U.S. at 723-724).

183. *Id. at 302.*

of the PEB, the union is free to strike and the carrier may implement the provisions of its Section 6 notices and other proposals discussed during bargaining. However, the U.S. Congress has the power under the Commerce Clause to the Constitution to intervene and either resolve the dispute through legislation or create additional dispute resolution procedures.[184] Until the parties have exhausted the major dispute procedures, they must maintain the status quo and changes to rates of pay, rules, or working conditions may not be made.[185] Federal district courts have subject matter jurisdiction to enjoin violations of the status quo pending completion of the required bargaining and mediation.[186]

In contrast, settlement of minor disputes is governed by the Act's conference and compulsory arbitration procedures.[187] In the railroad industry, minor disputes not settled by the parties "on property" are subject to compulsory, binding arbitration before the National Railroad Adjustment Board[188] or before a "system board of adjustment" or "public law board" voluntarily established by the employer and union.[189] PLB's are mandatory after the grievance has been pending for a year. In the airline industry, minor disputes are resolved by adjustment boards created by the individual airlines and representative unions, akin to the "system board of adjustments" in the railroad industry.[190]

In both industries courts do not have subject matter jurisdiction to decide cases involving minor disputes.[191] Judicial review of the arbitration decisions made by adjustment boards is limited.[192] Courts have au-

184. *See* Transport Workers Union of Am. Local 567, *Major Dispute Resolution Process*, http://twu567.org/uploadpages/brgnrla.htm (outlining bargaining process and providing convenient flow chart explanation of major dispute resolution under the RLA).

185. *Consol. Rail Corp.*, 491 U.S. at 302-303.

186. *See* Detroit and Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969).

187. 45 U.S.C. § 153 (2009). Airline minor disputes are subject to the procedures set forth in Title 2 of the Act. 45 U.S.C. § 152 (2009).

188. Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 567 (1937) ("The National Railroad Adjustment Board . . . is . . . the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts.").

189. 45 U.S.C. § 153 (2009). *See also* Bradley v. Alton & S. Ry., 2004 U.S. App. LEXIS 15884 (7th Cir. 2004) (reviewing decision of public law board).

190. 45 U.S.C. § 184 (2009).

191. Bhd. of Maint. of Way Employees v. CSX Transp., Inc., 2005 U.S. App. LEXIS 13217, at *158 (11th Cir. 2005); Airline Prof'l Ass'n, Teamster Local Union 1224 v. ABX Air, Inc., 400 F.3d 411, 414 (6th Cir. 2005); Int'l Ass'n of Machinists & Aerospace Workers v. US Airways, Inc., 358 F.3d 255, 260 (3rd Cir. 2004).

192. 45 U.S.C. § 153 (q) (2009). *See Consol. Rail Corp.*, 491 U.S. at 304 (citing Union Pac. R.R. v. Sheehan, 439 U.S. 89, 93 (1978)); *Bradley*, 2004 U.S. App. LEXIS at 502 (calling review of arbitration decisions under the RLA "among the narrowest known to law") (quoting Pokuta v. Trans World Airlines, Inc., 191 F.3d 834, 839 (7th Cir. 1999) (quoting *Union Pac. R.R.* ., 439 U.S. at 91))); Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters, 391 F.3d 613, 617 (5th Cir. 2004);

thority to enjoin strikes arising out of minor disputes, but this authority is designed to assure compliance with the Act's mandatory arbitration procedures.[193] Thus the statute is designed to keep most railroad and airline labor disputes out of the court system entirely.

The U.S. Supreme Court has recognized that, to some extent, "the distinction between major and minor disputes is a matter of pleading. The party who initiates a dispute takes the first step towards categorizing the dispute when it chooses whether to assert an existing contractual right to take or to resist the action in question."[194]

A long line of court decisions have held that the grievance arbitration procedure is the exclusive procedure for resolving minor disputes and that recourse is mandatory.[195] The RLA establishes a detailed, mandatory dispute resolution process that virtually eliminates the rights of the parties to seek relief in court and dictates what relief is available to the parties.

One could logically conclude that this comprehensive, federally-created process would be seen as evidence of Congressional intent completely to displace state court actions, thereby creating an action that arises solely under federal law. One could also logically conclude that it should be exclusively the province of the federal courts to determine the character of a dispute between the employer, and the employees and their representatives. In many instances a dispute is prompted by a disagreement over the interpretation or application of a collective bargaining

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Nachtsheim v. Cont'l Airlines- Int'l Ass'n of Mechanists and Aerospace Workers, 2004 U.S. App. LEXIS 20612, at 4-5 (3rd Cir. 2004); Robinson v. Union Pac. R.R., 245 F.3d 1188, 1193 (10th Cir. 2001) ("even if we were inclined to disagree with the [adjustment] Board's interpretation of the applicable provisions of the collective bargaining agreement," the scope of review of the award does not permit the court to make this interpretation).

193. *Trainmen*, 353 U.S. at 39-40; Bhd. of Maint. Way Employees v. CSX Transp., Inc., 2005 U.S. App. LEXIS 13217 (11th Cir. 2005); Airline Prof'ls Ass'n, Teamster Local Union 1224 v. ABX Air, Inc., 400 F.3d 411, 415 (6th Cir. 2005); CSX Transp., Inc. v. United Transp. Union, 395 F.3d 365, 368-369 (6th Cir. 2005); Nat'l R.R. Passenger Corp. v. Transp. Workers Union of Am., 373 F.3d 121, 125 (D.C. Cir. 2004); Burlington N. & Santa Fe R.R. v. Bhd of Locomotive Eng'rs., 367 F.3d 675, 679 (7th Cir. 2004) ("A federal court may enjoin a labor strike arising out of a minor dispute in order to assure compliance with the mandatory arbitration procedures of the RLA, notwithstanding the anti-injunction section of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-105."); *see* Bhd. of R.R. Signalmen v. Burlington N. R.R., 829 F.2d 617, 619 (7th Cir. 1987) (observing whether a dispute constitutes a major or minor dispute is a frequently litigated issue and has led to a substantial body of federal court decisions); *see, e.g., Consol. Rail Corp.*, 491 U.S. at 304.

194. *Consol. Rail Corp.*, 491 U.S. at 305.

195. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1354 (11th Cir. 2003) ("This comprehensive framework establishes a system of adjustment boards with exclusive and mandatory jurisdiction to handle minor disputes . . . thus keeping them out of courts altogether"), *cert. denied*, Am. Airlines, Inc. v. Geddes, 2003 U.S. LEXIS 7447, at *1 (2003); e.g., Kozy v. Wings W. Airlines, Inc., 89 F.3d 635, 639 (9th Cir. 1996) (stating arbitration boards "are the mandatory, exclusive, and comprehensive system for resolving grievance disputes.").

agreement (a minor dispute) and therefore a case that must be sent to mandatory arbitration. In other instances, the dispute is an effort to change the status quo (a major dispute) for which an injunction can issue to preserve the status quo pending the outcome of mandatory negotiations.[196] But such logic, to date, has not always prevailed.

B. The Complete Preemption View: *Graf v. Elgin, Joliet & Eastern Railway and Its Progeny*—Focusing on the Exclusivity of the Remedy

In *Graf*,[197] the plaintiff sued his former employer in state court for wrongful discharge claiming that his discharge was in retaliation for his filing of a claim under the Federal Employers Liability Act ("FELA"). The plaintiff also sued his union for breach of the duty of fair representation alleging that it failed to process an appeal of his termination. After the union unilaterally removed the case to federal court, the propriety of which the plaintiff did not challenge,[198] the district court granted the union's motion for summary judgment and dismissed *sua sponte* the plaintiff's wrongful discharge claim on the merits. On appeal, the Seventh Circuit affirmed the dismissal of the claims against the union but remanded the case to the district court for a determination of whether the plaintiff's wrongful discharge claim was viable.[199] On remand, the district court found that the complaint stated a state law claim for wrongful discharge but that such claim was preempted by the RLA.[200] The district court dismissed the case entirely. The plaintiff again appealed.

