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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, et. al. Plaintiffs, vs. STEVEN H. BRADFORD, PAUL J. DIORIO, ROBERT A. FREAR, MARK W. KING, DOUGLAS L. MOWERY, and JOHN A. STEPHAN, et. al. Defendants.	Case No. 2:08-CV-1728-PHX-NVW **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND**

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I. INTRODUCTION

Plaintiffs' Motion to Remand (Dkt. No. 9),[1] is founded on the argument that their claims are in no way based on the terms of a collective bargaining agreement (CBA) governed by the Railway Labor Act (RLA) 45 U.S.C. §§ 151 *et seq*. Plaintiffs assert that, since their First Amended Complaint (FAC) alleges only "common law contract" rights, the action was appropriately brought in state court:

> [The FAC] does not allege breach of a CBA. It, therefore, does not state a claim that arises under, or is controlled by, federal law.
>
> It does not matter that the document that established the initial agreement to arbitrate – the Transition Agreement – established other contract rights involving an RLA carrier.

(Dkt. No. 9, 9:8-13).

Nevertheless, Ninth Circuit precedent establishes that the propriety of removal *must* be evaluated based on the pleadings at the time the removal was filed.[2] The Plaintiffs' original complaint alleges that their claims arise exclusively from collective bargaining agreements: the West Pilots' collective bargaining agreement as modified by the Transition Agreement. Even the FAC – notwithstanding its self-conscious effort to expunge virtually any reference to CBA's – acknowledges that the Plaintiffs' alleged rights are "memorialized" in the Transition Agreement, which defines itself as a CBA subject to the RLA.

Since, under either complaint, the Plaintiffs allege causes of action, and seek remedies, that are within the exclusive province of the Railway Labor Act, the Defendants

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[1] Defendants refer herein to the relevant filings by each document's docket number.

[2] In view of the fact that Plaintiffs' Motion to Remand is based entirely on a document – the FAC – which is immaterial to the issue of removal, the Court may decide that the motion is not properly before it.

respectfully submit that the Plaintiffs' Motion for Remand should be denied. In addition, since the Plaintiffs attribute their contractual breaches to the actions of officers of the de-certified Air Line Pilots Association (ALPA) and the US Airline Pilots Association (USAPA), the Plaintiffs' lawsuit constitutes a duty of fair representation action and is subject to removal on that basis as well.

Finally, the propriety of removal in this matter is bolstered by this action's striking similarity to the Plaintiffs' federal court action currently pending in this Court. Plaintiffs seek analogous relief in both actions, but through artful pleading have attempted to disguise the true federal nature of their complaints in this action by recasting them as purely state law claims.

II. ARGUMENT

A. The Propriety of Removal is Based Solely on Plaintiffs' State Court Pleadings

The Ninth Circuit has "long held that post-removal amendments to the pleadings cannot affect whether a case is removable, because the propriety of removal is determined *solely* on the basis of the pleadings filed in state court." *Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 976 (9th Cir. 2006) (emphasis supplied); *Sparta Surgical Corp. v. Nat'l Ass'n of Securities Dealers, Inc*., 159 F.3d 1209, 1213 (9th Cir. 1998) ("jurisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments. … a plaintiff may not compel remand by amending a complaint to eliminate the federal question upon which removal was based."); *O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1379 (9th Cir. 1988) ("In determining the existence of removal jurisdiction, based upon a federal question the court must look to the complaint as of the time the removal petition was filed.").

Plaintiffs characterize the changes made to their pleadings as involving only "background allegations that are unnecessary surplusage …." (Dkt. No. 9, 2:3). This characterization is astonishingly disingenuous.

B. The Plaintiffs May Not Avoid Federal Court Jurisdiction Through Artful Pleading

Based on the changes made in the FAC, it is clear that the Plaintiffs have attempted to "artfully phrase[] a federal claim by dressing it in state law attire." *Lippitt v. Raymond James Fin. Serv., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003). However, the artful pleading doctrine precludes such an attempt to avoid application of federal law and federal court jurisdiction.

> The artful pleading doctrine is a corollary to the well-pleaded complaint rule, and provides that although the plaintiff is master of his own pleadings, he may not avoid federal jurisdiction by omitting from the complaint allegations of federal law that are essential to the establishment of his claim.
>
> ***
>
> Under the artful pleading doctrine, a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. The artful pleading doctrine allows courts to delve beyond the face of the state court complaint and find federal question jurisdiction by recharacterizing a plaintiff's state-law claim as a federal claim.

