No. _______

In the Supreme Court of the United States

ALASKA AIRLINES, INC.,

Petitioner,

v.

JUDY SCHURKE, in her official capacity as Director of the State of Washington Department of Labor and Industries; ELIZABETH SMITH, in her official capacity as Employment Standards Program Manager of the State of Washington Department of Labor and Industries,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In order to promote stability in labor-management relations and minimize disruptions in vital transportation services, the Railway Labor Act (RLA) requires mandatory arbitration for all disputes in the railroad and airline industries that require the "interpretation or application" of a collective bargaining agreement (CBA). 45 U.S.C. §§ 153(i), 184. State law claims that involve the interpretation or application of a CBA are therefore preempted. This Court applies the same preemption analysis under the RLA as it does under Section 301 of the Labor Management Relations Act (LMRA), which governs all "[s]uits for violation of contracts between an employer and a labor organization representing employees." 29 U.S.C. § 185(a); *see Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994) (observing that the RLA and LMRA preemption standards are "virtually identical").

This case arises from a dispute between an airline and a flight attendant over the latter's claim that she was entitled to reschedule claimed vacation time to cover for an upcoming flight. Although the applicable CBA governs the taking and rescheduling of such vacation, the plaintiff sought to avoid arbitration by pleading her claim solely in terms of the violation of state law. Splitting 6-5, an en banc panel of the Ninth Circuit held—in direct conflict with the decisions of other courts of appeals—that federal courts cannot inquire into the nature and scope of the state law claim in conducting this preemption inquiry. App. 38a-39a. According to the majority, a plaintiff's mere allegation that her claim turns on state law, not a CBA, is thus alone sufficient to avoid the RLA's

arbitration mechanism. *Id.* at 32a-33a. As the majority acknowledged, this holding applies equally to Section 301 of LMRA. *Id.* at 3a, 8a, 16a.

In dissent, Judge Ikuta concluded that the majority's limited view of the RLA and Section 301's preemptive scope not only was "unprecedented," but also "directly contrary to decades of the Supreme Court's preemption decisions." *Id.* at 39a (Ikuta, J., joined by Tallman, Callahan, Bea, and M. Smith, JJ.). If the decision were allowed to stand, she explained, it would "impair[] or extinguish[] preemption" and allow plaintiffs to sidestep arbitration simply through the exercise of "clever pleading." *Id.* at 39a, 72a.

The question presented is whether federal courts lack authority to inquire into the nature and scope of an alleged state law claim in determining whether resolution of that claim would involve interpretation or application of a CBA and thus trigger preemption.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Alaska Airlines Inc., an Alaska Corporation, which is wholly owned by Alaska Air Group, Inc. No public company owns more than 10% of the stock of Alaska Airlines, Inc.

Respondents are Judy Schurke, in her official capacity as Director of the State of Washington Department of Labor and Industries, Elizabeth Smith, in her official capacity as Employment Standards Program Manager of the State of Washington Department of Labor and Industries, and the Association of Flight Attendants–Communication Workers of America, AFL-CIO, who participated as Intervenor-Defendant-Appellee in the Ninth Circuit.

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Petitioner Alaska Airlines, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The en banc opinion of the court of appeals (App. 1a-74a) is reported at 898 F.3d 904. The initial panel opinion of court of appeals (App. 75a-111a) is reported at 846 F.3d 1081. The district court's order entering summary judgment for respondents (App. 112a-34a) is available at 2013 WL 2402944.

JURISDICTION

The court of appeals entered its opinion and order of judgment on August 1, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted at App. 135a-40a.

STATEMENT OF THE CASE

This case involves a circuit conflict on a recurring question of national importance. Federal labor law has long required that disputes in the airline or railroad industries involving the interpretation or application of a collective bargaining agreement (CBA) be addressed through arbitration. When a plaintiff raises state law claims that implicate a CBA, the Railway Labor Act (RLA or the Act) requires a court to assess the legal character of those claims to determine whether their resolution will require interpretation or application of the CBA. If they do, those claims are preempted. The preemption analysis under the RLA "is virtually identical" to that "in cases

involving § 301 of [the Labor Management Relations Act (LMRA)]," and this Court has interpreted the two provisions coextensively. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994). Countless employee grievances each year are subject to arbitration as a result of this longstanding preemption analysis.

In the decision below, a 6-5 majority of the Ninth Circuit sitting en banc fashioned a sweeping new rule governing RLA preemption—one that provides a roadmap for plaintiffs seeking to bypass the RLA's mandatory arbitration mechanism. The Ninth Circuit held that federal courts lack the authority to consider the nature and scope of a claim pleaded under state law. Instead, a court is limited to considering the claim *as pleaded*, even if a simple legal analysis of the claim would reveal that it requires interpretation or application of a CBA. App. 24a. As Judge Ikuta explained, that approach drives a stake through federal labor policy in this context by allowing plaintiffs to sidestep arbitration simply through "clever pleading." *Id.* at 72a (dissent).

The Ninth Circuit's decision directly conflicts with the decisions of other courts of appeals. Furthermore, because preemption under the RLA is "virtually identical" to preemption under Section 301 of the LMRA, *Norris*, 512 U.S. at 260, the Ninth Circuit's holding will affect *every* industry governed by a CBA. The Ninth Circuit's rule—covering approximately a third of the country—will affect thousands of employment-related disputes each year. And it will subject CBAs to divergent interpretations depending on the particular State in which the claim is brought—a result that "strikes at the very core of federal labor policy." *Local 174, Teamsters,*

Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

This Court's intervention is needed.

A. Statutory Background

Congress enacted the RLA in 1926 to "encourage collective bargaining by railroads and their employees" and prevent "wasteful strikes and interruptions of interstate commerce." *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148 (1969). The provisions of the Act were extended to the airline industry in 1936. *See* 45 U.S.C. § 181. As Congress recognized, stable employment arrangements have "special importance in the rail and air industries, where failure to resolve labor disputes . . . may 'interrupt[] . . . commerce' and thus adversely affect the public interest in traveling and shipping." *Air Line Pilots Ass'n, Int'l v. US Airways Grp., Inc.*, 609 F.3d 338, 341 (4th Cir. 2010) (Wilkinson, J.) (alterations in original) (quoting 45 U.S.C. § 151a(1) and citing *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam)).

Accordingly, the RLA sets forth a detailed statutory "machinery to resolve disputes . . . as to wages, hours, and working conditions" between airlines and their employees. *International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963). The core aspect of this machinery is arbitration, which is conducted by panels known as adjustment boards. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1968). Congress viewed such arbitration as essential to ensuring "the prompt and orderly settlement" of labor disputes and key to "minimizing

interruptions in the Nation's transportation services." *Cent. Airlines, Inc.*, 372 U.S. at 687, 689.

The RLA's arbitration mechanism applies to two classes of disputes. The first class, referred to as "major" disputes, relates to "the formation of collective [bargaining] agreements or efforts to secure them." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989) (citation omitted). The second class, known as "minor" disputes, "grow[s] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). Put another way, "major disputes seek to create contractual rights, minor disputes to enforce them." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994) (citation omitted).

Arbitration is critical to resolving disputes involving CBA-governed employees—especially in the context of multistate CBAs—where "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour Co.*, 369 U.S. at 104. "The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation." *Allis-Chalmers v. Lueck*, 471 U.S. 202, 211 (1985). "Congress considered it essential to keep . . . so-called 'minor' disputes within [the RLA's mandatory arbitration mechanism] and out of the courts." *Sheehan*, 439 U.S. at 94.

To prevent employees from bringing employment-related grievances under the guise of state law claims, this Court has long held that the RLA has preemptive force. *See Andrews v. Louisville & Nashville R.R. Co.,*

406 U.S. 320, 321-22 (1972). When a state law cause of action is either founded on a right created by a CBA or involves "interpretation or application" of the CBA, then the claim is preempted, and the employee must instead pursue relief through the RLA's mandatory arbitral mechanism. *Norris*, 512 U.S. at 252-53.

This preemption is important to ensuring that the interpretation of CBAs—especially multistate CBAs—remains uniform and consistent. Accordingly, when "resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor law principles—which are necessarily uniform throughout the Nation—must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988).

The legal standards governing preemption under the RLA are particularly important because they apply not only to the RLA itself but also to Section 301 of the LMRA, which establishes federal subject matter jurisdiction over all "[s]uits for violation of contracts between an employer and a labor organization representing employees." 29 U.S.C. § 185(a). The preemption analysis under the RLA "is virtually identical" to that "in cases involving § 301 of the LMRA," *Norris*, 512 U.S. at 260, and this Court has interpreted the two provisions coextensively.

The primary difference between Section 301 and the RLA is that the "source of the obligation to arbitrate differs between the" two provisions. App. 11a n.7. While the RLA involves a statutorily created arbitral mechanism, Section 301 "protects contractually created obligations [and thus] provides,

as a matter of federal common law, for the specific performance of CBA terms requiring the . . . arbitration of disputes." *Id.* Although arbitration is "not mandated by statute, . . . in practice '[a]rbitrators are delegated by nearly all [CBAs] as the adjudicators of contract disputes.'" *Id.* (alterations in original) (citation omitted). Thus, "the end purposes of LMRA § 301 preemption and RLA preemption are the same—to enforce 'a central tenet of federal labor-contract law . . . that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.'" *Id.* (alteration in original) (citation omitted).

B. Factual Background

Alaska Airlines is a federally regulated common carrier by air subject to the RLA. It conducts hundreds of flights each day from cities all over the country (and in other countries). It has approximately 17,500 employees, including roughly 5,800 flight attendants. Like other major airlines, it operates in accordance with system-wide, and therefore nationwide, CBAs that it negotiates with unions of employees, organized by craft or class. As relevant here, Alaska Airlines operates its inflight operations, for which its flight attendants work, in accordance with a system-wide CBA negotiated with the Association of Flight Attendants, Communication Workers of America—AFL-CIO (AFA).

Because reliable attendance is critical to both running an airline and meeting federal safety standards, Alaska Airlines, like all major airlines, has strict rules about the scheduling, and rescheduling, of vacation. Flight attendant absences pose unique concerns in the airline industry because under FAA

regulations, a plane cannot take off without the requisite number of flight attendants on board. Accordingly, under Alaska Airlines's long-standing workplace practice, flight attendants must "pre-bid" their vacation each year. App. 3a. And to ensure sufficient staffing on each aircraft, once an attendant's vacation is scheduled, flight attendants are highly circumscribed in the ways in which they are permitted to move that scheduled vacation. *Id.*

Under the applicable CBA and Alaska Airlines's policies and past practices, flight attendants accrue sick leave based on the amount of time they work, including the number of flights staffed. *Id.* at 117a-18a. The CBA identifies situations in which flight attendants may use sick leave, including when necessary to care for certain family members. The CBA also sets forth detailed rules for earning paid vacation and the circumstances in which such leave may be used outside of a scheduled period. *Id.* If a flight attendant takes an absence that is not allowed under the CBA, the employee may incur attendance points, which may then become the basis for disciplinary action. *Id.* at 3a-4a.

This case arises from a dispute between Alaska Airlines and a flight attendant, Laura Masserant, over the use of scheduled vacation to care for a sick family member. In October 2010, Masserant bid for her preferred vacation schedule in 2011. *Id.* at 76a. She was awarded the vacation in accordance with her seniority. Masserant scheduled four paid vacation days in January and seven in each of four other months, including December. *Id.* at 120a-21a & n.4.