On appeal to the Seventh Circuit, Judge Posner considered whether the district court properly exercised original federal subject matter jurisdiction or pendent jurisdiction over the plaintiff's state law claim for wrongful discharge.[201] Considering the difference between ordinary and complete preemption, Judge Posner posited the following question:

> The question, then, is whether the plaintiff seeks to base his claim on a body of state law that cannot be applied to his case without violating federal law, or on a body of federal law whose provenance he coyly refuses to acknowledge. In the first situation the case is really a state case, blocked by a federal defense; in the second it is a federal case in state wrapping paper. A federal statute could bring about either situation. A statute that merely created a defense to a state claim would bring about the first, so the case to which it

196. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 208-209 (1991) (stating under the NLRA, courts determine whether the agreement existed to arbitrate a particular dispute).

197. Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341 (7th Cir. 1986).

198. *Id.* at 1343.

199. *Id.*

200. *Id.*

201. Posner noted that, for purposes of the case before him, removal jurisdiction and original federal jurisdiction were the same. *Id.*

> applied would not be within the federal-question jurisdiction, which depends on the legal basis of the claim, not the defense. But a statute that took over the whole field, with the result that the claim necessarily arose under federal rather than state law, would place the case within the federal-question jurisdiction.[202]

Judge Posner then looked to cases evaluating complete preemption under § 301, finding:

> The Supreme Court has held that section 301 provides the exclusive remedy for such breaches. Therefore anyone who brings suit to redress such a breach is, whether he likes it or not, basing his suit on section 301—on federal law—because federal law, which is supreme, does not allow such a suit to be based on anything else.[203]

Judge Posner further found:

> Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, the cases hold that that remedy is exclusive; the worker has no state remedies. The explanation is the traditional mistrust—a steady theme in federal labor legislation—of state judicial intervention in disputes arising out of collective bargaining activities. But whether soundly based on the history and practicalities of the labor field or not, the principle of complete preemption in collective bargaining matters is too well settled to be disturbed by us; and the force of the principle is no less when the state happens to call wrongful discharge a tort rather than a breach of contract.[204]

Judge Posner concluded that "just as section 301 of the Taft-Hartley Act is the exclusive remedy for breaches of such contracts within the scope of that Act, so the Railway Labor Act provides the exclusive remedy for breaches of such contracts within its scope."[205] Consequently, the Railway Labor Act, like the Taft-Hartley Act, completely preempts state law claims.[206]

The Eighth and Ninth Circuits later reached similar conclusions. In *Deford v. Soo Line Railroad*,[207] the Eighth Circuit found that the RLA "'pervasively occupies' the field of railroad labor disputes, completely preempting state law claims arising out of collective bargaining agreements."[208] According to the Eighth Circuit, the RLA grants the Railroad Adjustment Board "*exclusive* power to resolve all minor 'disputes between an employee or group of employees and a carrier . . . growing out

202. *Id.* at 1344-45.
203. *Id.* at 1345.
204. *Id.* at 1346.
205. *Id.* at 1345.
206. *Id.*
207. 867 F.2d 1080 (8th Cir. 1989).
208. *Id.* at 1085.

of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'"[209]

Several years later, the Eighth Circuit reiterated its position in *Gore v. Trans World Airlines*.[210] In that case, the plaintiff was a mechanic with Trans World Airlines ("TWA"). After a co-worker overheard Gore say he was going to kill himself and several co-workers, Gore was unceremoniously handcuffed, patted down, and removed from the TWA worksite. Employee meetings were held with TWA employees to warn them that Gore was dangerous, and Gore's picture was hung throughout the facility to enable TWA employees to recognize Gore if he attempted to enter the premises. After a psychologist determined Gore was not a threat to TWA personnel, TWA's "termination board" ordered Gore's reinstatement. Gore then sued TWA alleging false arrest, negligence, libel and slander, false light invasion of privacy, and public disclosure of private facts.[211]

TWA removed the case to federal district court, arguing that Gore's claims were inextricably intertwined with consideration of the terms of the collective bargaining agreement governing Gore's employment with TWA. The district court denied Gore's motion to remand and ultimately dismissed Gore's lawsuit as an RLA "minor dispute" subject to mandatory arbitration under the Act, finding that the court would have to analyze Gore's rights and TWA's duties under the collective bargaining agreement to resolve Gore's claims.[212] The Eighth Circuit affirmed, holding that the RLA completely preempted Gore's state law tort claims because Gore could not establish liability for the state law tort "without demonstrating that the defendants' actions were wrongful" under the parties' collective bargaining agreement.[213]

In reaching its decision, the Eighth Circuit noted that "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a *comprehensive* framework for resolving labor disputes."[214] The RLA, therefore, creates the sole mechanism for resolving disputes involving the interpretation of an RLA-covered collec-

209. *Id.* (citing 45 U.S.C. § 153(I)(i)).

210. *Gore v. Trans World Airlines*, 210 F.3d 944, 947 (8th Cir. 2000), *cert. denied*, 532 U.S. 921 (2001).

211. *Id.* at 947-48.

212. *Id.* at 948.

213. *Id.* at 952.

214. *Id.* at 949 (quoting Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994)) (emphasis added). The Eighth Circuit emphasized that "[c]laims of preemption under the RLA are governed by a standard that is 'virtually identical' to that employed under § 301 of the Labor [ ] Management Relations Act . . . under this standard, 'a state-law cause of action is not preempted by the RLA if it involves rights and obligations that exist independent of the [collective bargaining agreement].'"

tive bargaining agreement and the sole source of remedies for such disputes. Because the RLA *obligates* the parties to arbitrate minor disputes, complete preemption applies when disputes involve "duties and rights created or defined by" collective bargaining agreements.[215]

In *Schroeder v. Trans World Airlines, Inc.*,[216] the Ninth Circuit considered actions filed by several airline employees in state court alleging the employer engaged in unlawful business practices that were not authorized by the collective bargaining agreement between the employees and TWA. After the defendants removed to federal court, the district court dismissed the state law claims as being preempted by federal law.[217] On appeal to the Ninth Circuit, the court found that federal question jurisdiction was properly exercised by the district court, stating that it was "clear from plaintiffs' complaints here, they intended to *avoid* application of federal law and relied solely on state law to articulate their claims."[218] The Ninth Circuit noted that the Supreme Court had previously found that the RLA, in cases involving interpretation or application of a collective bargaining agreement, made the "federal administrative remedy *exclusive*, rather than merely requiring exhaustion of remedies in one forum before resorting to another"[219] and that "[o]nce the grievance has been heard by the adjustment board, *exclusive jurisdiction* rests with the federal court."[220] Accordingly, the Ninth Circuit determined that the RLA and the necessity of interpretation of the underlying collective bargaining agreement in deciding the plaintiff's claims established the existence of a federal question, and thus provided a proper basis for removal.[221]

215. *Id.* at 949. *See also* Robinson v. Nw. Airlines, Inc., No. Civ.04-650 ADM/AJB, 2004 WL 1941277, at *4 (D. Minn. Aug. 30, 2004) (finding plaintiff's defamation claims completely preempted by RLA based on *Gore* and *Beneficial*).

216. 702 F.2d 189, 190 (9th Cir. 1983).

217. *Id.* at 192.

218. *Id.* at 191.

219. *Id.* at 191 (quoting Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 325 (1972)).

220. *Id.* at 192.

221. *Id.* at 191. Since the *Schroeder* decision, the Ninth Circuit has noted an apparent intra-circuit conflict on the issue of whether the RLA has complete preemptive power. *See* Holman v. Laulo-Rowe Agency, 994 F.2d 666, 669 n.4 (9th Cir. 1993). *See also* Shafi v. British Airways, PLC, 83 F.3d 566, 569-570 (2d Cir. 1996) (finding state law claims removable based on RLA complete preemption).