Id. (citations omitted). The Ninth Circuit has applied the artful pleading doctrine in the specific context of analyzing the propriety of federal question removal pursuant to the RLA. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983) ("Artful pleading by the plaintiff will not be allowed to conceal the true nature of the complaint. … The application of [the RLA] and the necessity of its interpretation establish the existence of a federal question as an essential element of plaintiffs' cause of action, providing the basis for removal.").

1. Both the Original Complaint and the FAC are Based on Collective Bargaining Agreements Governed by the RLA

Both causes of action in the original complaint are based on the "express language" and/or "implied covenant" contained in the Transition Agreement. (Original Complaint at ¶¶ 110, 119-20.) The Transition Agreement is described as having modified the existing West and East CBA's. (*Id*. at ¶ 63).[3] The Transition Agreement thereby created "collective bargaining rights and obligations" that ran between US Airways and the West and East pilot groups. (*Id*. at ¶ 64). The Original Complaint's section entitled "Plaintiffs' Injuries" ties all of the injuries listed therein to a "breach of the West CBA as modified by the Transition Agreement." (*Id*. at ¶¶ 104-07). The remedial order sought by the Plaintiffs would preclude the Defendants from "negotiating a collective bargaining agreement" in one manner and affirmatively order them to "negotiate a single collective bargaining agreement" in another manner. (*Id*. at p. 21). Nonetheless, the Plaintiffs remarkably assert that their litigation "does *not* plead breach of any collective bargaining agreement…." (Dkt. No. 9, 2:16-17).

The Plaintiffs' FAC purges all of the above-referenced allegations in favor of a new legal theory – "common law contract" rights. Nevertheless, the Plaintiffs concede that the purported "common law contract" is memorialized in two documents – the "Transition Agreement" and "ALPA Merger Policy."[4] (FAC, Dkt. No. 8 at ¶ 16(a) and (b)).

[3] In the Plaintiffs' parallel federal court action, they recognized, as a matter of fact, that the Transition Agreement is a collectively bargained-for agreement between an RLA covered air carrier and labor union. *See* Case No. 08-cv-1633, Dkt. No. 77, Stipulated Statement of Facts, ¶¶ 16-17 ("US Airways and ALPA on behalf of West and East Pilots entered into the Transition Agreement.").

[4] ALPA Merger Policy embodies an internal policy of a de-certified union, the Air Line Pilots Association ("ALPA"). Plaintiffs assert rights under the ALPA Merger Policy based

The Transition Agreement, according to its own terms[5]:

- "is made and entered into in accordance with the provisions of the Railway Labor Act, as amended (the 'Act') …"[6]
- Addresses the duration and extent to which the East and West pilot groups will be governed "by their respective collective bargaining agreements"[7]
- "Governs in case of conflict between one of its terms and a provision of a collective bargaining agreement between the [Union] and an Airline Party;"[8]
- Sets forth the process by which the [Union] and the Airline Parties "will negotiate a single collective bargaining agreement applicable to the merged operations of America West and US Airways …."[9]
- Is subject to modification "by written agreement of the [Union] and the Airline Parties collectively;"

The Transition Agreement further provides that any "dispute" arising thereunder is subject to a Board of Adjustment in conformance with the terms of "Section 204 of the [Railway

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on the allegation that it is "part of the Transition Agreement as if written there directly." (Original Complaint at ¶ 111).