In May, 2011, Masserant informed Alaska Airlines that she needed to be absent from upcoming flights over a two-day period to care for her son, who had

bronchitis. *Id.* at 3a. Alaska Airlines informed her that she did not have sick leave to cover this two-day period, and that, under the CBA, she was not allowed to reschedule her December vacation to cover the absence. *Id.* at 121a. Masserant was allowed to take an emergency absence, but, in accordance with the CBA, she was assessed attendance points for doing so. App. 4a. Masserant disputed Alaska Airlines's refusal to allow her to reschedule her December vacation. But instead of invoking the CBA's grievance procedure, Masserant, supported by her union, filed a complaint with the Washington Department of Labor and Industries (WA L&I). *Id.*

Masserant's complaint alleged that she was denied "protected leave" under the Washington Family Care Act (WFCA). That Act provides, in pertinent part, that "[*i*]*f*, under the terms of a collective bargaining agreement" or other employer policy, an "employee is entitled to sick leave or other paid time off, then the employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for [a sick family member]." Wash. Rev. Code § 49.12.270(1) (emphasis added). The WFCA explicitly makes the statutory right it creates contingent on an employee being "entitled" to paid time off "under the terms of" the governing CBA. *Id.* The WFCA further specifies that an "employee taking leave . . . must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave." *Id.*

Although the parties disputed whether the "terms of" the CBA in fact "entitled" Masserant to reschedule her December vacation to cover her absence in May, the WA L&I found that Alaska Airlines had violated

the WFCA by assessing Masserant attendance points for taking an emergency absence. App. 5a.

C. Procedural History

In March 2012, Alaska Airlines filed this action in federal court against the director of the WA L&I and another official. *Id.* at 120a. It sought a declaration that L&I's enforcement action against the airline was preempted by the RLA's mandatory arbitration provision because Masserant's state law right depended upon—and thus required interpretation or application of—a CBA. As Alaska Airlines explained, the WFCA expressly made Masserant's state law right to use her vacation for family medical purposes contingent on her being "entitled" to that time off in the first place "under the terms of [her] collective bargaining agreement." Wash. Rev. Code § 49.12.270(1). As a result, the case would necessarily involve interpretation or application of the CBA to determine that initial "entitlement." App. 18a-19a.

While the parties agreed that Masserant had accrued vacation time, they disputed whether she was "entitled" under the CBA to use it in May when she had already been awarded that time off for December. As Alaska Airlines further explained, the WFCA provides that an employee "must comply with" all other "terms of the collective bargaining agreement" (including for advance scheduling), and those terms dictated that Masserant was not permitted to reschedule her December vacation for family care purposes in May. Wash. Rev. Code § 49.12.270(1).

WA L&I, in turn, argued that the WFCA provided Masserant with an "independent state law right" to reschedule her vacation days—notwithstanding the terms of her CBA. App. 29a. In L&I's view, the

statute dictates that once an employee has accrued time off they must be permitted to use that time off for family medical leave purposes, *even if* doing so violates a CBA policy governing advanced scheduling. *Id.* Accordingly, L&I argued that Masserant's claim would not require any interpretation of the CBA, because *her theory* of state law—which the Airline disputed—entitled her to relief notwithstanding the CBA's terms. The district court sided with L&I, reasoning that Masserant's complaint, on its face, was based on a violation of state law, and thus would not require interpretation of the CBA. *Id.* at 115a.

A divided panel of the Ninth Circuit reversed. Writing for the majority, Judge Kleinfeld observed that the "fundamental question" under existing precedent is "whether the state right is sufficiently independent of the collecting bargaining agreement to avoid the broad preemption of the . . . . [RLA]." *Id.* at 91a. And, in this case, he explained, "the state law right and the collective bargaining agreement are indeed inextricably intertwined"—the WFCA "expressly limits the right it establishes to employees 'entitled' to leave 'under the terms of a collective bargaining agreement or employer policy.'" *Id.* at 95a-96a. Judge Christen dissented. *Id.* at 100a-11a.

D. En Banc Decision Below

The Ninth Circuit subsequently granted rehearing en banc and, by a 6-5 vote, affirmed the district court's decision in an opinion written by Judge Berzon and joined by Chief Judge Thomas and Judges McKeown, Paez, Nguyen, and Hurwitz. App. 1a-38a. Judge Ikuta, joined by Judges Tallman, Callahan, Bea, and Milan Smith, dissented. *Id.* at 39a-74a.

1. Majority Opinion

According to the majority, the "preemption inquiry" under the RLA, like the "virtually identical" standard under Section 301 of LMRA, looks to "the claim's 'legal character'—whatever its merits—so as to ensure it is decided in the proper forum." App. 23a. "In conducting the preemption analysis," the majority held, "we may no more invade the province of the state court to resolve a state law claim over which we lack jurisdiction than we may invade the province of the labor arbitrator to construe the CBA." *Id.* Thus, in the majority's view, "[t]he primary point of reference in the preemption analysis is . . . not state law," but instead "the plaintiff's pleading." *Id.* at 22a. As long as "*a plaintiff contends* that an employer's actions violated a state-law obligation, wholly independent of its obligations under the CBA, there is no preemption." *Id.* at 23a (citation omitted).

Applying this understanding, the majority found it "straightforward" that Masserant's claim was not preempted. *Id.* at 29a. As the majority explained, "Masserant has alleged a violation of the WFCA's independent state law right to use banked vacation days." *Id.* The majority acknowledged that "the Airline disagrees with [Masserant's] interpretation of the WFCA" and that "a dispute exists over whether Masserant . . . was 'entitled' to take [the requested leave] within the meaning of the WFCA"—an entitlement which, under the express terms of the WFCA, depends on the CBA itself. *Id.* at 29a, 30a-31a. Nevertheless, the majority concluded that "[w]hat matters for present purposes . . . is that Masserant can prevail *if state law means what [she says] it means*, whether or not the Airline's CBA

interpretation is correct." *Id.* at 32a (emphasis added). Indeed, in the majority's view, the court lacked "jurisdiction" to "construe state law and resolve [the dispute] between the parties as to its meaning" as part of its RLA preemption analysis; instead, the court was limited to only the face of "plaintiff's pleading." *Id.* at 22a, 32a-33a.

The majority thus concluded that Masserant's claim was "not preempted under the RLA" and, therefore, not subject to arbitration. *Id.* at 38a.

2. Dissenting Opinion

Judge Ikuta, joined by four other judges, dissented. Judge Ikuta began by noting that when "a state-law cause of action requires interpretation or application of a collective bargaining agreement, it constitutes a 'minor dispute' that must be resolved through the RLA's mandatory arbitral mechanism." *Id.* at 39a (dissent). "Instead of applying this rule," Judge Ikuta explained, "the majority impose[d] an unprecedented constraint that effectively eviscerates federal court review." *Id.* It held "that in conducting an RLA preemption analysis, a federal court may not consider the nature and scope of the state cause of action . . . but must limit itself to determining whether the plaintiff has pleaded a claim that constitutes a minor dispute." *Id.*

As Judge Ikuta explained, under the terms of the WFCA, "Masserant must show that she is 'entitled to' paid time off 'under the terms of [the] collective bargaining agreement,' and that she 'compl[ied] with the terms of the collective bargaining agreement . . . applicable to the leave,' including any requirements applicable to rescheduling vacation time." *Id.* at 55a (alterations in original) (citation omitted).

"Masserant's WFCA claim," Judge Ikuta reasoned, "therefore turns on whether she was entitled to reschedule her December vacation time under the terms of the CBA." *Id.* Since this question clearly "requires interpretation and application of the CBA," Judge Ikuta concluded that "it is a quintessential minor dispute that must be channeled through the RLA's mandatory arbitral mechanism." *Id.* at 57a.[1]

The majority reached its contrary holding, Judge Ikuta explained, not because it interpreted the WFCA differently, but because it declined to interpret the WFCA at all. Instead, the majority concluded that "RLA preemption precludes *any consideration* of the state law governing a cause of action." *Id.* at 58a-59a (emphasis added). Thus, the majority establishes a rule under which "a federal court's 'only job is to decide whether, as *pleaded*,' a claim is independent of the CBA." *Id.* at 59a (quoting *id.* at 24a). That approach, according to the dissent, is "not only baseless and illogical, but contrary to Supreme Court and [Ninth Circuit] precedent." *Id.*

As Judge Ikuta explained, this Court has long-held that in deciding the scope of preemption under the RLA and Section 301 of the LMRA, "federal courts must understand the claim's legal character to determine whether the state-law cause of action is . . . 'substantially dependent on analysis of a collective-

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[1] As Judge Ikuta explained, respondents' claim that the WFCA created a non-negotiable right to use leave to care for family members regardless of a CBA's rules not only is contradicted by the express terms of the statute but also was based on a "late-blooming" interpretation manufactured for this litigation. App. 53a (quoting *Livadas v. Bradshaw,* 512 U.S. 107, 126 (1994)).

bargaining agreement'"—a task that necessarily "involves interpreting state law." *Id.* at 59a-60a (citation omitted). In particular, Judge Ikuta continued, the majority's holding is in clear conflict with this Court's decision in *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 364 (1990). *Id.* at 62a; *see infra* at 24-25.

The upshot, Judge Ikuta observed, is that the majority's rule that "a court must take a plaintiff's pleadings at face value" in determining RLA preemption "'permit[s] an individual to sidestep available grievance procedures' through clever pleading." *Id.* at 72a-73a (alteration in original) (citation omitted). This, in turn, "'would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law"—"that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 73a (quoting *Lueck*, 471 U.S. at 220). And this, too, "is contrary to Supreme Court precedent and common sense." *Id.* at 71a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's 6-5 en banc decision in this case meets all the conventional criteria for certiorari. The Ninth Circuit's decision squarely conflicts with the decisions of other courts of appeals. As Judge Ikuta explained, the Ninth Circuit's decision is also "directly contrary to decades of the Supreme Court's preemption decisions." App. 39a (dissent). And the Ninth Circuit's decision undermines a crucially important component of the Nation's labor laws, designed to promote labor-management relations and minimize disruptions in critical transportation services. The petition should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The Ninth Circuit's decision holds that, in gauging preemption, a federal court lacks authority to interpret state law in order to determine whether a state law claim will require interpretation or application of a CBA. *Id.* at 23a-24a. Under the Ninth Circuit's new rule, whenever a plaintiff pleads any *theory* of state law under which an interpretation of the CBA is not required, arbitration is avoided and the entire dispute—including any subsequent interpretation or application of the CBA—must be decided by a state agency or court. As Judge Ikuta explained, the decision effectively "precludes any consideration of the state law governing a cause of action" and leaves "a federal court's 'only job . . . to decide whether, *as pleaded*,' a claim is independent of the CBA." *Id.* at 59a (citation omitted).

1. That holding directly conflicts with the Seventh Circuit's decision in *Tifft v. Commonwealth Edison Co.*, 366 F.3d 513 (7th Cir. 2004). In *Tifft*, a group of ex-employees filed suit against their employer, alleging wrongful termination in violation of the Illinois Electric Services Law (ESL). *Id.* at 515-16. Plaintiffs alleged that their termination or demotion following their employer's merger violated a provision of the ESL dictating that, "following the transfer of ownership of an Illinois electric utility, such an entity must maintain the 'status quo' of all non-supervisory utility employees' compensation and cannot either lay off or demote such workers for at least thirty months." *Id.* at 517.

Defendants removed the case on the ground that it was preempted under Section 301 of the LMRA

because the state law claims would involve interpretation or application of a CBA. And Plaintiffs responded exactly as WA L&I did here—by arguing that "there is no preemption because no (or very little) interpretation of the CBA is necessary" under their state law *theory* of the case. *Id.* As the court explained, "Plaintiffs" asserted that because they "were laid off or demoted within thirty months of the merger . . . Defendants are clearly liable for damages under their reading, [and] a court need not look to the CBA or any other agreement." *Id.*

Under the Ninth Circuit's rule, that would have ended the preemption inquiry. As the Seventh Circuit acknowledged, if the employees' theory of state law were correct, there would be "no need to interpret the CBA or any other agreements, their state law claim would be independent of the CBA, and their claims would not have been preempted by Section 301 of the LMRA." *Id.* at 519. But the Seventh Circuit "disagree[d]" with this interpretation of Illinois law, *id.* at 517—the very thing that the Ninth Circuit held a federal court lacks authority to do. And then the Seventh Circuit held that the ESL required only that an employer provide a "workforce reduction plan" and a "transition plan" for laid off workers, and because these plans were negotiated pursuant to a CBA, the adequacy of the plans and whether they complied with the ESL would require interpretation of a CBA. *Id.* at 518-20. Accordingly, the court held that the claim was preempted under Section 301. *Id.* at 520.