C. The Opposing View—*Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie Railroad Co.*; *Geddes v. American Airlines, Inc.*; and *Roddy v. Grand Trunk Western Railroad*—Focusing on Congressional Intent to Allow Removal

In *Pittsburgh & Lake Erie Railroad*,[222] the plaintiff association filed suit in state court alleging that certain transactions undertaken by railroads and their officials were fraudulent transactions under the Pennsylvania Uniform Fraudulent Conveyance Act.[223] After the defendants removed the case to federal court, the district court denied the plaintiffs' motion to remand and granted the defendants' motion to dismiss the suit because the state law claims were preempted by the RLA.[224]

On appeal, the Third Circuit reversed the dismissal and ordered the case remanded to state court. The Third Circuit determined that the RLA and its legislative history provided no evidence of Congressional intent to permit removal of exclusively state court actions to federal court and, thus, that the RLA did not completely preempt state law.[225] The Third Circuit found important the fact that the RLA provided no substitute federal cause of action for the state law cause of action that plaintiffs had asserted.[226] Accordingly, the Third Circuit determined that the issue of whether state law was preempted by the RLA was an issue to be determined in the first instance by the state court.[227]

In *Geddes*,[228] the plaintiff was an American Airlines ("AA") aircraft technician who was accused of threatening a co-worker.[229] As a result of the complaint, Geddes was temporarily suspended while the company investigated. According to Geddes, AA "knew the accusation was false but nonetheless published it and failed to stop the spread of false statements related to it."[230] Geddes sued his employer for defamation, negligence, and negligent supervision and retention.[231]

Contending that it was merely acting in accordance with the terms of the applicable collective bargaining agreement between the company and the Transport Workers Union of America, AA removed the case.[232] AA

222. Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R., 858 F.2d 936, 938 (3d Cir. 1988).
223. *Id.*
224. *Id.*
225. *Id.* at 942.
226. *Id.*
227. *Id.* at 939.
228. Geddes v. Am. Airlines, Inc., 321 F.3d 1349 (11th Cir. 2003).
229. *Id.* at 1351.
230. *Id.* at 1353.
231. *Id.*
232. *Id.*

argued that claims requiring the interpretation of a collective bargaining agreement in the airline industry are minor disputes governed by the RLA's mandatory arbitration provisions and, as such, are completely preempted.[233] The Southern District of Florida agreed and dismissed Geddes' claims.[234]

On appeal, the Eleventh Circuit held that removal was improper because the doctrine of complete preemption does not apply to claims arising under the RLA. Noting that the U.S. Supreme Court "has cautioned that complete preemption can be found only in statutes with 'extraordinary' preemptive force,"[235] the Eleventh Circuit opined that the "'extraordinary' preemptive force must be manifest in the clearly expressed intent of Congress:"[236] Thus, the complete preemption inquiry turns on the question of "whether Congress not only intended for a federal statute to provide a defense to state-law claims, but also intended to confer on defendants the *ability to remove* a case to a federal forum."[237]

In addressing whether the RLA completely preempted Geddes' state law claims, thereby providing federal question jurisdiction on which removal could be based, the Eleventh Circuit first looked at the language and substance of the RLA. The Court noted that (1) the stated purpose of the RLA is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions"[238] and (2) the RLA establishes a "comprehensive framework" for resolving labor disputes to keep those disputes out of court altogether.[239] The Eleventh Circuit nevertheless reasoned that the "RLA permits narrow federal judicial review of adjustment board decisions . . . but the statute includes no language granting general jurisdiction over minor disputes to federal courts."[240] In the absence of such language, the Eleventh Circuit concluded the face of the statute did not evidence intent to allow removal and, therefore, did not completely preempt the plaintiff's state law claims.

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233. *Id.* at 1351-1352.

234. *Id.* at 1352.

235. *Id.* at 1353 (quoting *Caterpillar Inc.*, 482 U.S. at 393 and *Metro. Life Ins. Co.*, 481 U.S. at 65).

236. *Id.* at 1353 (citing *Anderson*, 287 F.3d at 1047).

237. *Id.* at 1353 (quoting *Anderson*, 287 F.3d at 1041) (emphasis added).

238. 45 U.S.C. § 151a (1934). *See also* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 ("Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes.").

239. *Geddes*, 321 F.3d at 1354 (quoting Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978) ("Congress considered it essential to keep these so-called 'minor disputes' within the Adjustment Board and out of the courts.") and Pyles v. United Air Lines, Inc., 79 F.3d 1046, 1050 (11th Cir. 1996) ("Congress intended that these 'minor disputes' be resolved through the grievance procedures of the RLA rather than in federal court.").

240. *Geddes*, 321 F.3d at 1354 (citing 45 U.S.C. § 153 (1970)).

Ignoring the internal inconsistency in its reasoning regarding the implications of the language and substance of the Act itself, the Eleventh Circuit then turned to the statute's legislative history. The Eleventh Circuit opined that the legislative history evidenced "an agreement to arbitrate certain disputes," but did not evidence "that Congress intended to allow parties to *litigate* RLA minor dispute claims in federal court."[241]

The Eleventh Circuit's reasoning creates quite a logical conundrum: Why would a statute—that was expressly designed to keep disputes out of courts entirely and which gives exclusive jurisdiction over minor disputes to a federally-created system of adjustment boards—include a provision giving the federal courts general jurisdiction to decide those disputes or have a legislative history that reflects an intent of Congress to allow parties to litigate those disputes in federal court?[242]

The Eleventh Circuit ultimately based its decision on the lack of evidence "that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment."[243] In reaching this conclusion, the court evaluated the language of the LMRA and ERISA—the two statutes under which the Supreme Court previously had found complete preemption. According to the *Geddes* court, both the LMRA and ERISA contain "express language creating a federal cause of action for the resolution of disputes"[244] as well as clear legislative intent to create federal causes of action. The statutory language of the LMRA and ERISA, coupled with the Acts' legislative histories formed "the primary basis for concluding that Congress intended removability by complete preemption under the two statutes."[245] In contrast, the "intent to authorize federal court jurisdiction" is not clear from either the RLA's language or its legislative history.[246]

The Eleventh Circuit noted that the standard for ordinary preemp-

241. *Id.* at 1354 (emphasis added).

242. A similar conundrum was created in the Eleventh Circuit's evaluation of complete preemption under the Medicare Act, which expressly strips federal courts of jurisdiction and provides for hearings before the Secretary of the Department of Health & Human Services. Dial v. Healthspring of Ala., Inc., 541 F.3d 1044, 1047-48 (11th Cir. 2008) (rejecting complete preemption).

243. *Geddes*, 321 F.3d at 1354.

244. *Id.* (citing 29 U.S.C. § 185(a)(1998) ("Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties") and 29 U.S.C. § 1132(f) (1999) ("The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.").

245. *Id.* at 1354-55.

246. *Id.* at 1355.

tion is the same under the LMRA and the RLA,[247] but concluded the standard for complete preemption was different because "[t]he LMRA, unlike the RLA does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements."[248] The *Geddes* court further reasoned that complete preemption was necessary under the LMRA to assure a consistent federal common law of labor, while complete preemption was not necessary under the RLA because both state and federal courts are required to send minor disputes to mandatory arbitration where the consistent body of common law will be created.[249]

Other circuits, sometimes relying on *Geddes*, similarly have concluded that the RLA does not reflect a Congressional intent to permit removal.[250] For example, in *Roddy*,[251] the Sixth Circuit addressed whether Grand Trunk's formal investigation into Roddy's off-duty arrest and detention for marijuana possession and ultimate termination of Roddy based on that investigation violated Michigan's Civil Rights law.[252] Roddy filed the case in the Circuit Court for the County of Shiawassee and Grand Trunk removed to federal district court on the basis of federal question jurisdiction.[253] The district court denied Roddy's motion to remand and subsequently granted Grand Trunk's motion for summary judgment.[254]

In evaluating whether Roddy's state law claim was completely preempted by the RLA, the Sixth Circuit noted "Congress passed the RLA 'to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes.'"[255] However, the Sixth Circuit further opined: "[t]he existence of a mandatory arbitration provision, however, does not answer the question of whether Congress intended the RLA to occupy the field so completely that any 'ostensibly

247. For a reasoned evaluation between the differences between the RLA and LMRA, *see* Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485 (1990).