[5] The FAC incorporates the Transition Agreement by reference and therefore review of that document as part of the removal analysis is appropriate. *Salveson v. Western States Bankcard Corp.*, 525 F. Supp 566, 572 (N.D. Cal. 1981) ("it is proper for the court to examine the record to determine if the real nature of the claim is federal"); *Voss v. Supermail/Western Union*, 675 F. Supp 1210, 1212 (S.D. Cal. 1981); *County of Sonoma v. Bill Bisso*, 1998 U.S. Dist. LEXIS 17861 at *6 (N.D. Cal. Nov. 9, 1998); *Ford v. Mayflower Transit Inc.*, 1993 U.S. Dist. LEXIS 4905 at *6 (N.D. Cal. Apr. 8, 1993); *Armstrong v. Asbestos Defendants (BHC)*, 1997 U.S. Dist. LEXIS 6934 at *4 (N.D. Cal. May 14, 1997); *Marin General Hosp. v. Modesto & Empire Traction Co.*, 2007 U.S. Dist. LEXIS 37701, *7 (N.D. Cal. May 9, 2007). *See also Cumis Ins. Soc'y Inc. v. Merrick Bank Corp.*, 2008 U.S. Dist LEXIS 78451, *11-12 (D. Ariz. Sept. 18, 2008) (in choice of law context, artful pleading doctrine permits court to review entire record).

[6] Original Complaint, Ex. B, Transition Agreement at 1.

[7] *Id*. at 2, 14, §§ II.A, II.B, and XII.C.

[8] *Id*. at 15, § XII.D.

[9] *Id*. at 7, § V.

Labor] Act."[10] "The Ninth Circuit has held [that] if a state-law claim falls within the scope of the RLA's dispute provisions, it is converted into a federal claim under the RLA for purposes of removal jurisdiction." *Moore-Thomas v. Alaska Airlines, Inc*., 2006 U.S Dist. LEXIS 61282 at *7 (D. Or. Aug. 28, 2006) (*citing Schroeder v. Trans World Airlines, Inc*., 702 F.2d 189, 191 (9th Cir. 1983)).

As set forth in Defendants' Notice of Removal, because Plaintiffs' claims require the application, interpretation or analysis of collective bargaining agreements, removal is proper. (Dkt. No. 1 at ¶ 38); *see also, Tu v. S. Pac. Transp. Co.*, 1992 U.S. App. LEXIS 13348 at *11-13 (9th Cir. Jun. 1, 1992); *Navarro v. ServisAir, LLC*, 2008 U.S. Dist. LEXIS 62513 at *13-14 (N.D. Cal. Aug. 14, 2008) (finding that because claim required "actual interpretation of the [RLA] CBA. … enough of a federal question is presented. . . such that the court may exercise jurisdiction. . .").

2. Plaintiffs' Original Complaint and FAC Both Concern the Actions and Rights of RLA Labor Organizations

As we have previously briefed the Court, claims asserting violations of a union's duty of fair representation (DFR) are preempted and subject to removal. (Dkt. No. 1 at ¶¶ 42-51). Plaintiffs cannot evade exclusive federal court jurisdiction by re-casting an alleged failure by union representatives to enforce CBA rights as state law breach of contract claims. *Richardson v. United Steelworkers of Am.*, 864 F.2d 1162 (5th Cir. 1989) (preemption and removal appropriate where state law claims implicated duty of fair representation even in the absence of allegations that there was a breach of the collective bargaining agreement); *BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of Am.*, 132 F.3d

[10] *Id*. at 12, § X.C.

824, 831-32 (1st Cir 1997) (state law claims challenging a union's representational activities must be recharacterized under the artful pleading doctrine as arising under federal law where plaintiff "sufficiently asserts a claim implicating the duty of fair representation."); *Jones v. Truck Drivers Local Union No. 299,* 838 F.2d 856, 861 (6th Cir. 1988) ("Unfair representation, then, is unfair representation whether by reason of . . . discrimination, or a willful breach of responsibility to carry out clear terms of a collective bargaining agreement for the benefit of union members and employees. The claims of plaintiffs under these circumstances related to a failure fairly to represent . . . [and] must be deemed to be foreclosed and preempted."); *Thomas v. Nat'l Ass'n of Letter Carriers*, *225 F.3d 1149,* 1158 (10th Cir. 2000) ("Where a plaintiff's allegations fall within the scope of the duty of fair representation, federal labor law governs and ordinarily preempts any state-law claims based on those allegations."); *Cash v. Chevron Corp.*, 1999 U.S. Dist. LEXIS 20709 (N.D. Cal. Oct. 4, 1999) ("State law claims are preempted whenever a plaintiff's claims invokes rights derived from a union's duty of fair representation" (internal quotations omitted)); *Bergeron v. Henderson,* 52 F. Supp. 2d 149, 153 (D. Me. 1999) (holding that plaintiff's sexual discrimination claim was preempted by the duty of fair representation); *Sousa v. The Stop & Shop Supermarket Co.*, 1999 U.S. Dist. LEXIS 9367 at *1 (D. Mass. Apr. 16, 1999) (holding that plaintiff's state statutory anti-discrimination claim was preempted by the duty of fair representation because the claim presented a "colorable federal question within a field in which state law is completely preempted"(internal quotations omitted)); *Flathau v. Int'l Ass'n of Machinists, District 141,* 2003 U.S. Dist. LEXIS 8827 (W.D. Wash. May 14, 2003) ("'Federal courts that have considered the preemption doctrine in the duty of fair representation context have consistently held that state law claims of union misconduct are