The Ninth Circuit's decision in this case squarely conflicts with the Seventh Circuit's decision in *Tifft*. Under the Ninth Circuit's rule, the fact that plaintiffs pleaded a *theory* of state law that did not require resort to a CBA would be sufficient to avoid

preemption. And under the Ninth Circuit's rule the court in *Tifft* would have lacked authority to interpret the provisions of the ESL to determine whether plaintiffs' reading (that the statute categorically bars layoffs for thirty months) is a valid one. Instead, because that threshold question is "for the state court" to decide, the Ninth Circuit would have committed the dispute to a state court or agency, and not the arbitrator—even if, as the Seventh Circuit subsequently found, the best interpretation of state law would result in *the state court or agency interpreting the CBA*. There is no way to reconcile the approaches taken in the decision below and in *Tifft*.

2. The decision below also conflicts with the Fourth Circuit's decision in *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95 (4th Cir.), *cert. denied*, 135 S. Ct. 160 (2014). There, employees at a chicken processing plant brought claims for underpayment of wages in violation of the South Carolina Wages Act (SCWA). Defendant asserted that the claims were preempted because its payment obligations depended on an interpretation of the CBA. The district court held that the SCWA "claims were not preempted because the *plaintiffs' theory of recovery* did not depend on the meaning of the CBA but on the alleged breach of separate agreements to pay 'clock time.'" *Id.* at 101 (emphasis added).

The Fourth Circuit, in an opinion written by Judge Niemeyer, reversed. The court noted that plaintiffs expressly "disavow[ed] reliance on the collective bargaining agreement [for the relevant claim] and assert[ed] that their claims are based on a notice provision of the [SCWA]." *Id.* at 108. Under that theory of state law, the plaintiffs asserted, "[n]o resort to any CBA was necessary" because a jury merely had

"to determine [plaintiffs] were not told that they would be paid based on 'line time' when they were hired." *Id.* (alteration in original) (citation omitted). The court, however, disagreed with this interpretation, holding that "the far more natural reading of [the notice provision] is that it [requires employers to notify] *when* and *where* wages are to be paid, not the *amount* of wages due to an employee." *Id.* Accordingly, the Fourth Circuit held that any right to recover unpaid wages must stem from the CBA, and that "plaintiffs' [contrary] approach would undermine one of the fundamental goals of § 301 preemption by allowing employees covered by a collective bargaining agreement to circumvent their arbitration commitments." *Id.* at 109.

As with *Tifft*, the approach adopted by the Fourth Circuit in *Barton*—which looked beyond plaintiffs' *theory* of the state law claim to examine the actual nature and legal character of the claim—conflicts with the rule adopted by the Ninth Circuit here. Under the Ninth Circuit's rule, the Fourth Circuit would have lacked authority to interpret the SCWA to determine if the plaintiffs' claims in substance turned on an interpretation of the CBA. As soon as plaintiffs *pleaded* a state law theory of recovery which would entitle them to relief notwithstanding the terms of the CBA, the inquiry must be at an end. The result in *Barton* would thus have been the opposite under the Ninth Circuit's approach.

3. The Ninth Circuit's new preemption rule also is at odds with the decisions of other courts of appeals. For example, the First Circuit has adopted a rule under which a claim is preempted under the RLA and Section 301 if "'resolution' of [that] claim '*arguably hinges* upon an interpretation of the collective

bargaining agreement.'" *Rueli v. Baystate Health, Inc.,* 835 F.3d 53, 58 (1st Cir. 2016) (emphasis added) (citation omitted); *see also O'Brien v. Consol. Rail Corp*., 972 F.2d 1, 5 (1st Cir. 1992) (adopting the Section 301 standard for cases under the RLA). As the First Circuit explained in *Rueli*, "[t]he qualifier 'arguably' is necessary because, at the outset of a case . . . 'we cannot know the exact contours of the wage dispute and the precise CBA terms likely to require interpretation cannot be certain.'" 835 F.3d at 58-59 (citation omitted). But that caveat is unnecessary under the Ninth Circuit's approach, which looks only to the face of the claim pleaded by the plaintiff.

Thus, while the Seventh and Fourth Circuits interpret state law in order to determine the *best* reading of a state provision, the First Circuit holds that a claim is preempted if there is even an *arguable* reading of state law under which a CBA needs to be interpreted. The Ninth Circuit's decision in this case lies at the other end of the spectrum: it holds that only those claims that *indisputably* involve interpretation of a CBA—i.e., do so without any initial construction or interpretation of state law—are preempted. In other words, the Ninth Circuit's new rule is effectively the inverse of the First Circuit's. The fact that four different circuits have now crafted tests across the entire range of this spectrum underscores the need for this Court's intervention.

The Ninth Circuit's rule also contradicts the approach followed by the Eighth Circuit. In *Gore v. Trans World Airlines*, for example, the Eighth Circuit addressed a plaintiff's state law claims of false arrest, negligence, libel and slander, and invasion of privacy against his employer. 210 F.3d 944, 949-50 (8th Cir. 2000), *cert. denied*, 532 U.S. 921 (2001). The

plaintiff's "complaint ple[d] th[e] essential element[s] generically, avoiding any mention of the relative rights and duties contained within the collective bargaining agreement." *Id.* at 950. With reference to state court cases, the Eighth Circuit carefully examined the elements of each of these state law causes of action to determine whether the "resolution of [his] claim[s] depend[ed] on an interpretation of the [collective bargaining agreement]." *Id.* at 949 (last alteration in original) (citation omitted).

The Sixth Circuit took a similar approach in *DeCoe v. General Motors Corp.*, 32 F.3d 212 (6th Cir. 1994). There, where a plaintiff brought various state law tort claims against his former employer. The court held that, in determining whether these claims were preempted under Section 301, "the court is not bound by the 'well-pleaded complaint' rule, but rather, looks to *the essence* of the plaintiff's claim, in order to determine whether the plaintiff is attempting to disguise what is essentially a contract claim as a tort." *Id.* at 216 (emphasis added). As the Eighth Circuit did in *Gore*, the court then examined the elements of each state law cause of action to determine whether *in substance* the resolution of those claims would require an interpretation of the CBA.

Other circuits have adopted similar approaches. *See, e.g.*, *Vera v. Saks & Co.*, 335 F.3d 109, 115 (2d Cir. 2003) (noting that "Plaintiff asserts that section 193 [a New York statute] creates state rights that are independent of the CBA, that is, that he can establish defendant's liability under section 193 without any analysis of the terms of the CBA," but holding, based on the court's own assessment of New York law, that in fact a court "must interpret the CBA" in order to resolve the claim); *Pennsylvania Fed'n of the Bhd. of*

Maint. of Way Employees v. National R.R. Passenger Corp., 989 F.2d 112, 115 (3d Cir. 1993) (Plaintiffs "argue that we can resolve this dispute merely by construing Pennsylvania law, particularly the term 'hours worked' as defined in 34 Pa.Code § 231.1," but the claim is nonetheless preempted because it is in fact "impossible to [resolve the claim] without interpreting the collective bargaining agreement)"; *Kollar v. United Transp. Union*, 83 F.3d 124, 126 (5th Cir. 1996) ("While Plaintiffs couch their claim in terms of fraud, resolution of their claim nonetheless requires interpretation of the CBA"); *Ertle v. Continental Airlines, Inc.*, 136 F.3d 690, 694 (10th Cir. 1998) (construing Colorado's law of fraudulent concealment to determine whether claim would in fact depend on interpretation of the CBA).

In short, the Ninth Circuit's new rule that a federal court lacks authority to go beyond the pleadings in determining whether an employment-related claim is preempted under the RLA and Section 301 of the LMRA directly conflicts with the decisions of other circuits and cannot be reconciled with the approach used in any other circuit.

B. The Decision Below Conflicts With The Decisions Of This Court

As Judge Ikuta explained, the Ninth Circuit's decision also is "directly contrary to decades of the Supreme Court's preemption decisions and impairs or extinguishes RLA preemption" and preemption under Section 301 of the LMRA. App. 39a (dissent).

1. The RLA requires arbitration of disputes that "grow[] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a.

Section 301 likewise requires that claims involving interpretation of a CBA be addressed in federal court under the "heavy presumption that claims requiring interpretation of [a] CBA are arbitrable." *Rueli*, 835 F.3d at 59. Thus, when a plaintiff pleads a state law claim, the RLA and Section 301 both *require* a court to assess whether "resolution" of that claim involves "interpretation or application" of a CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210, 213-14 (1985); *see also Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994) (applying the standard from *Lueck* to the RLA). If it does, then, as a matter of *federal* law, the claim is preempted. "While the nature of the state [rule] is a matter of state law, the question whether the [state law] is sufficiently independent of federal contract interpretation to avoid pre-emption is, of course, a question of federal law." *Lueck*, 471 U.S. at 213-14.

The Ninth Circuit's decision in this case flouts this settled principle. As the majority itself recognized, "a dispute exist[ed] over whether Masserant truly 'earned' her vacation and was 'entitled' to take it within the meaning of the WFCA." App. 31a. The majority reasoned however, that "those terms . . . are contained within the WFCA, not the CBA," and that a "dispute over their meaning is a dispute over state law." *Id.* In the majority's view, the court lacked "jurisdiction" to answer that question of state law, and it therefore held that Masserant's claim was not subject to RLA arbitration and must be resolved instead in the state system. *Id.* at 33a.

The Ninth Circuit failed to appreciate, however, that the parties' "dispute over state law" bears on the answer to a federal question it was obligated to resolve. On Alaska Airlines's interpretation of state

law, the WFCA *does* require "interpretation or application of" the CBA. In particular, it requires a court to determine whether the CBA "entitled" Masserant to reschedule her paid vacation days in December to cover her unexpected absence in May. If the CBA does not (as Alaska Airlines maintains, *see* Alaska Airlines CA9 Br. 42-54), then neither does the WFCA, which is explicitly tied to the terms of CBA.

Masserant reads state law differently. "Her view of the WFCA . . . is that the statute's 'choice of leave' exception applies to banked vacation already earned, even if under [the CBA]," she is not permitted to reschedule her "prescheduled vacation." App. 29a. But the crucial point is that, if Alaska Airlines is correct, then "resolution" of Masserant's claim *would* turn on an interpretation or application of the CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 486 U.S. 399, 405-06 (1988). As a result, a federal court cannot simply avoid addressing state law. It has no choice but to resolve the parties dispute over the meaning of state law—because doing so is a *necessary step* in answering the federal question of whether resolution of the state claim will require interpretation of the CBA. Indeed, federal courts decide issues of state law all the time in adjudicating disputes; there is no reason to believe—as the Ninth Circuit appeared to—that they are ill-equipped or without authority to do so in this context.[2]

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[2] At oral argument before the Ninth Circuit en banc panel, both L&I and the union purported to waive Masserant's claim that the CBA entitled her to reschedule her vacation days, and thus asserted that resolution of Masserant's claim will no longer require interpretation of the CBA. As Judge Ikuta pointed out, however, Masserant herself (who alone filed the initial complaint in this case) "did not concede [her] right[s] under the

The Ninth Circuit's alternative approach—under which federal courts cannot go beyond the pleadings—abdicates a federal court's crucial gate-keeping function under the RLA and Section 301 of the LMRA. If federal courts simply lack authority to construe or interpret state law (even when doing so is an essential step in determining preemption), then, as Judge Ikuta observed, a plaintiff can avoid labor arbitration simply by pleading a theory of state law that avoids interpretation of the CBA, no matter how implausible that theory may be. *See* App. 72a-73a. That subordinates the availability of arbitration to the creativity of "clever pleading." *Id.* at 72a.

2. It hardly comes as a surprise that this Court has previously engaged in precisely the type of inquiry into state law that the Ninth Circuit's opinion deems beyond a federal court's authority.