248. *Geddes*, 321 F.3d at 1355-56.

249. *Id.* at 1356.

250. *See, e.g.*, Roddy v. Grand Trunk W. R.R., 395 F.3d 318, 326 (6th Cir. 2005); Price v. PSA, Inc., 829 F.2d 871, 876 (9th Cir. 1987) ("Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is 'so powerful as to displace entirely any state cause of action.'") (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23 (1983)).

251. *Roddy*, 395 F.3d at or 321-22. *Roddy* was decided after *Beneficial* and purports to rely on *Beneficial*. However, in reading the conclusion that complete preemption does not arise under the RLA, the Sixth Circuit's analysis utilizes the pre-*Beneficial* language and reasoning of the Third and Eleventh Circuits, not *Beneficial*.

252. *Roddy*, 395 F.3d at 321.

253. *Id.*

254. *Id.* at 321-22.

255. *Id.* at 325 (quoting *Hawaiian Airlines*, 512 U.S. at 252).

state law claim' touching on railroad employment 'is in fact a federal claim' for purposes of removal jurisdiction."[256] Relying on *Geddes*, the Sixth Circuit concluded "Congress has not clearly manifested an intent to make all causes of action that touch on railroad employment removable to federal court."[257]

But is the prevailing emphasis on a standard that requires "the clear Congressional intent to permit removal"[258] still good law following the Supreme Court's 2003 decision in *Beneficial National Bank*? Arguably, the answer is no.[259]

IV. RLA Complete Preemption Revisited: Application of *Beneficial National Bank* to RLA Cases

Prior to *Beneficial National Bank*, the U.S. Supreme Court utilized several different standards for determining if "Congressional intent" warranted a finding that federal law provides the exclusive cause of action for the plaintiff's claims. Many of the lower court cases evaluating whether complete preemption existed under the RLA relied upon the Court's "Congressional intent to permit removal" standard enunciated in *Metropolitan Life* and found such intent did not exist in the language of the RLA or in the Act's legislative history, and concluded the complete preemption doctrine did not apply.[260]

In *Geddes*,[261] for example, the Eleventh Circuit required evidence that Congress intended "to confer on defendants the ability to remove a case to a federal forum"[262] for complete preemption to attach. In essence, the court looked for a parallel federal cause of action that could replace the underlying state claim and thereby give the federal court orig-

256. *Id.* (citing AmSouth Bank v. Dale, 386 F.3d 763, 776 (6th Cir. 2004)).

257. *Id.* at 326.

258. Eleventh Circuit precedent requires "clear congressional intent to permit removal." Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1356-57.

259. *But see* Dunlap v. G&L Holding Group Inc., 381 F.3d 1285 (11th Cir. 2004) (paying lip service to *Beneficial* but ultimately relying on *Geddes*' intent to authorize removal standard in finding state court claim involving trademarks was not completely preempted); *Roddy*, 395 F.3d at 318 (even mentioning *Beneficial*, the court concluded the RLA did not completely preempt state law claims). *See also In Re* W. States Wholesale Natural Gas Antitrust Litig. v. Encana Energy Servs., Inc., 346 F. Supp. 2d 1123 (D. Nev. 2004) (because no evidence of Congressional intent to completely preempt the regulatory field of natural gas law, state unfair trade practice claims not completely preempted); *In re* Wireless Tel. Fed. Cost Recovery Fee Litig., 343 F. Supp. 2d 838 (W.D. Mo. 2004) (although finding compelling policy reasons for retaining federal jurisdiction, no complete preemption by Federal Communications Act found because of lack of finding Congress intended to provide an exclusive *federal remedy* for the particular claim).

260. Geddes v. Am. Airlines, Inc., 321 F.3d 1349 (11th Cir. 2003), *cert. denied*, 532 U.S. 321 (2001); Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R., 858 F.2d 936 (3d Cir. 1988).

261. *Geddes*, 321 F.3d at 1349.

262. *Id.* at 1353 (quoting Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041 (11th Cir. 2002)).

inal jurisdiction over the claim before permitting removal. Finding no such substitute federal cause of action in the RLA, the Eleventh Circuit held there was insufficient evidence of Congressional intent to permit removal for the statute to completely preempt state claims.[263] The court relied upon the RLA's grant of exclusive jurisdiction to national boards of adjustment in cases involving minor disputes—and Congress' resulting failure to provide a federal cause of action in federal court in such disputes—as evidence that Congress did not intend to create a federal cause of action upon which complete preemption could be based.[264] "Looking to the legislative history of the RLA, we see that it represented an agreement to arbitrate certain disputes . . . but we find nothing to suggest that Congress intended to allow parties to *litigate* RLA minor dispute claims in federal court."[265]

In *Beneficial National Bank*, the Court clarified that Congressional intent to make a cause of action removable is *not* a necessary element in the complete preemption analysis and, by implication, overruled the analysis used in *Geddes*. The Court instructed the lower courts to determine "whether Congress intended the federal cause of action to be exclusive."[266] As the First Circuit recently noted: "Exclusive federal regulation alone might preempt state claims; but it is the further presence of a counterpart federal cause of action that allows the state claim to be transformed into a federal one."[267]

To this end, lower courts must determine: "(1) Does federal law provide a cause of action for any of the claims asserted by the Complaint? (2) If so, does federal law provide the exclusive cause of action for that claim?"[268]

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263. *Id.* at 1357.

264. *Id.*; *cf.* Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 277 (2d Cir. 2005) (noting "the RLA demonstrates that Congress knew how to create federal-court jurisdiction when it wanted to . . . . Had Congress wished to create a cause of action in federal court solely to determine whether a state-law claim was a minor dispute under the RLA, it could have done so.").

265. *Geddes*, 321 F.3d at 1354.

266. *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5.

267. Fayard v. Ne. Vehicle Servs., LLC, 533 F.3d 42, 46 (1st Cir. 2008) (while acknowledging that a state suit regarding rates could be completely preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), the court held there was no complete preemption of state nuisance suit because nothing in ICCTA provides for a nuisance suit before either a federal court or federal agency). *But see* Matthew J. Kleiman, *Crossed Signals in a Wireless World: The Seventh Circuit's Misapplication of the Complete Preemption Doctrine*, 14 Duke L. & Tech Rev. 1, 20-38 (2004) (arguing against complete preemption under the Federal Communication Act based on *Beneficial*); *Valles*, 410 F.3d at 1075 (without mentioning *Beneficial*, California meal period law held not completely preempted by § 301 of the LMRA).

268. *In re* Wireless Te. Fed. Cost Recovery Fees Litig., 343 F. Supp. 2d 838, 846 (W.D. Mo. 2004). *See also* Hoskins v. Bekins Van Lines, 343 F.3d 769, 778 (5th Cir. 2003) (finding the Carmack Amendments completely preempted state claim following *Beneficial* because the federal law provides the "exclusive cause of action" for breaches of contract by interstate carriers);

Arguably, in the context of the RLA, the answer to both questions is yes given the Act's purpose of providing a "comprehensive framework for resolving labor disputes."[269] But the First Circuit answered each question with a resounding no.[270]

A. An Emerging View—*Sullivan v. American Airlines*

In *Sullivan v. American Airlines*[271] the plaintiffs were terminated for allegedly posting racist campaign fliers during a union election campaign.[272] "To clear their names and recover from their loss of reputation, the plaintiffs filed a state-law defamation suit in New York state court against American, two of its managers and three union members who ran against them."[273] AA removed the case to federal court on the grounds the claims against it were minor disputes under the RLA and, therefore, within the district court's jurisdiction. The district court agreed and subsequently dismissed the claim against AA on the grounds of ordinary preemption.