preempted where the conduct at issue is subject to the union's statutory duties as exclusive representative, because that relationship is governed solely by the duty of fair representation'"); *Arnold v. Air Midwest, Inc.*, 1994 U.S. Dist. LEXIS 7628 at *6 (D. Kan. May 24, 1994) (citing opinions in which negligence, fraud, tortious interference, misrepresentation, promissory estoppel, and conspiracy claims against unions were found preempted by federal law); *Brumbaugh v. Int'l Bhd. of Elec. Workers, Local Union No. 51*, 2007 U.S. Dist. LEXIS 56270 (C.D. Ill. Aug. 2, 2007) (state law claims for breach of contract and negligent professional representation brought against union and union's business manager were preempted by federal law).

Apprised of the arguments made by Defendants in their Notice of Removal, the Plaintiffs now argue that:

> this is an action to enforce common law contract obligations related to an [sic] common law arbitration and is **brought against ordinary individuals who were parties** to that contract and the arbitration.
>
> * * *
>
> State law governs enforcement of the arbitration because neither side here, either individually or in aggregate, was a "labor organization" subject to § 301 of the LMRA and no party was a 'carrier" or a union subject to the RLA.

(Dkt. No. 9, 2:18-20, 3:3-5) (emphasis supplied). Consistent with their new "ordinary individuals" strategy, the Plaintiffs have excised from the FAC all those allegations that attribute the alleged contract breaches to the actions of officers of the Air Line Pilots Association (ALPA) and the US Airline Pilots Association (USAPA). Nevertheless, as

discussed above, the Ninth Circuit has held that a removal action must be analyzed in light of the allegations contained in the original complaint.[11]

The original complaint attributes responsibility to the named Defendants based on their respective positions as union officers:

- Plaintiff Bradford as the USAPA President (Original Complaint at ¶ 11)
- Plaintiff Diorio as Chairman of the USAPA Negotiating Advisory Committee (Original Complaint at ¶ 13)
- Defendant Frear as a member of the USAPA Negotiating Advisory Committee (Original Complaint at ¶ 15)
- Defendant King as USAPA Secretary-Treasurer (Original Complaint at ¶ 17)
- Defendant Mowery as Consultant to the USAPA Negotiating Advisory Committee (Original Complaint at ¶ 19)
- Defendant Stephan as chairman of the US Airways Master Executive Council (MEC), Airline Pilots Association, International (ALPA) (Original Complaint at ¶ 21)

All of the above allegations have been purged from the FAC on the purported grounds that they are mere "surplusage."

The onset of the contractual breach alleged – at least in the original complaint – is tied to actions committed by ALPA's US Airways MEC.[12] For example:

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[11] *See infra* pp. 2-3.

[12] ALPA is a "unitary" national labor organization that is not composed of local unions like most other labor organizations. *Crawford v. Air Line Pilots Ass'n Int'l,* 992 F.2d 1295 (4th Cir. 1993), *cert. denied,* 510 U.S. 869 (1993). MEC representatives are thus agents of ALPA who, when acting within the scope of their apparent authority "bind the union, regardless of whether [their acts] were specifically authorized or ratified." *North River Energy Corp. v. United Mine Workers of Am.,* 664 F.2d 1184, 1192 (11th Cir. 1981).

- An ALPA US Airways MEC representative is quoted as stating that "[t]he Nicolau Award will never see the light of day on the East." (Original Complaint at ¶ 91)

- The ALPA US Airways MEC Chairman reports the East objective of having "permanent" separate operations (Original Complaint at ¶ 92)

- The ALPA US Airways MEC withdrew its representatives from a joint committee seeking to negotiate the terms of a merged operation of US Airways (Original Complaint at ¶ 93-94)

All of the above allegations have been purged from the FAC on the purported grounds that they are mere "surplusage."