As Judge Ikuta explained, *Rawson* is a prime example. App. 60a-62a. There, plaintiffs sued their union under state law, asserting that the "duty to perform [a mine] inspection reasonably arose from the fact of the inspection itself rather than the fact that the provision for the Union's participation in mine

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CBA" and "[n]either AFA nor L&I represent Masserant in this appeal, and neither claims to have authority to waive Masserant's access to the CBA's dispute resolution mechanism." App. 56a (dissent). In any event, the Ninth Circuit's holding does not rest on any concession of Masserant's CBA-based claim. Instead, the en banc majority broadly held that it lacked authority to construe the WFCA in order to determine whether resolution of Masserant's claim would require interpretation of the CBA. That holding would result in the case being sent to state court, and not the arbitrator, irrespective of whether Masserant had in fact waived her CBA-based claim. The Ninth Circuit's holding therefore is not based on—and sweeps far more broadly than—any concession attempted by L&I or the union.

inspection was contained in the labor contract." *Rawson*, 495 U.S. at 370-71. As the Ninth Circuit concluded Masserant had done here, the plaintiffs in *Rawson* pleaded a *theory* of state law that would have permitted recovery without reference to the CBA.

Under the Ninth Circuit's rule, that would have defeated preemption. Instead, the Court in *Rawson* carefully analyzed the Idaho Supreme Court's opinion on the duty of care to understand the nature and scope of state law. *Id.* Having conducted its own analysis of state law, *Rawson* rejected the plaintiffs' claim that there was a colorable interpretation of state law that would not require interpretation or application of a collective bargaining agreement. Rather, it held that "[p]re-emption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort." *Id.* at 371-72. In other words, as Judge Ikuta explained, "*Rawson* forecloses the majority's view that a federal court must defer to any proposed interpretation of state law and allow a state-law claim to proceed on that theory." App. 62a (dissent).

The Ninth Circuit's decision likewise cannot be reconciled with this Court's decision in *Lueck*. There an employee raised a tort claim against his employer for bad faith in the administration of the employee's disability benefits. While the plaintiff, as here, "asserted that the tort claim [was] independent of any contract claim" that might require interpretation of the CBA, this Court held that "[u]nder Wisconsin law, the tort intrinsically relates to the nature and existence of the contract." 471 U.S. at 213, 216 (citing *Hilker v. Western Automobile Ins. Co.*, 235 N.W. 413,

414-15 (Wis. 1931)). In other words, the Court interpreted state law in order to determine whether the resolution of a claim which, as pleaded, avoids mention of a CBA would *in reality* require its interpretation. That is an inquiry that cannot be reconciled with the Ninth Circuit's holding that federal courts simply lack authority to make threshold determinations of state law.

In short, it is "well established" under this Court's precedent "that determining the legal character of a state cause of action by interpreting the state law at issue is an essential step in deciding the . . . preemption question" under the RLA and Section 301 of the LMRA. App. 64a (dissent). The Ninth Circuit's decision in this case eliminating that "essential step" warrants this Court's review.

C. The Question Presented Is Exceptionally Important And Warrants Review Here

1. The Ninth Circuit's unprecedented approach to RLA preemption will have immediate and far-reaching consequences. As noted above and stressed by Judge Ikuta, a plaintiff raising a CBA-based grievance in the Ninth Circuit now need only allege a threshold question of state law (however tenuous) in order to avoid mandatory arbitration. And because, as discussed, preemption under Section 301 of the LMRA is "virtually identical" to that under the RLA, the Ninth Circuit's holding will affect *every* industry whose labor relations are governed by a CBA. Tens of thousands of employment-related grievances are filed each year, and the Ninth Circuit's rule—covering approximately a third of the country—would permit plaintiffs in such disputes to avoid mandatory

arbitration simply by asserting a *theory* of state law that purportedly avoids interpretation of the CBA.

As this Court warned in *Lueck*, unless a federal court may look through such artful pleading, "the arbitrator's role in every case could be bypassed easily," and "[c]laims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court." 471 U.S. at 219-20. This would "eviscerate a central tenet of federal labor-contract law"—"that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220; *see also Sheehan,* 439 U.S. at 94 ("Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts.").

Furthermore, such an outcome will inevitably lead to "inconsistent results since there could be as many state-law principles as there are States." *Lingle*, 486 U.S. at 405-06. Multistate CBAs could be routinely subject to divergent interpretations depending on the State in which the claim is brought, directly undermining federal labor policy. The decision below could thereby re-open a vast number of interpretative disputes that had been previously settled in arbitration, and force employers to serially litigate those issues in various state courts—an outcome that fundamentally undercuts the value of a nationwide CBA. *Sheehan,* 439 U.S. at 94 ("The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.").

Moreover, as this Court has recognized, even the *possibility* of inconsistent application of a CBA makes "the process of negotiating an agreement . . .

immeasurably more difficult," as employers become reluctant to cede benefits to employees, knowing that the obligations they receive in return will be uncertain and subject to collateral attack in the state courts. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). The specter of such inconsistency may also burden negotiations over sensitive labor-management issues as employers and unions struggle to "formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract." *Id.*

These concerns are all the more acute in the airline industry, because airlines operate nationwide, have a highly mobile workforce, and rely on the consistency of CBA terms across jurisdictions. Indeed, as Judge Ikuta noted, flight attendant absences "pose unique concerns in the airline industry" because "[u]nder FAA regulations, a plane cannot take off without the requisite number of flight attendants on board." App. 57a-58a. To ensure "the basic operations of an air carrier," carriers rely on their "negotiations with [unions] for detailed scheduling of leave, attendance, and absence, as embodied in the CBA." *Id.* at 58a. And a "cornerstone of these negotiations is the mandatory arbitral mechanism, designed for 'the prompt and orderly settlement' of disputes concerning the CBA's negotiated leave terms." *Id.* "If state courts could apply the potentially conflicting state law of each of the fifty states to interpret the CBA's terms and conditions, the congressional goal of consistent, reliable operation would be threatened . . . ." *Id.*

The inconsistency and confusion that will be engendered by the decision below regarding the provisions of a carrier's multistate CBA may severely interfere with its ability to safely staff and operate its flights. The same goes for railroads impacted by the Ninth Circuit's decision, which are also subject to the RLA, as well as numerous other employers that may be subject to Section 301 of the LMRA.

2. The Ninth Circuit's decision requires this Court's immediate intervention. The decision provides a roadmap for plaintiffs seeking to avoid labor arbitration; those lawsuits will not only impose burdens on the providers of critical transportation services like airlines and railroads, but because of the LMRA, will impact labor-management relations across a vast range of industries. As noted above, even the prospect of divergent interpretations of CBAs will upset settled expectations of employers and employees across the vast swath of the country governed by Ninth Circuit law. Postponing review would create significant uncertainty and hardship.

Indeed, the Ninth Circuit has *already* channeled other disputes away from arbitration and to the courts in reliance on the decision below, underscoring the broad sweep of the decision in this case. *See, e.g., McCray v. Marriott Hotel Servs., Inc.*, 902 F.3d 1005 (9th Cir. 2018). In *McCray*, a plaintiff raised a claim under a San Jose ordinance guaranteeing all employees a minimum wage of $10 an hour. *Id.* at 1007-08. The ordinance, however, expressly provided that, "'To the extent required by federal law,' . . . 'all or any portion of the applicable requirements of [the ordinance] may be waived in a bona fide collective bargaining agreement.'" *Id.* at 1008 (citation omitted). Like the WFCA, therefore, the San Jose

ordinance made application of a state law right *contingent* on the provisions of a CBA. And the plaintiff's employer in *McCray* had agreed with the plaintiff's union to waive this provision of the San Jose ordinance in exchange for various other benefits.

The plaintiff nonetheless brought a state law claim based on the ordinance. And, like Masserant here, he argued that his claim was not subject to preemption because he had a *theory* of state law under which no interpretation of the CBA was required. His theory was that (despite the clear language of the ordinance permitting waiver) the ordinance's protections could in fact *not* be waived by a CBA.[3] Even though that interpretation of the ordinance's language was patently meritless, a panel of the Ninth Circuit, relying on the decision below, nonetheless held that the claim must be litigated in state court.

As the *McCray* dissent explained, "[t]he majority concludes that because [an] initial question involves interpretation of the ordinance under state law, the entire case must be resolved in state court" even though "that initial issue concerning interpretation of the ordinance raises no serious question." *Id.* at 1014 (Schroeder, J., dissenting). That was error, the dissent explained, because "the issue is not whether

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3 Specifically, McCray argued that the ordinance's text only permitted waivers when "required by federal law." 902 F.3d at 1012. As the City's own guidelines—which carry the force of law—explained, the reference to "federal law" in the ordinance's text concerns the federal requirement that waivers of statutory rights in CBAs be express. That is, for a waiver from state law to be effective it is "required by federal law" that it be part of the written terms of the CBA. McCray's interpretation, by contrast, would render the waiver provision a complete nullity because no waiver is ever "required by federal law."

the complaint frames the case in terms of the CBA, but whether resolution of the claims will depend on analyzing the agreement." *Id.* at 1015. As a result of the majority's refusal to address this meritless threshold question of state law, a court—not an arbitrator—will end up deciding a "challenge [to] the basic wage rate, a core subject of virtually all collective bargaining negotiations." *Id.*

3. Finally, this case presents an ideal vehicle to address this important issue. The decision below is a final judgment that conclusively determines the parties' obligations under the RLA and requires the adjudication of this dispute outside of the labor arbitration mechanism established by Congress. The petition arises from a 6-5 en banc decision in which this Court has the benefit of lengthy majority and dissenting opinions addressing the question presented. The issue arises in an industry in which the concerns created by the Ninth Circuit rule are especially acute. And the issue is clearly framed because this case involves a disputed threshold question of state law, and the answer to that threshold question will determine whether or not the plaintiff's claim involves interpretation or application of the CBA, and is therefore preempted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 30, 2018

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA AIRLINES INC., an Alaska corporation,
Plaintiff-Appellant,

v.

Judy SCHURKE, in her official capacity as Director of the State of Washington Department of Labor and Industries; Elizabeth Smith, in her official capacity as Employment Standards Program Manager of the State of Washington Department of Labor and Industries, Defendants-Appellees,

Association of Flight Attendants–Communication Workers of America, AFL-CIO, Intervenor-Defendant-Appellee.

No. 13-35574

Argued and Submitted En Banc
September 19, 2017—San Francisco, California

Filed August 1, 2018

898 F.3d 904

Before: Sidney R. Thomas, Chief Judge, and M. Margaret McKeown, Richard A. Paez,[*] Marsha S. Berzon, Richard C. Tallman, Consuelo M. Callahan,

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[*] This case was submitted to a panel that included Judge Kozinski. Following Judge Kozinski's retirement, Judge Paez was drawn by lot to replace him. *See* Ninth Cir. Gen. Order 3.2.h. Judge Paez has read the briefs, reviewed the record, and listened to oral argument.

Carlos T. Bea, Milan D. Smith, Jr., Sandra S. Ikuta, Jacqueline H. Nguyen and Andrew D. Hurwitz, Circuit Judges.

OPINION

BERZON, Circuit Judge:

We are asked whether a claim premised on a state law right to reschedule vacation leave for family medical purposes is preempted by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151–65, 181–88, when the worker's underlying right to vacation leave is covered by a collective bargaining agreement ("CBA"). We conclude that it is not.

The Supreme Court has repeatedly instructed that RLA preemption—like the "virtually identical" preemption under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185[1]—extends only as far as necessary to protect the role of labor arbitration in resolving CBA disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 262–64, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). Consistent with

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[1] Because the RLA and LMRA § 301 preemption standards are "virtually identical" in purpose and function, they are, for the most part, analyzed under a single test and a single, cohesive body of case law. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260, 262–63 & n.9, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). The one significant difference between RLA and LMRA § 301 preemption is that, under our case law, the latter, but not the former, gives rise to federal court jurisdiction under the "complete preemption" doctrine. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393–94, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009); *see also infra* note 15.

this precedent, we recognize RLA and LMRA § 301 preemption only where a state law claim arises entirely from or requires construction of a CBA. *Matson v. United Parcel Serv., Inc.*, 840 F.3d 1126, 1132–33 (9th Cir. 2016); *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1032–33 (9th Cir. 2016); *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1060 (9th Cir. 2007). Neither condition applies here. That a CBA must be consulted to confirm the existence of accrued vacation days is not sufficient to extinguish an independent state law right to use the accrued time to care for a sick child.