The Second Circuit reversed. Instead of relying upon the intent to remove seen in the *Geddes* line of cases, the Second Circuit instead focused on *Beneficial National Bank's* "exclusive cause of action" standard. In somewhat circuitous fashion, the court noted that RLA minor disputes cannot be filed in federal court in the first instance.[274] The court also noted that "only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant,"[275] because "[w]hen a state-law claim is removed to federal court . . . the district court may then adjudicate the claim on the merits under the relevant preemptive statute."[276] Based on those two premises, and with no analysis of whether the federally mandated grievance and arbitration pro-

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Briarpatch Ltd. V. Phoenix Pictures, Inc., 373 F.3d 296, 303-04 (2d Cir. 2004) (demonstrating complete preemption by Copyright Act). *See, e.g.,* Fuller, *supra* note 4, at 1484-96 (setting forth two prong test for post-Beneficial cases: (1) did Congress intend for the federal statute to be the exclusive remedy for the plaintiff's claims and (2) do the plaintiff's claims fall within the preemptive force of the statute).

269. *Hawaiian Airlines,* 512 U.S. at 252. This comprehensive framework seemingly fulfills the *Beneficial* emphasis on the National Bank Act's "procedures and remedies governing that cause of action" as well as the *Aetna Health Inc.* court's emphasis on ERISA's "integrated system of . . . enforcement." *Beneficial Nat'l Bank,* 539 U.S. at 8-9. *Aetna Health Inc.*, 542 U.S. at 208. However, "[t]here is disagreement [among the federal circuits] whether non-judicial claims alone can trigger complete preemption." *Fayard,* 533 F.3d at 47 n.5.

270. Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 276-78 (2d Cir. 2005).

271. *Id.*

272. *Id.* at 268.

273. *Id.*

274. *Id.* at 276.

275. *Id.* (quoting *Caterpillar Inc.*, 482 U.S. at 392).

276. *Id.* at 276.

cedures constituted a federal cause of action,[277] the court concluded "that the RLA does not completely preempt state-law claims that come within its scope."[278]

The Eleventh Circuit rejected extending the complete preemption doctrine to the RLA in *Geddes* because it found that Congress did not intend to provide a defendant a right to remove a state court action to a federal district court, but rather conferred jurisdiction on a federally mandated arbitral board. Arguably, the Eleventh Circuit's reliance on intent to provide a removal right is contrary to *Beneficial National Bank*'s guiding principles.

B. An Alternative View

Under *Beneficial National Bank*, complete preemption arises if the federal statute provides a federal cause of action and that action is exclusive. The RLA's requirement that cases involving interpretation or application of a collective bargaining agreement be referred to the Board of Adjustment is tantamount to a federal cause of action (*i.e.*, breach of contract) with a federal remedy (*i.e.*, damages, injunctive relief, or specific performance). The case in controversy still "arises under" federal law because a federal statute provides the *exclusive* way to resolve a contractual dispute involving the interpretation or application of RLA collective bargaining agreements; that is, the RLA's "comprehensive framework"[279] for resolving disputes creates the *Beneficial National Bank* Court's "procedures and remedies governing that cause of action"[280] as well as the *Aetna Health Inc.* Court's "integrated system . . . of enforcement."[281] The fact that the statute requires that an arbitral board com-

277. The First Circuit recently highlighted that the circuits are split on "whether non-judicial claims alone can trigger complete preemption; this turns in part on the weight given to conceptual as opposed to prudential underpinnings of the doctrine." *Fayard*, 533 F.3d at 47 n.5. (*comparing* Lontz v. Tharp, 413 F.3d 435, 442-43 (4th Cir. 2005) (administrative cause of action insufficient) *with* Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1344-46 (7th Cir. 1986) (arbitrable claim sufficient).

278. *Sullivan*, 424 F.3d at 276. At least one court has rejected the *Sullivan* approach, noting "[t]he *Sullivan* court, respectfully, reads a bit more into *Beneficial* than this Court sees." Sw. Airlines Employees Ass'n v. Sw. Airlines Co., Civ. Action No. 3:05-CV-1192-N (N.D. Tex. 2006) (holding union's state law breach of contract case was completely preempted by RLA). However, relying on *Sullivan*, the Ninth Circuit reached the opposite conclusion. Moore-Thomas v. Ala. Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009) (holding no complete preemption because RLA does not provide an exclusive federal cause of action). Similarly circuitous reasoning was used by the Eleventh Circuit to reject complete preemption by the Copyright Act. Weitzman, LLC v. Microcomputer Res., Inc., 542 F.3d 859, 864 (11th Cir. 2008) (rejecting complete preemption because of lack of substitute federal cause of action).

279. *Hawaiian Airlines,* 512 U.S. at 252.

280. *Beneficial Nat'l Bank*, 539 U.S. at 8.

281. *Aetna Health Inc.*, 542 U.S. at 208.

posed of carrier, labor, and neutral representatives, all private parties, resolve the dispute does not lessen the fact that a federal law governing employer/union contracts compels the arbitration.[282]

Moreover, as Judge Posner has written:

> The National Railroad Adjustment Board . . . while private in fact, is public in name and function; it is the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life liberty, or property without due process of law.[283]

As a "tribunal"[284] authorized by federal statute to resolve disputes,[285] the Adjustment Boards are in essence a form of court created to hear the cause of action created by the federal statute.[286]

In addition, despite the findings of the Third and Eleventh Circuits to the contrary, the RLA's history does contain evidence that Congress intended the RLA's procedures and remedies to be *exclusive*. Demonstrable evidence of Congress' intent to provide strictly a federal procedure and federal remedy is the fact that the decision of a board of adjustment is enforceable *only* in a federal district court.[287] If Congress

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282. Indeed, binding arbitration rather than litigation is synonymous with dispute resolution in the rail industry; a fact reflected in other rail-related legislation such as the Northeast Rail Service Act which specifically provides for binding arbitration if a commuter railroad and its union cannot resolve furlough issues stemming from the Act's enforcement. Northeast Rail Service Act, 45 U.S.C. § 1113(a) (2006).

283. Elmore v. Chi. Ill. Midland Ry., 782 F.2d 94, 96 (7th Cir. 1986). *See also* Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 751-752 (1945) ("The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making . . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established.") (quoting Lloyd K. Garrison, *The Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 568-69 (1937)).

284. BLACK'S LAW DICTIONARY 1506 (6th ed. 1990) (defining "tribunal" as: "The seat of a judge; . . . the place where he administers justice . . . a judicial court; . . . ").

285. Bates v. Balt. & Ohio R.R., 9 F.3d 29, 30 (7th Cir. 1993) (characterizing the National Railroad Adjustment Board as "a tribunal created by Congress in 1934 under the Railway Labor Act to adjudicate disputes between railroad carriers and their employees"). BLACK'S LAW DICTIONARY 42 (6th ed. 1990) (defining "adjudicate" as: "To settle in the exercise of judicial authority").

286. *See* Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 372 U.S. 682, 695 (1963) ("Quite the contrary, the Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it 'intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice.'") (quoting Bower v. E. Airlines, 214 F.2d 623, 626 (3d Cir. 1954)).

287. 45 U.S.C. § 153(p). *See* Deford v. Soo Line R.R., 867 F.2d 1080, 1085 (8th Cir. 1989) ("Once the administrative remedy with the NRAB has been exhausted, the party may not relitigate the issue in an independent judicial proceeding.") (citing Andrews v. Louisville & Nashville

had not intended to confer the federal jurisdictional umbrella over the RLA arbitration mechanism, Congress could have simply made such decisions enforceable in "any court of competent jurisdiction."[288]

Moreover, the court's jurisdiction to order arbitration in the federally created tribunal in minor dispute cases is premised on an enforcement of the RLA.[289] Analogously, there is an implied cause of action to consider and dismiss a removed cause of action that involves a question of interpretation or application of a collective bargaining agreement.