The original complaint attributes the perpetuation of the alleged contractual breach, in the aftermath of the de-certification of ALPA, to the actions of USAPA representatives:

- USAPA counsel advised the East Pilots that they could "use" USAPA to re-negotiate the integrated seniority list (Original Complaint at ¶ 97)

- USAPA counsel advised East pilots that they could "use" USAPA to implement a "seniority-based pilot integration agreement." (Original Complaint at ¶ 98)

- USAPA has publicly stated that any contract it negotiated with US Airways will not incorporate the Nicolau document. (Original Complaint at ¶ 103)

All of the above allegations have been purged from the FAC on the purported grounds that they are mere "surplusage."

In view of the fact that the Plaintiffs' lawsuit is based on alleged breaches of a CBA perpetrated successively by ALPA and USAPA representatives, the Court should not permit the Plaintiffs to resort to artful pleading to evade removal.[13] This is particularly critical in the instant case where the Plaintiffs seek to certify all "East pilots" as a defendant class and order

[13] "The federal interest in the duty of fair representation is of such importance that a duty of fair representation claim is governed exclusively by federal law even when brought in state

this class to "negotiate" as ordered by this Court. Such action clearly seeks to subvert the bargaining authority of USAPA – the certified collective bargaining representative – whose authority to negotiate on behalf of all US Airways pilots is exclusive as provided under the Railway Labor Act. *Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1007 (9th Cir. 1990) (the "RLA imposes the affirmative duty on the employer to treat only with the true representative, and hence the negative duty to treat no other.").

C. The District of Columbia District Court Remand Decision Relied Upon by Plaintiffs is Cleary Distinguishable

The Plaintiffs rely heavily on a D.C. district court decision finding that the East MEC's application to set aside the Nicolau Award did not warrant removal. (Dkt. No. 9, 13:18) (*citing US Airways Master Executive Council, Air Line Pilots Ass'n, Int'l v. America West Master Executive Council, Air Line Pilots Ass'n, Int'l*, 525 F. Supp. 2d 127 (D.D.C. 2007)). Far from supporting the Plaintiffs' Motion to Remand, the D.C. district court's analysis highlights why removal is appropriate in the instant case.

The D.C. district court based its decision on the factual findings that the dispute concerned an "internal" union policy the purpose of which was to generate a "proposed seniority list, which ALPA promises to present to the merged airlines in an effort to persuade the merged airlines to adopt the list." 525 F. Supp. 2d at 130-31. ALPA, the certified collective bargaining representative at that time, was not a party to the litigation and the East MEC sought no remedy that would restrain ALPA or its officers from exercising their rights,

court." *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 508 (E.D.N.Y. 2004) (*citing Vaca v. Sipes*, 386 U.S. 171, 178 (1967)).

or fulfilling their obligations, under the Railway Labor Act. To the contrary, the district court founded its decision on the limited state law contractual relief sought by the East MEC:

> In their application, plaintiffs requested that the following relief be granted: 1) that the Nicolau Award be vacated in its entirety; and 2) that the plaintiffs be granted such other and further relief as the court deems necessary and proper.
>
> Superior Court has the authority to vacate an award upon application of a party where, among other reasons, "the arbitrators exceeded their powers." D.C. Code § 16-4311(a)(3).

Id. at 132. This limited effort to vacate an intra-union arbitration contrasts sharply with the Plaintiffs' efforts in the case at bar to enjoin the defendants, including the USAPA President, USAPA Negotiating Committee, and other USAPA officers from:

> taking any steps toward *negotiating a collective bargaining agreement* that is inconsistent with fully implementing the Nicolau Award Single Seniority List…

and, similarly, orders the defendants

> to make good faith efforts *to negotiate a single collective bargaining agreement* that fully implements the Nicolau List.