I

In May 2011, Laura Masserant, a flight attendant for Alaska Airlines ("the Airline"), asked for time off to care for her son, who was sick with bronchitis. Masserant had no sick days available, so she asked to use two of her seven days of accrued vacation leave.

The Airline denied Masserant's request, noting that, in accordance with the CBA between the Airline and the Association of Flight Attendants ("the Union"), Masserant's banked vacation days had already been scheduled for use later in the year. Under the terms of the CBA, vacation days for each calendar year are requested the preceding fall and scheduled by January 1 for the ensuing year. Once scheduled, these vacation days may be "exchanged" between flight attendants, used for personal medical leaves of absence, used for maternity-related leaves of absence, used to extend bereavement leave, or "cashed out"—that is, paid out immediately, with the vacation days kept on calendar but converted to unpaid time off. However, the CBA does not allow scheduled vacation days to be moved for family

medical reasons. Accordingly, Masserant's only option under the CBA was to take unscheduled leave to care for her son and so to incur disciplinary "points."

On June 21, 2011, Masserant filed a complaint with the Washington Department of Labor and Industries ("L&I"), alleging that the Airline's refusal to allow use of banked vacation days violated the Washington Family Care Act ("WFCA"), Wash. Rev. Code § 49.12.270. The WFCA guarantees workers the flexibility to use accrued sick leave or other paid leave for family medical reasons. Workers invoking the WFCA must generally "comply with the terms of the [CBA] or employer policy applicable to the leave," except that they need not comply with terms or policies "relating to the choice of leave." Wash. Rev. Code § 49.12.270(1).[2]

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[2] The WFCA provides, in relevant part:

> If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for: (a) A child of the employee with a health condition that requires treatment or supervision; or (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition. An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.

Wash. Rev. Code § 49.12.270(1).

The Airline opposed Masserant's WFCA claim on two grounds here relevant. First, it disputed L&I's jurisdiction. The Airline asserted that Masserant's complaint was not an ordinary state law claim but a CBA dispute in disguise, and therefore was reserved, under the RLA, to the exclusive jurisdiction of the CBA's grievance and arbitration mechanism. Second, the Airline disputed Masserant's view of the application of Washington law to the CBA's vacation leave provisions. According to the Airline, requiring adherence to the CBA's vacation-scheduling regime was not a prohibited restriction on "the choice of leave," Wash. Rev. Code § 49.12.270(1), but a permissible condition on earning leave in the first place.

The state agency sided with Masserant. The investigator responsible for Masserant's claim noted that it was undisputed that Masserant's banked vacation days were available as of May 2011 for exchange, personal medical leave, maternity-related leave, bereavement leave, or immediate cash-out. The leave was therefore "earned," and Masserant was "entitled" to use it, within the meaning of the WFCA. The investigator concluded that the CBA's limits on the use of banked vacation time, which could be used for certain other unscheduled purposes, served only to limit "the choice of leave," and were therefore void under state law. In May 2012, L&I issued a final notice of infraction and a $200 fine.

L&I did not directly address the Airline's jurisdictional argument. But in resting entirely on the interpretation and application of Washington law rather than on some disputed aspect of the CBA, L&I necessarily rejected the argument. As the Supreme Court held in *Norris*, RLA preemption does not apply

where the state law claim can be resolved independently of any CBA dispute. *Norris*, 512 U.S. at 256–58, 114 S.Ct. 2239; *see also Lingle*, 486 U.S. at 407, 108 S.Ct. 1877 (describing the same standard in the LMRA § 301 context).

While the L&I proceeding was ongoing, the Airline was in the midst of federal litigation against L&I officials to enjoin it. That federal litigation, the genesis of the present appeal, asserted that Masserant's state law claim was so bound up in a dispute over the terms of the CBA as to be preempted under the Railway Labor Act.

Masserant was not a party to the federal action, but her Union intervened. In support of its intervention motion, the Union noted that if WFCA claims such as Masserant's were to be treated as CBA disputes, it would be largely the Union, rather than individual workers, that would have responsibility for pursuing those disputes through grievance and arbitration.[3] *See Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 49–52, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979).

The district court concluded that Masserant's WFCA claim was unrelated to any dispute over the meaning of the CBA. It was common ground among the parties that Masserant had banked vacation days but was not permitted, under the terms of the CBA, to take them early for her son's medical care. The

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[3] Section 20.A of the CBA "establishe[s] a Board of Adjustment for the purpose of adjusting and deciding [CBA] disputes." (Emphasis omitted). Section 20.D provides that "[t]he Board shall consider any dispute properly submitted to it by the [Master Executive Council] President of the Association of Flight Attendants . . . or by the [Airline]."

question was therefore purely one of state law—whether banked, prescheduled vacation days were subject to the state's nonnegotiable right to use accrued paid leave for family medical purposes. The Airline itself framed the inquiry in these terms at the L&I proceeding, arguing that "Masserant correctly sets out the approach outlined by the CBA and Alaska [Airlines] policy, but is wrong *in her WFCA analysis*." (Emphasis added).

Relying on a long line of RLA and LMRA § 301 cases from this circuit and the Supreme Court, the district court concluded that referring to undisputed CBA provisions in the course of adjudicating a state law cause of action was not enough to trigger RLA preemption. *See Livadas v. Bradshaw*, 512 U.S. 107, 124–25, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); *Lingle*, 486 U.S. at 407, 108 S.Ct. 1877; *Burnside*, 491 F.3d at 1060. The court therefore denied the Airline's motion for summary judgment and granted the defendants' and Union's cross-motions.

On appeal, the Airline renews its argument that the RLA preempts Masserant's WFCA claim. A divided panel of this court agreed. The panel majority acknowledged that the terms of the CBA were undisputed. *Alaska Airlines Inc. v. Schurke*, 846 F.3d 1081, 1093 (9th Cir. 2017). But it held the state law cause of action nonetheless preempted "because the right to take paid leave arises solely from the collective bargaining agreement." *Id.* The panel majority reasoned that the WFCA "only applies if the employee has a right conferred by the collective bargaining agreement, so the state right is intertwined with . . . the collective bargaining

agreement." *Id.*[4] A majority of active, nonrecused judges voted for en banc rehearing.

We review de novo the district court's conclusion that RLA preemption does not apply. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001) (en banc), and affirm the judgment of the district court. Under both the RLA and LMRA § 301, federal preemption extends no further than necessary to preserve the role of grievance and arbitration, and the application of federal labor law, in resolving *CBA disputes*. That a state law cause of action is conditioned on some term or condition of employment that was collectively bargained, rather than unilaterally established by the employer, does not itself create a CBA dispute.

II

We begin by reviewing the language of the RLA and the long line of cases explaining the purpose and scope of RLA and LMRA § 301 preemption.

A

The RLA creates "a comprehensive framework for resolving labor disputes" in the rail and airline industries. *Norris*, 512 U.S. at 252, 114 S.Ct. 2239. Within this framework, labor disputes are first categorized as "representation," "major," or "minor," according to their subject matter,[5] then assigned to a

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[4] The WFCA is not so limited. It applies both to workers covered by CBAs and to those covered by employer-established leave policies. *See supra* note 2.

[5] The RLA does not itself use the terms "major" or "minor." However, the terms were widely used to describe these two categories of dispute before the statute was enacted, *see Elgin,*

corresponding dispute-resolution mechanism. *See W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1302–03, 107 S.Ct. 1515, 94 L.Ed.2d 744 (1987) (O'Connor, J., in chambers).

"Representation" disputes concern the scope of the bargaining unit and the identity of the bargaining representative. *Id.* at 1302, 107 S.Ct. 1515. Under section 2, Ninth, of the RLA, representation disputes must be resolved by the National Mediation Board. *Id.* at 1302–03, 107 S.Ct. 1515; *see also* 45 U.S.C. §§ 152, 181.

"Major" disputes are those "concerning rates of pay, rules, or working conditions." 45 U.S.C. § 151a; *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n* (*Conrail*), 491 U.S. 299, 302, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989). "They arise where there is no [CBA] or where it is sought to change the terms of [an existing] one." *Conrail*, 491 U.S. at 302, 109 S.Ct. 2477 (citation omitted). Major disputes must be resolved through an extensive bargaining, mediation, and noncompulsory arbitration process, in which both sides are subject to certain duties enforceable in federal court. 45 U.S.C. § 152, First, Seventh; *id.* §§ 156, 181; *Conrail*, 491 U.S. at 302, 109 S.Ct. 2477.

Finally, "minor" disputes are those "growing out of grievances or . . . the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a; *Conrail*, 491 U.S. at 303, 109 S.Ct. 2477. They are, in other words, CBA disputes, for which the term "grievance" is often used as a generic descriptor. *Norris*, 512 U.S. at 255, 114 S.Ct. 2239; *see also Conrail*, 491 U.S. at 302, 109 S.Ct.

J. & E. Ry. Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), and remain in common use.

2477 ("[M]ajor disputes seek to create contractual rights, minor disputes to enforce them."). Minor disputes must be addressed through the CBA's established grievance mechanism, and then, if necessary, arbitrated before the appropriate adjustment board.[6] 45 U.S.C. § 152, Sixth; *id.* §§ 153, 184.

Like the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151–69, and the LMRA, 29 U.S.C. §§ 141–97, the RLA contains no express preemption language. *See Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001). Preemption is instead implied as necessary to give effect to congressional intent, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208–11, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), subject to the critical caveat that the "[p]re-emption of employment standards within the traditional police power of the State should not be lightly inferred," *Norris*, 512 U.S. at 252, 114 S.Ct. 2239 (internal quotation marks omitted).

Congress's intent in passing the RLA was to promote industrial peace by providing a "comprehensive" scheme for resolving labor disputes "through negotiation rather than industrial strife." *Norris*, 512 U.S. at 252, 114 S.Ct. 2239; *Bowen v. U.S.*

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[6] Minor disputes in the rail industry are arbitrated before the National Rail Adjustment Board. *See* 45 U.S.C. § 153, First. When the RLA was extended to the airline industry in 1936, Congress provided for the possibility of a National Air Transport Adjustment Board, *see* 45 U.S.C. § 185, but no such body was ever formed. Instead, minor disputes arising in the airline industry are arbitrated before the specific "system board of adjustment" set up by each airline industry CBA. *See Conrail*, 491 U.S. at 304 n.4, 109 S.Ct. 2477.

Postal Serv., 459 U.S. 212, 225, 103 S.Ct. 588, 74 L.Ed.2d 402 (1983); *see* 45 U.S.C. § 151a. As in the LMRA context,[7] the arbitration of CBA disputes in RLA-covered industries—"minor disputes," in RLA terms—is an essential component of federal labor policy. *See United Steelworkers v. Warrior & Gulf Navigation Co.* (*Steelworkers II*), 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The reasons are threefold.

First, a collective bargaining agreement is more than just a contract; it is "an effort to erect a system of industrial selfgovernment." *Id.* at 580, 80 S.Ct. 1347; *see also California v. Taylor*, 353 U.S. 553, 565–66, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957). A CBA sets forth "a generalized code to govern . . . the whole

[7] The source of the obligation to arbitrate differs between the RLA and the LMRA. The RLA creates the obligation, providing for CBA disputes to be resolved through grievance and arbitration, and requiring "adjustment boards" to be created for the arbitration. 45 U.S.C. §§ 153, 184; *see also Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 610–11, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959) (explaining the origins of the RLA's grievance and arbitration mandate). LMRA § 301, on the other hand, protects contractually created obligations. It provides, as a matter of federal common law, for the specific performance of CBA terms requiring the grievance and arbitration of disputes. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 450–51, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *see also Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103. 92 S/Ct/ 581, 7 L.Ed.2d 593 (1962). Such terms are not mandated by statute. But as, in practice, "[a]rbitrators are delegated by nearly all [CBAs] as the adjudicators of contract disputes," *Lingle*, 486 U.S. at 411 n.11, 108 S.Ct. 1877, the end purposes of LMRA § 301 preemption and RLA preemption are the same—to enforce "a central tenet of federal labor-contract law . . . that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lueck*, 471 U.S. at 220, 105 S.Ct. 1904.

employment relationship," including situations "which the draftsmen [could not] wholly anticipate." *Steelworkers II*, 363 U.S. at 578–79, 80 S.Ct. 1347. Accordingly, CBA dispute resolution is itself a part of a "continuous collective bargaining process," *United Steelworkers v. Enter. Wheel & Car Corp.* (*Steelworkers III*), 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)—"a vehicle by which meaning and content are given" to the labor agreement, *Steelworkers II*, 363 U.S. at 581, 80 S.Ct. 1347. To set aside the parties' grievance and arbitration process is to undo an integral part of the workplace self-governance scheme. *Id.* at 578, 80 S.Ct. 1347; *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969); *see also Conrail*, 491 U.S. at 310–11, 109 S.Ct. 2477.