V. Other Considerations Weighing in Favor of Complete Preemption Under the Railway Labor Act

In addition to the exclusivity of the federal remedy and the integrated system of enforcement provided by § 153 of the RLA, numerous federal courts and commentators have considered other factors in support of a finding of complete preemption by the RLA.

A. The Case for Complete Preemption Under § 153 of the RLA is Equal to if not Stronger than the Case for Preemption Under § 301 of the LMRA

Numerous courts, including the Supreme Court, have recognized the similarity between § 301 and § 153 with respect to the pervasive, extraordinary and exclusive character of each federal regulatory scheme. According to the Supreme Court in *Andrews v. Louisville & Nashville Railroad*,[290] the *exclusive* (and, by implication, the preemptive) effect of the federal remedy provided by the RLA may be greater than its counterpart.[291]

This is evidenced by the fact that arbitration is mandatory under the RLA and voluntary under the NLRA. A rail or air carrier and the unions

R.R., 406 U.S. 320, 325 (1972); Schroeder v. Trans World Airlines, Inc., 702 F.2d 189, 192 (9th Cir. 1983) ("Once the grievance has been heard by the adjustment board, exclusive jurisdiction rests with the federal court. As a result, California state law is preempted from providing a basis for relief."); *accord* 45 U.S.C. 159 Sixth (National Mediation Board).

288. *See, e.g.*, 47 U.S.C. § 332(c)(7)(B)(v) (Telecommunications Act of 1996).

289. W. Airlines, Inc. v. Int'l Bhd. Of Teamsters, 480 U.S. 1301, 1302 (1987); United Transp. Union v. Gateway W. Ry., 78 F.3d 1208, 1213 (7th Cir. 1996) ("Although a federal court has no authority to interpret the terms of a collective bargaining agreement in order to resolve a minor dispute, the court may compel arbitration before the appropriate adjustment board and may enjoin the union from striking in the interim.").

290. *Andrews*, 406 U.S. at 325.

291. *Id.* at 323 ("Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.").

that represent its employees *must* establish a grievance arbitration procedure and submit minor disputes to its processes. There is no counterpart beyond a policy statement in the LMRA. Express and extraordinarily limited procedures for review of adjustment board awards are set out in the RLA. The LMRA is silent. Complete preemption reflects a measure of federal interest in the dynamic calculus between state and federal responsibilities. As such, the federal interest is significantly more evident in the RLA.

In *Andrews*, the plaintiff sued his prior employer, the Louisville & Nashville Railroad, for wrongful discharge. The carrier removed the case to federal court and moved to dismiss the complaint for failure to exhaust the administrative remedies provided under the RLA, *i.e.*, arbitration before a board of adjustment. The district court granted the motion and the Fifth Circuit affirmed the district court's decision.[292] The plaintiff, who did not contest removal, appealed the dismissal on the merits.

The Supreme Court affirmed the district court's decision.[293] Expressly overruling the Court's earlier decision in *Moore v. Illinois Central*,[294] which held that the RLA did not prohibit state court damage actions for breach of a collective bargaining agreement, the Supreme Court held that the plaintiff's state court cause of action for wrongful discharge was foreclosed by the plaintiff's failure to seek the administrative remedy mandated by the RLA: arbitration before a board of adjustment.[295] Comparing the exclusive remedy provision of the RLA to the LMRA, the Supreme Court stated:

> Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the [Railway Labor] Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.
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> . . . .
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> The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. He is limited to the judicial review of the Board's proceedings that

292. *Id.* at 320.
293. *Id.* at 326.
294. 312 U.S. 630, 634-36 (1941).
295. *Andrews*, 406 U.S. at 325-26.

the Act itself provides.[296]

Similarly, the Ninth Circuit determined in *Grote v. Trans World Airlines* that, "because the RLA's preemptive force appears on the face of the statute and § 301 preemption is judicially imposed, . . . preemption under the RLA is broader than under § 301."[297] The Seventh and Eighth Circuits have also echoed the Supreme Court's observations regarding the similarity between § 301 and § 153.[298] Accordingly, at the very least, § 153 of the RLA is as preemptive as § 301 of the LMRA, and a strong argument can be made that the RLA has a greater preemptive effect.

B. The Possibility of Conflicting State and Federal Substantive Interpretations of Federal Labor Policy Necessitates a Single Body of Federal Law Under the RLA and LMRA

In *Local 174 v. Lucas Flour Co.*,[299] the Supreme Court recognized that § 301 of the LMRA "is peculiarly one that calls for uniform law" such that only federal courts should determine questions involving interpretation and application of collective bargaining agreements.[300] According to the Supreme Court:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.
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> . . . .
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> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many

296. *Id.* at 323-25.

297. 905 F.2d 1307, 1309-10 (9th Cir. 1990). *See also* Arbogast v. CSX Corp., 655 F. Supp. 371, 373 (N.D. W. Va. 1987) ("courts interpreting the Railway Labor Act have typically found much broader preemption than under NLRA because of the different mechanisms established by the two acts . . . . In contrast to the more limited scope of the NLRA, the RLA created mandatory arbitration 'to provide for the prompt and orderly settlement of all disputes growing out of grievances, or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions'.") (quoting 45 U.S.C. § 151a(5)); *Gore*, 210 F.3d at 949 ("Claims of preemption under the RLA are governed by a standard that is 'virtually identical' to that employed under § 301 of the Labor [ ] Management Relations Act (LMRA), 29 U.S.C. § 185").

298. *See Deford*, 867 F.2d at 1085-86; Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1346 (7th Cir. 1986). *See also* Navarro v. Servisair, LLC, 2008 U.S. Dist. LEXIS 62513 at *6 (N.D. Cal. 2008) ("The preemption analysis under both federal statutes is identical.").

299. 369 U.S. 95, 103 (1962).

300. *Id.* at 103.

> factors which bear upon competing state and federal interests in this area . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.[301]

In *International Ass'n of Machinists v. Central Airlines*,[302] the U.S. Supreme Court found that the same need for a "single body of federal law"[303] under the LMRA is readily apparent in the RLA. In that case, six airline employees filed grievances against their employer for wrongful discharge. After the dispute was submitted to arbitration, which resulted in a deadlocked board of adjustment, the National Mediation Board appointed a neutral arbiter who rendered a decision in favor of the employees. The airline refused to comply with the board's decision, and the employees filed suit in federal district court seeking enforcement of the board's decision.[304] The carrier moved to dismiss for lack of subject matter jurisdiction, and the district court granted the motion. The Fifth Circuit affirmed.[305]

In considering the district court's dismissal for want of jurisdiction, the Supreme Court framed the issue as "whether a suit to enforce an award of an airline system board of adjustment [created pursuant to § 204 of the Railway Labor Act] is a suit arising under the laws of the United States under 28 U.S.C. § 1331 or a suit arising under a law regulating commerce under 28 U.S.C. § 1337."[306] At the outset, the Court emphasized the need for uniformity in the enforcement of a national policy based on the subject matter of interstate air commerce, stating:

> It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. *If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity.*[307]
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> . . . .
>
> To be sure, different airlines may use different contracts, and any one may have different agreements for different crafts, but such lack of uniformity

301. *Id.* at 103-104 (citations omitted).
302. 372 U.S. 682 (1963).
303. *Lucas Flour*, 369 U.S. at 104.
304. *Cent. Airlines*, 372 U.S. at 682-83.
305. *Id.* at 684.
306. *Id.* at 684-85.
307. *Id.* at 691-92 (emphasis added).