(Original Complaint at p. 21).[14]

As the D.C. district court did in the intra-ALPA litigation, this Court's decision on the removal issue should focus on the remedy that the Plaintiffs seek. Focusing on the remedial nature of the complaint to assess the propriety of federal court jurisdiction is proper, as courts have held that where a plaintiff's right to relief is dependent on a question of federal law, federal courts have jurisdiction to hear the case. *Franchise Tax Bd. of Cal. v. Constr.*

[14] The FAC artfully alters the remedial request to that of a court order requiring that the East Pilots treat the Nicolau Award as "final and binding" and that it not "frustrate the Company's transition" to operations under the Nicolau List. (FAC, Dkt. No. 8, 12:21-13:4). Even artful pleading cannot change the fact that the Plaintiffs are demanding that USAPA adopt and implement ALPA's collective bargaining proposal on the seniority issue.

Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 27-28 (1983); *W. Radio Serv. Co. v. Qwest Corp.*, 530 F.3d 1186, 1192 (9th Cir. 2008); *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004).

Without cavil, Plaintiffs seek to have the Court dictate how collective bargaining is conducted and restrict what USAPA can propose to US Airways. The issue of who is authorized to conduct collective bargaining pursuant to the RLA is exclusively a federal question. *Barthelemy*, 897 F.2d at 1007. Likewise, any question concerning a Union's conduct of collective bargaining in alleged violation of its members' rights is also exclusively a federal question. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 322 (3d Cir. 2004) ("The rights and duties of unions in carrying our their representational functions is an area where the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes. . ."). Accordingly, "[a]llowing state law claims in this area would disrupt the federal scheme." *Cooper*, 349 F. Supp. 2d at 508.

D. Individual Pilots Were Not Parties to the ALPA Mandated Arbitration

Finally, Plaintiffs' arguments clearly rely on the fallacy that individual pilots were parties to the Nicolau arbitration and that they "agreed" to a process dictated by the ALPA Merger Policy. However, no individual pilot agreed to this process. ALPA Merger Policy mandates that this policy be followed. No rank-and-file pilot had a role in determining the procedure; rather, the ALPA Executive Council, by decree, established the mandatory process. No individual pilot agreed nor did any individual pilot have a right to opt out.

Despite Plaintiffs' arguments in this respect, these same Plaintiffs have agreed in their parallel federal court action currently pending in this Court, that the parties to the arbitration were, in fact, the East and West ALPA MEC's.[15] Equity mandates that Plaintiffs should not be allowed to advance and potentially benefit from such inconsistent legal and factual positions. *Engquist v. Oregon Dep't of Agric*., 478 F.3d 985, 1000 (9th Cir. 2007) ("Judicial estoppel prevents a party from taking inconsistent positions when those inconsistencies have an adverse effect on the judicial process.").

E. Exercising Removal Jurisdiction Does Not Require This Court to Determine the Scope Of Preemption Under the RLA, But if This Court Does, it Should Follow a Majority Of Circuits That Hold the RLA Completely Preempts State Claims

As a threshold matter, it is clear that the RLA establishes a mandatory and exclusive arbitral mechanism for settling "minor disputes" that grow out of "grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." *Espinal v. Northwest Airlines,* 90 F.3d 1452, 1456 (9th Cir. 1996) (*citing, Hawaiian Airlines, Inc. Norris*, 512 U.S. 246 (1994)); *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 99 (1978). A state claim is a minor dispute within the meaning of the RLA if it involves facts "inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA." *Edelman v. Western Airlines*, 892 F.2d 839, 843 (9th Cir.1989) (*quoting*, *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978)). Thus, where claims are effectively based on a claimed violation of a collective bargaining agreement (CBA), or any of its amendments or modifications, they are normally preempted and subject to resolution by Adjustment Boards.

[15] *See* Case No. 08-cv-1633, Dkt. No. 77, Stipulated Statement of Facts, ¶¶ 21, 25.

Saridakis v. United Airlines, 166 F.3d 1272, 1277-79 (9th Cir. 1999); *Perugini v. Safeway Stores, Inc.*, 935 F.2d 1083, 1088 (9th Cir. 1991); *Schroeder*, 702 F.2d at 191.