Second, and relatedly, a CBA is not strictly limited to its terms, but gives rise to a broader common law of its own—"the common law of a particular industry or of a particular plant." *Steelworkers II*, 363 U.S. at 579, 80 S.Ct. 1347. The resolution of CBA disputes may therefore "assume proportions of which judges are ignorant." *United Steelworkers v. Am. Mfg. Co.* (*Steelworkers I*), 363 U.S. 564, 567, 80 S.Ct. 1363, 4 L.Ed.2d 1432 (1960); *see also Conrail*, 491 U.S. at 311–12, 109 S.Ct. 2477. For example, the resolution of CBA disputes may be informed by ad hoc considerations—"the effect upon productivity of a particular result, its consequence to the morale of the shop, . . . whether tensions will be heightened or diminished," *Steelworkers II*, 363 U.S. at 582, 80 S.Ct. 1347—which a judge may lack the expertise properly to balance.

Third, grievance and arbitration are believed to provide certain procedural benefits, including a more

"prompt and orderly settlement" of CBA disputes than that offered by the ordinary judicial process. 45 U.S.C. § 151a. In committing CBA disputes to an adjustment board, a worker "receive[s] a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the [employer]." *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978) (per curiam). The intended result is to prevent an "[a]ccumulation of [minor] disputes," *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957), and so to "diminish the risk of interruptions in commerce." *Conrail*, 491 U.S. at 311, 109 S.Ct. 2477.

To account for these considerations, the Supreme Court has held that RLA and LMRA grievance and arbitration systems must be used for claims arising under the CBA. *See Air Transp. Ass'n*, 266 F.3d at 1076 (citing *Taylor*, 353 U.S. at 559–61, 77 S.Ct. 1037). Minor disputes under the RLA—those disputes concerned with "duties and rights created or defined by" the collective bargaining agreement, *Norris*, 512 U.S. at 258, 114 S.Ct. 2239—"must be resolved only through the RLA mechanisms." *Id.* at 253, 114 S.Ct. 2239; *see also Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). To the extent state law would also create a cause of action for a minor dispute, and thereby "permit[] an individual to sidestep available grievance procedures," the state law action is preempted. *Lingle*, 486 U.S. at 411, 108 S.Ct. 1877.

Such limited preemption has other benefits as well. In particular, it ensures that CBA disputes are

governed by a uniform set of principles informed by federal labor law and the industrial common law applicable to the agreement, *id.* at 405–06, 108 S.Ct. 1877, rather than "conflicting substantive interpretation under competing [state] legal systems." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); *see also Republic Steel Corp. v. Maddox*, 379 U.S. 650, 654–57, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *Int'l Ass'n of Machinists v. Cent. Airlines, Inc.*, 372 U.S. 682, 691–95 & nn. 17–18, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963). "[T]he application of state law" to CBA disputes "might lead to inconsistent results since there could be as many state-law principles as there are States." *Lingle*, 486 U.S. at 406, 108 S.Ct. 1877; *see also Norris*, 512 U.S. at 263 & n.9, 114 S.Ct. 2239.

At the same time—and of critical importance here—the RLA does *not* provide for, nor does it manifest any interest in, national or systemwide uniformity in substantive labor rights.[8] *See Buell*, 480 U.S. at 565, 107 S.Ct. 1410. "[T]he enactment by Congress of the Railway Labor Act was not a pre-emption of the field of regulating working conditions themselves . . . ." *Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 7, 63 S.Ct. 420, 87 L.Ed. 571 (1943). Setting minimum wages, regulating work hours and pay periods, requiring paid and unpaid leave, protecting worker safety, prohibiting discrimination in employment, and

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[8] The National Mediation Board has determined that the RLA allows certification of unions only where they "represent the majority of a system-wide class of employees." *Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 795 (2d Cir. 1980); *see* 45 U.S.C. § 152, Ninth.

establishing other worker rights remains well within the traditional police power of the states, and will naturally result in labor standards that affect workers differently from one jurisdiction to the next, even when those workers fall under a single labor agreement. *See Norris*, 512 U.S. at 262–63, 114 S.Ct. 2239.

Stated differently, it is not a concern of the RLA that the employer's operations may be affected by its obligation to comply with a different set of substantive state law rights in each jurisdiction. The purpose of RLA minor dispute preemption is to reduce commercial disruption by "facilitat[ing] collective bargaining and . . . achiev[ing] industrial peace," *Foust*, 442 U.S. at 47, 99 S.Ct. 2121, not to reduce burdens on an employer by federalizing all of labor and employment law so as to preempt independent state law rights. For RLA-covered workers, as for LMRA-covered workers, "it would be inconsistent with congressional intent . . . to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Lueck*, 471 U.S. at 212, 105 S.Ct. 1904.

It follows from the RLA minor dispute provision's focus on grieving and arbitrating *CBA disputes* that Congress did not intend to preempt state law claims simply because they in some respect implicate CBA provisions, *Lueck*, 471 U.S. at 211, 105 S.Ct. 1904, make reference to a CBA-defined right, *Livadas*, 512 U.S. at 125, 114 S.Ct. 2068, or create a state law cause of action factually "parallel" to a grievable claim, *Lingle*, 486 U.S. at 408–10, 108 S.Ct. 1877. Rather, "an application of state law is pre-empted . . . only if such application requires the interpretation of a

collective-bargaining agreement."[9] *Id.* at 413, 108 S.Ct. 1877. In sum, RLA minor dispute preemption and LMRA § 301 preemption protect the primacy of grievance and arbitration as the forum *for resolving CBA disputes* and the substantive supremacy of federal law within that forum, nothing more. *Norris*, 512 U.S. at 262–63, 114 S.Ct. 2239.

B

In evaluating RLA or LMRA § 301 preemption, we are guided by the principle that if a state law claim "is either grounded in the provisions of the labor contract or requires interpretation of it," the dispute must be resolved through grievance and arbitration.[10] *Burnside*, 491 F.3d at 1059. The line "between preempted claims and those that survive" is not one "that lends itself to analytical precision." *Cramer*, 255 F.3d at 691. This circuit, however, has distilled the Supreme Court's RLA and LMRA § 301 case law into a two-part inquiry into the nature of a plaintiff's claim. *Matson*, 840 F.3d at 1132–33; *Kobold*, 832 F.3d at 1032–34; *Burnside*, 491 F.3d at 1059–60.[11]

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[9] As only minor dispute preemption is at issue in this case, we refer to "RLA preemption" and "RLA minor dispute preemption" interchangeably.

[10] The same principle applies to federal law claims, although they might better be described as "precluded." *See Buell*, 480 U.S. at 563–65 & n.10, 107 S.Ct. 1410.

[11] The panel majority concluded that the *Burnside* test was inapplicable to the present case because *Burnside* dealt with a state law right from which workers could opt out if the CBA so provided. *Schurke*, 846 F.3d at 1090–91. The panel majority misread *Burnside*. There, we did not address the distinction between state law rights that are opt-in, opt-out, or nonnegotiable in explaining the general test for LMRA § 301 preemption; we addressed the distinction in explaining the *result*

First, to determine whether a particular right is grounded in a CBA, we evaluate the "legal character" of the claim by asking whether it seeks purely to vindicate a right or duty created by the CBA itself. *Livadas*, 512 U.S. at 123, 114 S.Ct. 2068. If a claim arises entirely from a right or duty of the CBA—for example, a claim for violation of the labor agreement, whether sounding in contract or in tort,[12] *Lueck*, 471 U.S. at 211, 105 S.Ct. 1904—it is, in effect, a CBA dispute in state law garb, and is preempted. *Livadas*, 512 U.S. at 122–23, 114 S.Ct. 2068. In such cases, the CBA is the "only source" of the right the plaintiff seeks to vindicate. *Norris*, 512 U.S. at 258, 114 S.Ct. 2239 (quoting *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972)). There is thus no part of the claim that "do[es] not require construing [the] collective-bargaining agreement[]," *Lingle*, 486 U.S. at 411, 108 S.Ct. 1877, and as to which litigation in court, rather than though the grievance and arbitration system, would be appropriate. *See Steelworkers I*, 363 U.S. at 568, 80 S.Ct. 1363. For the same reason, there is no part of

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we reached, after applying the generally applicable two-step test. *See Burnside*, 491 F.3d at 1060–64. *Burnside* has been repeatedly so construed. *See Matson*, 840 F.3d at 1132; *Kobold*, 832 F.3d at 1033. To the extent there remains any doubt, we here reject the panel majority's misinterpretation of *Burnside* and reiterate the general applicability of the two-step inquiry described.

[12] Breach-of-contract claims are the paradigmatic example. However, as the Supreme Court has recognized, RLA and LMRA § 301 preemption must extend beyond breach-of-contract claims, as "[a]ny other result would elevate form over substance and allow parties to evade [grievance and labor arbitration] by relabeling their contract claims as claims for tortious breach of contract." *Lueck*, 471 U.S. at 211, 105 S.Ct. 1904.

the claim in which the uniform body of federal labor law does not control the resolution of the parties' dispute. *See Maddox*, 379 U.S. at 654–57, 85 S.Ct. 614; *Cent. Airlines*, 372 U.S. at 691–95 & nn. 17–18, 83 S.Ct. 956; *Lucas Flour*, 369 U.S. at 104, 82 S.Ct. 571.

By contrast, claims are not simply CBA disputes by another name, and so are not preempted under this first step, if they just refer to a CBA-defined right, *Livadas*, 512 U.S. at 125, 114 S.Ct. 2068; rely in part on a CBA's terms of employment, *Lueck*, 471 U.S. at 211, 105 S.Ct. 1904; run parallel to a CBA violation, *Lingle*, 486 U.S. at 408–10, 108 S.Ct. 1877; or invite use of the CBA as a defense, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). *See also Kobold*, 832 F.3d at 1032; *Burnside*, 491 F.3d at 1060.

Second, if a right is *not* grounded in a CBA in the sense just explained, we ask whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration. *Norris*, 512 U.S. at 262, 114 S.Ct. 2239; *Livadas*, 512 U.S. at 124–25, 114 S.Ct. 2068. "Interpretation" is construed narrowly; "it means something more than 'consider,' 'refer to,' or 'apply.'" *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000).[13] Accordingly, at this second step of an RLA or

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[13] As in *Balcorta*, we here use the term "apply" in the sense of applying the plain or undisputed terms of the CBA. *See Balcorta*, 208 F.3d at 1110–11; *see also Lingle*, 486 U.S. at 410, 108 S.Ct. 1877 ("[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement . . . ."). Although a claim for breach of the CBA might be framed as "applying" the CBA, that

LMRA § 301 preemption analysis, claims are only preempted to the extent there is an active dispute over "the meaning of contract terms." *Livadas*, 512 U.S. at 124, 114 S.Ct. 2068. "[A] *hypothetical* connection between the claim and the terms of the CBA is not enough to preempt the claim . . . ." *Cramer*, 255 F.3d at 691 (emphasis added). Nor is it enough that resolving the state law claim requires a court to refer to the CBA and apply its plain or undisputed language—for example, "to discern that none of its terms is reasonably in dispute," *id.* at 692 (quoting *Livadas*, 512 U.S. at 125, 114 S.Ct. 2068); to identify "bargained-for wage rates in computing [a] penalty," *Livadas*, 512 U.S. at 125, 114 S.Ct. 2068; or "to determine whether [the CBA] contains a clear and unmistakable waiver of state law rights," *Cramer*, 255 F.3d at 692. *See also Kobold*, 832 F.3d at 1033.