> represents a minimal burden on commerce. The lack of uniformity created by dividing everything by 50 (or however many States the system spans) would multiply the burden by a substantial factor and aggravate the problem to an intolerable degree.[308]
>
> . . . .
>
> . . . [A] § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts.[309]

Similarly, in *Burley*,[310] the Supreme Court noted:

> From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.[311]

The interstate character of national railroads and airlines, especially since the recent consolidations in both industries, amply demonstrate the need for nationwide uniformity in the interpretation and application of collective bargaining agreements between rail carriers and transportation employee unions. Air and rail carriers covered by the RLA typically operate in multiple states, and many of their operating craft employees — locomotive engineers, pilots, trainmen, flight attendants—perform service throughout the carriers' systems.

Class I railroads, for example, employ 167,216 workers in operations that span 44 states and the District of Columbia.[312] The vast majority of those employees are represented by a union. The largest Class I rail carrier, the Burlington Northern Santa Fe Railroad ("BNSF"), operates in every State west of the Mississippi and in four States east of the Mississippi: Illinois, Tennessee, Mississippi and Alabama.[313] Given that railroads subscribe to multiemployer collective bargaining agreements covering particular crafts, it is conceivable, if state courts are allowed to decide questions of preemption under the RLA, that the BNSF could be

308. *Id.* at 692 n.16.

309. *Id.* at 692.

310. Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711 (1945).

311. *Id.* at 751.

312. *See* Ass'n of Am. R.Rs., Railroad Facts 68-69 (2008).

313. *See* Burlington N. Santa Fe Corp., 2008 Annual Report and Form 10-K 8 (2009), *available at* http://www.bnsf.com/investors/annualreports/2008annrpt.pdf.

subject to 26 differing State interpretations of what constitutes a major or minor dispute, or no dispute at all, under the RLA.[314] Multiply that by the number of national unions with which the BNSF must coexist and the magnitude of the need for national uniformity should be readily apparent to all but the most pro-employee or pro-States Rights jurists.[315] As the U.S. Supreme Court noted in *Central Airlines*: "Congress in 1936 could not . . . have thought that stability and continuity to interstate air commerce would come from the undulating policies . . . of the legislatures and courts (or both) of 48 [sic] states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration."[316]

The Eleventh Circuit in *Geddes* downplayed the importance of a need for nationwide uniformity of law under the RLA, stating that the possibility of "competing legal systems" was precluded by the RLA's requirement that "[b]oth state and federal courts must dismiss a claim as preempted by the RLA once they determine that it requires interpretation of the collective bargaining agreement."[317]

Geddes seemingly overlooked the fact that the preemption decision is itself a substantive decision that requires as much harmony from court to court as possible. When a court considers whether a state claim requires an interpretation of the collective bargaining agreement, the court is necessarily examining that agreement. This is the legal version of Heisenberg's uncertainty principle, in the sense that the examination cannot be made without impact on the agreement.[318]

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314. Similarly, air carriers who are members of AIRCON employ well over 500,000 workers and operate in every state except Delaware. *See* BUREAU OF TRANSPORTATION STATISTICS, NUMBER OF EMPLOYEES – CERTIFICATED CARRIERS 2004 YEAR END DATA, *available at* http://www.bts.gov/programs/airline_information/number_of_employees/certificated_carriers/html/2004.html; *See* AIRLINE INDUSTRIAL RELATIONS CONFERENCE, AIR CONFERENCE MEMBERS, http://www.aircon.org/members/index.htm (listing members of AIRCON) (last visited Oct. 10, 2009); *see* STATE OF DELAWARE, DELAWARE AVIATION – FREQUENTLY ASKED QUESTIONS, http://www.deldot.gov/information/community_programs_and_services/aviation_svcs/faq/index.shtml (explaining that no commercial airlines offer regular service from any Delaware airport) (last updated July 14, 2009).

315. *See* Int'l Ass'n of Machinists v. Cent. Airlines, Inc, 372 U.S. 682, 691-92 (1963) ("[the] validity, interpretation, and enforceability" of agreements creating system board procedures "cannot be left to the laws of the many States . . . . The needs of the subject matter manifestly call for uniformity").

316. *Cent. Airlines*, 372 U.S. at 691 note 15 (quoting Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 295 F.2d 209, 221-22 (5th Cir. 1961), rev'd 372 U.S. 682 (1963) (Brown, J., dissenting)).

317. Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1356 (11th Cir. 2003).

318. J. HORGAN, QUANTUM PHILOSOPHY, http://members.fortunecity.com/templarser/qphil.html ("Werner Heisenberg's uncertainty principle then showed that our knowledge of nature is fundamentally limited - as soon as we grasp one part, another part slips through our fingers."); *see generally* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, QUANTUM PHILOSOPHY, http://plato.stanford.edu/entries/qt-uncertainty/ (explaining the Uncertainty Principle).

Moreover, in its analysis, the *Geddes* court seemingly overlooked a basic premise of traditional labor law under which federal courts, in evaluating cases involving the interpretation or application of a collective bargaining agreement defer to the grievance and arbitration policies established by the parties in their collective bargaining agreements.[319] The *Geddes* court's emphasis on the § 301 cause of action as a basis to find complete preemption under the NLRA overlooks the fact that the courts typically defer disputed cases to arbitration. Under the NLRA, the court is a gatekeeper for the arbitration process. But courts play the same role under the RLA. The fact that arbitration is voluntary under the NLRA does *not* strengthen the case for complete preemption. To the contrary, the *mandatory* nature of arbitration in a statutorily created forum strengthens the case for complete preemption under the RLA.

In other words, when faced with a dispute involving the interpretation or an application of a collective bargaining agreement, the result is the same under both the RLA and LMRA—the cases are deferred to arbitration for an arbitrator (the exclusive interpreter of the meaning of collective bargaining agreements) to decide the dispute based on the federal common law of collective bargaining.[320] And under both statutes, creation of a consistent body of federal common law on what disputes are arbitrable bolsters the argument for complete preemption.

C. Federal v. State Court: Outcome Determinative

Strict constructionists often argue that principles of federalism require the elimination of the complete preemption doctrine in its entirety. Justice Scalia's dissenting opinion in *Beneficial National Bank v. Ander-*

319. The presumption of arbitrability was established in the Supreme Court's "Steelworkers Trilogy." United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960) (requiring arbitration of even frivolous claims); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) (upholding judicial enforcement of arbitration awards with limited availability of judicial review); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (establishing a presumption in favor or arbitration). The preference for arbitration is reflected in a number of other Supreme Court decisions involving the interpretation or application of collective bargaining agreements. *See, e.g.,* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1960) (requiring the NLRB to give deference to arbitration, rather than preferring judicial or administrative methods of dispute resolution); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal common law of collective bargaining used as basis for judicial deference to private arbitration in labor disputes). *See generally* Richard Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. Rev. 687 (1997) (analyzing the interplay between § 301 preemption and the arbitrability doctrine under the Federal Arbitration Act); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 Denv. U. L. Rev. 1017 (1996) (evaluating the impact of the arbitration preference on the individual rights of union workers).

320. *See* Textile Works Union v. Lincoln Mills, 353 U.S. 448 (1957).

son,[321] for example, lambasted the Supreme Court's development of the complete preemption doctrine, beginning with the Court's decision in *Avco*.[322] According to Justice Scalia, the appropriate course of action in response to an unsustainable state law claim is dismissal by the state court, rather than removal to federal court and recharacterization of the claim as a federal claim.[323] Any decision to provide removal jurisdiction to a federal court to determine whether a state court complaint states a federal question, according to Scalia, cannot reasonably be based upon the fear that state courts would erroneously rule on questions of federal preemption.[324]

While this notion might be true in a perfect world with a perfect judicial system,[325] numerous courts and commentators have recognized that the ultimate outcome of cases involving preemption questions often turn on whether those cases are heard in state or federal court.[326]

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321. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) (Scalia, J., dissenting).

322. *Id.* at 12-16.

323. *Id.* at 18-19.