In the case at bar, Plaintiffs do not deny the jurisdiction of the Adjustment Boards, nor do they invoke any independent state law as was done in the D.C. district court decision upon which they rely so heavily. Instead these are strictly contract claims that Plaintiffs allege do not require interpretation or application of CBAs. Now, in support of their motion, Plaintiffs argue that because "complete preemption [under the RLA] does not apply," remand is required. (Dkt. No. 9, 13:4). This argument should fail for several reasons:

First, as Plaintiffs acknowledge, the Ninth Circuit has not resolved whether the RLA is a complete preemption statute or not, hence this Court is not obliged to apply the RLA as an "ordinary" preemption statute . *Compare, Price v. PSA Inc*., 829 F.2d 871 (9th Cir. 1987) (not complete) *with, Grote v. Trans World Airlines, Inc*., 905 F.2d 1307 (9th Cir. 1990) (complete).[16] Moreover, the cases cited by Plaintiff are not RLA cases: *Beneficial Natl. Bank v. Anderson*, 539 U.S. 1, 6 (2003) nowhere mentioned the RLA and *Hall v. North American Van Lines, Inc*., 476 F.3d 683, 688, n.3 (9th Cir. 2007) concerned a claim of breach of an inter-state shipping contract, not an RLA produced CBA.

Second, even in the absence of, or without deciding the issue of, complete preemption, a federal court may exercise removal jurisdiction over state law claims that implicate a substantial federal question. *Lippitt*, 340 F.3d at 1042 ("In addition to state law

[16] In *Moore-Thomas*, 2006 U.S. Dist. LEXIS 61282 at *13, the Oregon District Court, in a decision issued three years after the *Beneficial* Supreme Court decision, examined the issue of complete preemption under the RLA and determined that plaintiffs' state-based wage claims were preempted by the RLA, and therefore were "converted into federal claims under the RLA; and removal was proper."

claims subject to complete federal preemption, the artful pleading doctrine allows federal courts to retain jurisdiction over state law claims that implicate a substantial federal question");[17] s*ee also, W. Radio Serv. Co,* 530 F.3d at 1192 (*citing with approval, Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 27-28 (1983)* (holding that federal question jurisdiction under *§ 1331* exists when "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law")); *Navarro,* 2008 U.S. Dist. LEXIS 62513 at *14 (retaining removal jurisdiction pursuant to the RLA without resolving complete versus ordinary preemption).

Third, were this Court inclined to determine the scope of RLA preemption, it should follow a majority of the Circuits that have found the RLA to completely preempt state law claims: *BIW Deceived,* 132 F.3d at 831; *Shafi v. British Airways, PLC*, 83 F.3d 566, 569 (2d Cir. 1996); *O'Brien v. Duluth, Missabe & Iron Range Ry.*, 27 F.3d 569 (7th Cir. 1994); *Graf v. Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1344 (7th Cir. 1986); *Richardson v. United Steelworkers of Am.*, 864 F.2d 1162, 1165 (5th Cir. 1989); *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir. 2000); *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1085 (8th Cir. 1989).

Fourth, the minority of circuits that have found the RLA not to completely preempt are distinguishable from the case at bar. In those cases the plaintiffs explicitly asserted a state law cause of action in the complaint. This is distinguishable from the case at hand where the plaintiffs have asserted nothing more than a violation of a collective bargaining

[17] This case was decided after, and cites, *Beneficial Nat. Bank v. Anderson, 539 U.S. 1 (2003). Lippitt at 340 F.3d 1042.*

agreement that exists solely under the Railway Labor Act. Any claim of contract violation of this collective bargaining agreement arises under the RLA and hence original jurisdiction is proper in this federal court. *See, e.g., Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 277 (2d Cir. 2005) (Plaintiffs/employees alleged a claim of state law defamation); *Roddy v. Grand Trunk W.R. Inc.*, 395 F.3d 318, 326 (6th Cir. 2005) (Plaintiff/employee alleged a violation of a state civil rights statute); *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1357 (11th Cir. 2003) (Plaintiffs/employees explicitly claimed defendants had violated state laws of defamation, negligence and negligent supervision and retention).

III. REQUESTED REMEDY

For the reasons set forth herein and in Defendants' Verified Notice of Removal, and any live testimony, evidence or argument to be presented in hearing, Defendants respectfully request that the Court deny Plaintiffs' motion to remand.

Respectfully Submitted,

Dated: November 7, 2008 By:

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below a true and accurate copy of the foregoing pleading, *to wit*,

- Memorandum Of Points And Authorities In Opposition To Plaintiffs' Motion to Remand;
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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And further that paper hard copies were provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On November 7, 2008, by:

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