Notably, the result of preemption at the second step is generally *not* the extinguishment of the state law claim. *Kobold*, 832 F.3d at 1033–34. As previously explained, neither the RLA nor the LMRA allows for the impairment of worker rights that would exist in the absence of a CBA dispute. *Norris*, 512 U.S. at 256, 262–63, 114 S.Ct. 2239. It is contrary to the statutes' scope to allow "the parties to a collective-bargaining agreement . . . to contract for what is illegal under state law," *Lueck*, 471 U.S. at 212, 105 S.Ct. 1904, or to "penalize[] workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S.Ct.

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sort of dispute over CBA "application" would be preempted under step one.

2380, 85 L.Ed.2d 728 (1985); *see also* 45 U.S.C. § 151a (stating, as a purpose of the RLA, "to forbid any limitation upon freedom of association among employees"). As a result, if, at the second stage of the analysis, a state law claim depends on a dispute over the meaning of a CBA, it is only "to that degree preempted." *Kobold*, 832 F.3d at 1036; *see also Matson*, 840 F.3d at 1135. That is, state law claims are preempted by the RLA or LMRA § 301 "only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement."[14] *Lingle*, 486 U.S. at 409 n.8, 108 S.Ct. 1877; *see also Livadas*, 512 U.S. at 124 n.18, 114 S.Ct. 2068.

As this two-step preemption inquiry suggests, RLA and LMRA § 301 preemption differ from typical conflict preemption because they are not driven by substantive conflicts in law. Rather, RLA and LMRA § 301 preemption are grounded in the need to protect the proper *forum* for resolving certain kinds of disputes (and, by extension, the substantive law applied thereto). RLA and LMRA § 301 preemption are, in effect, a kind of "forum" preemption, resembling the doctrine of primary jurisdiction or the reference of disputes to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1–16.

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[14] So, for example, if addressing a state law claim first requires resolving a dispute over CBA interpretation, resolving that dispute—through grievance, through labor arbitration, or through settlement—should allow the state law claim to proceed. *See, e.g.*, *Matson*, 840 F.3d at 1135 (concluding that "even if any interpretation of the CBA had been required," it was addressed by earlier grievance settlements and therefore was not a basis for LMRA § 301 preemption).

In considering primary jurisdiction, for example, a court's goal is not to ascertain the substance of applicable law, but to ensure that "an administrative body having regulatory authority" that "requires expertise or uniformity in administration" is permitted to resolve the issues that Congress committed to it. *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015) (internal quotation marks omitted). Similarly, in the arbitrability context, a court's responsibility is to ascertain the subject matter or posture of the dispute to determine the proper forum for resolving it. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). RLA and LMRA § 301 preemption are analogous. The court's role is not to resolve the labor dispute, but to protect the role of grievance and arbitration as a forum for doing so to the extent that forum's unique area of competency—CBA disputes—is at issue.[15]

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[15] The dissent treats *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004), as ruling out the possibility of a forum preemption analysis of this kind. But *Davila* has nothing to do with the subject of the RLA or LMRA § 301 preemption analysis—the protection of a nonjudicial forum. The statute at issue in *Davila*, the Employee Retirement Income Security Act ("ERISA"), provides for no such alternative forum.

Moreover, *Davila* deals only with "complete preemption," which, despite its name, "is actually a doctrine of jurisdiction and is not to be confused with ordinary preemption doctrine." *Balcorta*, 208 F.3d at 1107 n.7; *see also Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425. According to *Davila*, section 502(a) of ERISA, like section 301 of the LMRA, has such strong preemptive force that it justifies an exception to the well-pleaded complaint rule. *Davila*, 542 U.S. at 209, 124 S.Ct. 2488. ERISA preemption defenses, like LMRA § 301 defenses, are therefore valid grounds for removal. *Id.* at 207–08, 124 S.Ct. 2488. Unlike

The parallels are more than superficial. For one, the result of RLA and LMRA § 301 forum preemption is not to preempt state laws as such, but to assure that discrete *claims* are decided in the appropriate forum. *Caterpillar*, 482 U.S. at 394, 107 S.Ct. 2425 ("Section 301 governs claims . . . ."); *see also, e.g.*, *Norris*, 512 U.S. at 266, 114 S.Ct. 2239 ("[R]espondent's *claims* for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA . . . ." (emphasis added)); *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987) ("[W]e must determine if respondent's *claim* is sufficiently independent of the collective-bargaining agreement . . . ." (emphasis added)); *Humble v. Boeing Co.*, 305 F.3d 1004, 1008 (9th Cir. 2002) ("[T]he plaintiff's *claim* is the touchstone for the preemption analysis . . . ." (emphasis added)). The primary point of reference in the preemption analysis is therefore not state law writ large—no state law is "challenged" under RLA or LMRA § 301 preemption, nor is any state law at risk of wholesale invalidation—but the plaintiff's pleading. *See Espinal v. Nw. Airlines*, 90 F.3d 1452, 1456 (9th Cir. 1996) ("*Where a plaintiff contends* that an employer's actions violated rights

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ERISA (or the LMRA), the RLA is not a source of complete preemption, as it "does not provide a federal cause of action." *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245–46 (9th Cir. 2009) (quoting 15 Moore's Federal Practice § 103.45(3)(b) (3d ed. 2008)); *see also Hughes v. United Air Lines, Inc.*, 634 F.3d 391, 394–95 (7th Cir. 2011), *cert. denied*, 565 U.S. 819, 132 S.Ct. 103, 181 L.Ed.2d 30; *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 274–75 (2d Cir. 2005); *Roddy v. Grand Trunk W. R.R. Inc.*, 395 F.3d 318, 326 (6th Cir. 2005); *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1356–57 (11th Cir. 2003), *cert. denied*, 540 U.S. 946, 124 S.Ct. 386, 157 L.Ed.2d 276.

protected by the CBA, there is a minor dispute subject to RLA preemption. By contrast, *where a plaintiff contends* that an employer's actions violated a state-law obligation, wholly independent of its obligations under the CBA, there is no preemption." (emphases added) (citation omitted)).[16]

Furthermore, the RLA and LMRA § 301 forum preemption inquiry is not an inquiry into the merits of a claim; it is an inquiry into the claim's "legal character"—whatever its merits—so as to ensure it is decided in the proper forum. *Livadas*, 512 U.S. at 123–24, 114 S.Ct. 2068. In conducting the preemption analysis, we may no more invade the province of the state court to resolve a state law claim over which we lack jurisdiction than we may invade the province of the labor arbitrator to construe the CBA.[17] *See*

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[16] *See also, e.g., United Steelworkers v. Rawson*, 495 U.S. 362, 371, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990) ("As we see it . . . , respondents' tort claim cannot be described as independent of the collective-bargaining agreement. This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society. There is no allegation, for example, that members of the safety committee negligently caused damage to the structure of the mine . . . ."); *Hechler*, 481 U.S. at 861, 107 S.Ct. 2161 ("In her complaint, respondent alleges . . . [a] type of [preempted] tortious breach-of-contract claim. She asserts that . . . the Union owed respondent a duty of care to ensure her a safe working environment. Having assumed this duty under the collective-bargaining agreement, the Union—according to the complaint—was then negligent . . . ." (citation omitted)).

[17] Ordinarily, RLA and LMRA § 301 preemption claims are made defensively, by an employer seeking the dismissal of a claim brought in or removed to federal court. In such cases, a federal court finding no preemption may, if it otherwise has jurisdiction, go on to resolve the merits. Here, however, the Airline raised RLA preemption offensively, in a federal action in

Steelworkers III, 363 U.S. at 599, 80 S.Ct. 1358. Our only job is to decide whether, as pleaded, the claim "in this case is 'independent' of the [CBA] in the sense of 'independent' that matters for . . . pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407, 108 S.Ct. 1877.

The distinction between RLA and LMRA § 301 preemption (as an inquiry into the proper forum for resolving a claim) and the more common application of conflict preemption (as an inquiry into substantive conflicts between state and federal law) is widely recognized across the circuits. *See, e.g.*, *Smith v. Am. Airlines, Inc.*, 414 F.3d 949, 952 (8th Cir. 2005) ("[M]inor disputes are subject to mandatory arbitration before an adjustment board which has primary jurisdiction to construe the collective bargaining agreement."); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 276 (2d Cir. 2005) ("[P]rimary jurisdiction over minor disputes under the RLA . . . exists solely in the adjustment boards established pursuant to [the RLA]."); *Renneisen v. Am. Airlines, Inc.*, 990 F.2d 918, 923 (7th Cir. 1993) ("[T]he RLA mandates a statutory forum for plaintiffs' claims."); *Davies v. Am. Airlines, Inc.*, 971 F.2d 463, 465 n.1 (10th Cir. 1992) ("By [RLA] 'preemption' we refer to

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which our jurisdiction is strictly limited to the preemption analysis. The parties do not cite, nor have we uncovered, a similar offensive RLA or LMRA § 301 preemption case, in which the intended subject of the federal injunction is an ongoing state agency or state court proceeding. But the defendants have raised no procedural objection to our authority to decide the present case. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79–80, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1271–72 (9th Cir. 1994).

forum preemption."); *Ry. Labor Execs. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936, 944 (3d Cir. 1988) ("[F]orum preemption under the RLA may ultimately affect the litigation of this case."); *Miller v. Norfolk & W. Ry. Co.*, 834 F.2d 556, 561 (6th Cir. 1987) ("[A] state claim which is preempted by the RLA, as by the NLRA under *Garmon*, is instead preempted under a choice of forum analysis.").

The Supreme Court further clarified the distinction in *Livadas*. There, a worker subject to a CBA filed a complaint with the California Division of Labor Standards Enforcement ("DLSE"), seeking damages under a state statute requiring the immediate payment of past wages upon termination. *Livadas*, 512 U.S. at 111–12, 114 S.Ct. 2068. DLSE refused to consider the complaint, citing the worker's CBA. *Id.* at 112–13, 114 S.Ct. 2068. At the time, DLSE had a policy of refusing to consider state law labor complaints that involved a CBA in some way. *Id.* at 112–14, 121, 114 S.Ct. 2068.

In deciding against DLSE, the Supreme Court made two distinct observations about two distinct preemption doctrines. First, the Supreme Court noted that nothing about the worker's claim implicated LMRA § 301 preemption. Although the worker was owed wages based on having worked under a CBA, and although the CBA determined the amount of those wages, the CBA did not create the right to immediate payment on termination. *Id.* at 124–25, 114 S.Ct. 2068 ("The only issue raised by Livadas's claim . . . was a question of state law . . . ."). Nor was any disputed term of the CBA implicated in the adjudication of that state law right. *Id.* at 125, 114 S.Ct. 2068 (observing that, although CBA-defined wages were used to calculate damages under the

Labor Code, "[t]here is no indication that there was a 'dispute' in this case over the amount" of wages owed under the CBA). The claim was therefore well within DLSE's authority to adjudicate.

Second, and separately, the Supreme Court concluded that DLSE's policy of refusing to consider state law complaints involving a CBA was subject to substantive conflict preemption, as the policy uniquely disfavored CBA-covered workers, and thus interfered with substantive federal rights under the NLRA. 29 U.S.C. § 157; *Livadas*, 512 U.S. at 116–17 & n.11, 114 S.Ct. 2068. The NLRA protects the right "to bargain collectively through representatives of [workers'] own choosing." 29 U.S.C. § 157. Accordingly, DLSE's policy was preempted substantively to the extent there existed, "rooted in the text of [the NLRA]," a right to bargain without the state imposing penalties on workers if they ultimately reached and became bound by a labor agreement.[18] *Livadas*, 512 U.S. at 117 n.11, 114 S.Ct. 2068.