324. *Id.* at 20-21. *See also* Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1346 (7th Cir. 1986) ("the argument amounts to distrust of the ability or willingness of state courts to enforce federal defenses. It would also be simpler to make federal preemption always a defense, so that parties to state court litigation could be sure whether the case was removable to federal court, or if removed whether it could be retained in federal court (the issue in this case), rather than having to speculate about whether the federal court would consider the case one of partial or complete preemption.").

325. Federal court jurisdiction over questions of federal law arose after the Civil War and during Reconstruction when Congress perceived that Southern State court judges might be less receptive to enforcing federal laws and protecting federal rights than their federal counterparts. Neil Miller, *An Empirical Study of Foreign Choices in Removal Cases Under Adversity in Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 372-73 (Winter 1992). In recent years, the focus of concern has shifted away from fears of post-Reconstruction bias to concerns about the need to protect (1) out-of-state litigants from local bias and (2) corporate litigants from prejudices of differing interpretations of federal law by the several States. *Id.* at 373-74. On-going concerns over the potential for state court bias has been noted in numerous court decisions, including decisions of the U.S. Supreme Court. *See, e.g.*, Arizona v. Manypenny, 451 U.S. 232, 241-42 (1981) (superseded by statute, Actions Removable Generally, 28 U.S.C. § 1441(e) (Supp. IV 1986)); Colorado v. Symes, 286 U.S. 510, 517-18 (1932); Maryland v. Soper, 270 U.S. 9, 32 (1926); Cochran v. Montgomery County, 199 U.S. 260, 272 (1905). *See also* Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (quoted in Yosef Rothstein, *Ask Not for Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b)*, 33 COLUM. J.L. & SOC. PROBS. 181, 182 (Winter 2000). Perceived bias in state courts was an enumerated reason for the passage of the Class Action Fairness Act of 2005. 109 P.L. 2 ("Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—(A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States"). *See also* S. REP. No. 109-14, at 49-50, 60 (2005) (citing studies on abuses in state court system).

326. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105-06, 1127-28 (1977)

Even the Senate's Committee on the Judiciary has recognized that having a case brought in one of the "plaintiff-friendly" state courts "affects the substantive outcome of a lawsuit,"[327] and having cases heard in the federal courts provides "a forum where the threat of prejudice is significantly lower."[328] Indeed the Committee's primary concern in explaining the need for the Class Action Fairness Act of 2005 stated:

> One key reason for these problems is that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) . . . . Finally, many state courts freely issue rulings in class action cases that have nation-wide ramifications sometimes overturning well-established laws and policies of other jurisdictions.[329]

Like class actions, the same "state court provincialism"[330] and concerns that "a system that allows state court judges to dictate national policy on these and numerous other issues from the local courthouse steps"[331] are equally problematic in the rail and airline labor relations fields where differing state court decisions on what constitutes a minor dispute could "have significant implications for interstate commerce and national policy."[332]

In an area such as railway labor law where the need for uniformity is so great,[333] the outcome determinative nature of the jurisdiction decision

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(noting that decisions by federal courts to defer to state courts are frequently outcome determinative operating as indirect decisions not the merits). *See also* Miller, *supra* note 325, at 388; Rothstein, *supra* note 325, at 182-83. Plaintiffs who file actions in state court only to have defendants remove the actions to federal court on the basis of diversity of citizenship or federal subject matter jurisdiction see their chances for success nearly cut in half. Kevin Clermont & Theodore Eisenberg, *Do Case Outcomes Reveal Anything About the Legal System? Win Rate and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593-600 (March 1998). Several commentators have observed that plaintiff-win rates are especially high in those jurisdictions in which judges are elected rather than appointed. Taylor Simpson-Wood, *Has the Seductive Siren of Judicial Frugalities Ceased to Sing?: Data Flux & its Family Tree*, 53 DRAKE L. REV. 281 (Winter 2005).

327. S. REP. NO. 109-14, at 22 (2005).

328. *Id.* at 29.

329. *Id.* at 5.

330. *Id.* at 6.

331. *Id.* at 26.

332. *Id.* at 29. *See also id.* at 36 (noting "tendency of some state courts to be less than respectful of the laws of other jurisdictions").

333. *See* Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1346 (7th Cir. 1986) ("Where the worker is covered by a collective bargaining contract and therefore . . . has a potential federal remedy, judicial or arbitrable, the cases hold that that remedy is exclusive; the worker has no state remedies. The explanation is the traditional mistrust—a steady theme in federal labor legislation—of state judicial intervention in disputes arising out of collective bargaining activities."). *See also* Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 372 U.S. 682, 691-92 (1963) ("If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a

should tip the scales in favor of federal jurisdiction. The prospect of an ultimate discretionary review by the U.S. Supreme Court is not a satisfactory alternative.

In its *Study of the Division of Jurisdiction between State and Federal Courts*, the American Law Institute recommended that federal question jurisdiction be expanded by allowing defendants to remove cases to federal court based on the existence of a federal defense.[334] Another commentator has suggested a narrower approach—that the removal statute be broadened to include removals by out-of-state defendants asserting a federal defense when diversity of citizenship is lacking.[335] In either instance, expansion of federal court jurisdiction by allowing removal based on a federal defense would necessarily limit application of the well-pleaded complaint rule, but it would nonetheless further the purpose of removal jurisdiction by protecting uniformity in federal law interpretation.[336]

Whether or not the courts revisit the well-pleaded complaint rule as a whole, the principles underlying that debate highlight the need for application of the complete preemption doctrine in the context of RLA cases. The potential tendency of state courts and juries to favor rail carrier employees over their employers, and the empirical studies statistically validating the fear of such bias, weighs in favor of allowing defendants to remove cases involving the interpretation or application of collective bargaining agreements cases to federal court to ensure a consistent body of common law arises governing what disputes are arbitrable.

VI. Conclusion

Historically, the courts have been divided on whether the RLA completely preempts state tort claims, giving federal district court's original jurisdiction to decide if a particular case involves a minor dispute requiring dismissal and referral to federally mandated arbitration or remand to state court. The historical divide primarily stems from the courts' interpretation of what Congressional intent is necessary before complete preemption attaches. Courts that have required an "intent to permit removal," as evidenced by a substituted federal cause of action in federal court, consistently have found complete preemption under § 301 of the

contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity.").

334. A.L.I., *Study of the Division of Jurisdiction Between State and Federal Courts 101* (1969), *available at* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=81 (cited in Miller, *supra* note 325, at 375-76).

335. Simpson-Wood, *supra* note 326, at 317.

336. Rothstein, *supra* notes 325, at 181-82 (Winter 2000).

LMRA and § 502 of ERISA because of the existence of a substitute federal cause of action. Those courts historically have eschewed extending complete preemption to RLA cases because of the lack of a substitute action in federal court. In contrast, courts that focused on Congressional intent to completely preempt an area of the law and required a statute to provide an exclusive federal remedy consistently have found complete preemption in RLA cases because the RLA creates the exclusive and mandatory adjustment board procedure as the counterpart to § 301 jurisdiction and provides the exclusive method for resolving disputes in the railroad and airline industries.

In today's litigious environment and the court's increased preference of alternative dispute resolution over litigation, the fact that one statute provides the remedy of arbitration and another provides the remedy of litigation in federal court should not have a conclusive effect upon the outcome of a particular case under the RLA. Instead, based on *Beneficial National Bank*, the RLA should completely preempt state law tort claims because the RLA, like the LMRA and ERISA, provides the exclusive federally mandated forum and remedy for the claim asserted that is tantamount to a cause of action. Moreover, based on *Aetna Health Inc.*, the RLA should completely preempt state law tort claims because the RLA, like ERISA, establishes the "integrated system of procedures for enforcement" necessary to trigger complete preemption.

Complete preemption also would better fulfill the purpose of the Act by providing a uniform body of federal common law governing what disputes constitute "minor disputes" which must be deferred to the RLA arbitration procedures akin to the body of federal common law governing which disputes must be deferred to arbitration under the NLRA.