The differences between LMRA § 301 preemption (and so RLA preemption) and ordinary, substantive

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[18] The Court concluded, in the alternative, that the DLSE policy was subject to *Machinists* preemption. *Machinists* preemption is another, more specific application of substantive conflict preemption under the NLRA. It applies where state law attempts to regulate areas intentionally left "to be controlled by the free play of economic forces," so as to "preserve[] Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 225–26, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (internal quotation marks omitted); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

conflict preemption, as the Court employed the doctrines in *Livadas*, are significant. With respect to LMRA § 301 preemption, the Court considered the worker's claim based on her complaint before DLSE, concluded the claim was not extinguished, and noted that a different result could obtain in a differently pleaded claim under the same state statute. *Id.* at 121–25 & n.19, 114 S.Ct. 2068. The focus was thus the plaintiff's pleading, the character of the claim, and the proper forum to resolve that claim. With respect to substantive conflict preemption under the NLRA, the Court looked at the state law as the state applied it, concluded that the rule of law applied by the state was substantively in conflict with federal law, and invalidated it wholesale. *Id.* at 128–32, 114 S.Ct. 2068. The focus was thus the meaning of state law and its consistency with federal law. The two analyses—procedural and substantive—were not conflated in *Livadas* and should not be conflated here. *See also Air Transp. Ass'n*, 266 F.3d at 1076 (distinguishing RLA minor dispute preemption from "substantive" conflict preemption as applied in the RLA context, and observing that the latter "is analogous to *Machinists* preemption under the NLRA").

It is perhaps because of the risk of such confusion that labor law preemption is rarely described as an undifferentiated application of the "field" or "conflict" preemption that governs in other substantive areas, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 & n.6, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000), but rather by identifying the particular *species*

of labor preemption—*Garmon* preemption,[19] *Machinists* preemption,[20] RLA or LMRA § 301 preemption—relevant to the parties' dispute, based on the federal labor law interests ostensibly under threat in a given case. *See, e.g.*, *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993); *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners*, 768 F.3d 938, 951–55 (9th Cir. 2014). But as in *Livadas*, what matters in a preemption analysis is not the nomenclature; what matters is "[t]he purpose of Congress," which is "the ultimate touchstone." *Lueck*, 471 U.S. at 208, 105 S.Ct. 1904 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)). In the RLA and LMRA § 301 context, the "purpose of Congress" is to protect the role of grievance and arbitration and of federal labor law in resolving CBA disputes, not to alter or displace state law labor rights. *Norris*, 512 U.S. at 256, 114 S.Ct. 2239; *Lingle*, 486 U.S. at 408–09, 108 S.Ct. 1877; *Maddox*, 379 U.S. at 654–57, 85 S.Ct. 614; *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria*

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[19] *See San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) (holding that "the States as well as the federal court must defer to the exclusive competence of the National Labor Relations Board" if "an activity is arguably subject to § 7 or § 8 of the [NLRA]").

[20] *See Int'l Ass'n of Machinists & Aerospace Workers*, 427 U.S. at 145–48, 96 S.Ct. 2548 (holding that state law is preempted where it would upset the congressionally defined balance of power between management and labor by regulating activity Congress deliberately left unregulated); *see also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986).

& W. R.R., 321 U.S. 50, 58, 64 S.Ct. 413, 88 L.Ed. 534 (1944). The preemption analysis is targeted accordingly—not to the substance of state law or the merits of the parties' dispute, but to the "legal character" of the claim asserted. *Livadas*, 512 U.S. at 123, 114 S.Ct. 2068. To the extent a plaintiff's state law claim can be resolved without infringing on the role of grievance and arbitration, there is no "conflict" to speak of, and the preemption analysis ends.

C

Having identified the correct approach to RLA preemption, applying it in this case is straightforward.

First, Masserant's claim does not arise entirely from the CBA. Masserant has alleged a violation of the WFCA's independent state law right to use banked vacation days. Her view of the WFCA, and that of the L&I, is that the statute's "choice of leave" exception applies to banked vacation already earned, even if under workplace practices (whether CBA-governed or not) prescheduled vacation may be rescheduled or used for exigencies only under specified circumstances. Unsurprisingly, the Airline disagrees with this interpretation of the WFCA. And after further administrative or state court review, the Airline may yet prevail in its view of Washington law. *See* Wash. Admin. Code § 296-130-070 (describing the administrative appeal process at L&I). But what matters here is not the legal merits of Masserant's state law claim, but that Masserant's claim invokes a state law right that applies to all workers, whether CBA-covered or not, and gives rise to a state law dispute, not a dispute concerning the meaning of the CBA.

Second, whatever the correct interpretation of Washington law, Masserant's claim does not require construction of the CBA. The claim of course *relies on* the terms and conditions of employment established by the CBA, in that Masserant's banked vacation days exist only by virtue of her having earned them in accordance with a workplace policy incorporated in the CBA. And the claim may be aided by *reference to* certain other CBA provisions, such as those making banked vacation immediately available for exchange, personal medical leave, maternity leave, bereavement leave, or cash-out. *See Livadas*, 512 U.S. at 125, 114 S.Ct. 2068. But reliance on and reference to CBA-established or CBA-defined terms of employment do not make for a CBA dispute if there is no disagreement about the meaning or application of any relevant CBA-covered terms of employment. *See id.* (rejecting preemption where the calculation of damages depended on the CBA's undisputed wage provisions); *Burnside*, 491 F.3d at 1072 (citing examples of employers attempting to manufacture preemption by invoking CBA disputes unrelated to the resolution of the claims at issue).

In this case, the meaning of every relevant provision in the CBA is agreed upon. Most importantly, the parties agree that Masserant did, in fact, have seven days of banked vacation, which she could also have chosen to use for a number of exigent, unscheduled purposes, such as bereavement or personal medical leave.[21] The Airline argues that a

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[21] In light of the numerous undisputed options for repurposing advance-scheduled leave, the Airline's professed concern for the predictability of its schedules—irrelevant in any

dispute exists over whether Masserant truly "earned" her vacation and was "entitled" to take it within the meaning of the WFCA. But those terms, as here relevant, are contained within the WFCA, not the CBA. *See* Wash. Rev. Code § 49.12.270(1). A dispute over their meaning is a dispute over state law, and therefore outside the scope of the "minor disputes" to which an RLA system adjustment board is limited. *See* 45 U.S.C. § 184; *Norris*, 512 U.S. at 254–55, 114 S.Ct. 2239. "[T]he construction of the [CBA] is simply not involved." *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1082 (9th Cir. 2005). If the state agency or state courts ultimately decide that the Airline is correct about the meaning of the WFCA, Masserant will not have been entitled to use her seven banked vacation days to care for her sick child, and she will lose without regard to any construction of the CBA; if Masserant is correct about the meaning of the WFCA, the remedies accorded by state law will be available, and she will win without regard to any construction of the CBA.

At oral argument, the Airline suggested that the Union was separately seeking to have the CBA reinterpreted to allow for the rescheduling of vacation leave for family medical purposes. But it does not matter for present purposes whether the Union, or a worker, may in a separate grievance proceeding pursue the theory that the CBA does allow rescheduling vacation leave for family medical reasons. A state law right to flexibility in rescheduling vacation leave for family medical reasons is no less independent of the CBA if the CBA

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event for the purposes of an RLA preemption analysis, *see Buell*, 480 U.S. at 565, 107 S.Ct. 1410—is somewhat overstated.

also provides that right on its own. The fact that "a CBA provides a remedy or duty related to a situation that is *also* directly regulated by non-negotiable state law does not mean the employee is limited to a claim based on the CBA." *Humble*, 305 F.3d at 1009; *see Norris*, 512 U.S. at 261, 114 S.Ct. 2239; *Lingle*, 486 U.S. at 412–13, 108 S.Ct. 1877. What matters for present purposes, in other words, is that Masserant can prevail if state law means what L&I has already concluded it means, whether or not the Airline's CBA interpretation is correct.[22]

In sum, the requisites of RLA preemption do not exist in this case. Masserant is entitled to pursue her state law remedies, if any, before the state agency and in state courts, as state law provides.

D

The dissent advocates a version of preemption for which no authority exists in the RLA minor dispute or LMRA § 301 context, for which no party has argued,[23] and which neither the district court nor the three-judge panel so much as mentioned.[24] The

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[22] At oral argument, the Union disavowed any interest in labor arbitration on Masserant's behalf over the possibility of a CBA-created right to reschedule accrued vacation leave. The Union, as the workers' representative, is the party responsible under the CBA for pursuing a worker's claim in labor arbitration. *Bowen*, 459 U.S. at 225–26 & n.14; *supra* note 3, 103 S.Ct. 588.

[23] The Airline disavowed the dissent's reading of the RLA both in its briefing and at oral argument. L&I and the Union took the same position.

[24] *Schurke*, 846 F.3d at 1085 ("The issue before us is not whether Masserant is entitled to use her vacation leave, scheduled for December, in May, to care for her sick child. Though that is what the case is all about, it is not the issue posed

court's first task, according to the dissent, is to construe state law and resolve all disputes between the parties as to its meaning. *Only then* would we consider who has the authority to resolve the parties' dispute—at that point, a seemingly futile endeavor.

The practical consequences of the dissent's approach are disturbing. As we have emphasized, RLA preemption presents, at bottom, a question of forum. But the dissent would begin its analysis by rejecting Masserant's state law claim, and would thus usurp the role of the state forum from the outset. The dissent would do so in the name of conflict preemption, even though there is no possible interpretation of the WFCA that would create a substantive "conflict" with the RLA, as the RLA has no bearing on substantive state law rights. *Norris*, 512 U.S. at 254, 114 S.Ct. 2239. And the dissent would conclude—notwithstanding a state agency ruling to the contrary, our lack of jurisdiction over the underlying claim, and Masserant's absence from the present action—that Masserant's interpretation of state law is invalid. The dissent would then enjoin any further consideration of Masserant's WFCA claim by the state agency, thereby barring the only body with jurisdiction over Masserant's state law claim

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for us. The issue before us is . . . whether the state administrative board or the [CBA] grievance procedure ought to decide . . . ."); *Alaska Airlines, Inc. v. Schurke*, No. C11-0616JLR, 2013 WL 2402944, at *7 (W.D. Wash. May 31, 2013) ("The court need not determine whether Alaska's restrictions on the use of banked vacation time violated the WFCA and does not reach the merits of that issue. It is sufficient that a court could determine that the WFCA independently guaranteed Ms. Masserant the right to use her accrued leave, whatever the source, for family leave.").

from resolving it.[25] As to Masserant, the end result is to force her into a CBA-based claim absent from her complaint and disclaimed by her legal representative. *Cf. Caterpillar*, 482 U.S. at 394–95, 107 S.Ct. 2425 ("It is true that respondents . . . possessed substantial rights under the collective [bargaining] agreement, and could have brought suit under [the LMRA]. As masters of the complaint, however, they chose not to do so."). More broadly, the end result is a break from any conventional understanding of our federal system: The dissent would use the RLA to enjoin the state agency from interpreting and applying state law, thus allowing a federal court effectively to police the development of substantive state law, and inhibiting the state from creating precedent on the meaning of its own statutes through the ordinary process of state court appeals.

The dissent would presumably allow the state to administer its own law if a WFCA claim were brought by a worker *not* covered by a CBA. This special treatment of CBA-covered workers reinforces the problems with the dissent's analysis. First, as the same claim exists for workers not covered by a CBA, the claim does not arise entirely from the CBA and should not be completely extinguished. *Lingle*, 486 U.S. at 409 n.8, 413 n.12, 108 S.Ct. 1877. Second, in using the RLA specially to disfavor union-represented workers, the dissent would replicate the very result the Supreme Court unanimously rejected in *Livadas*.

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[25] The dissent's approach would be just as objectionable had its state law analysis come out the other way, affirming the state agency's conclusion that the Airline violated the WFCA. Either way, this court would be deciding a state law issue not properly before it.

See Livadas, 512 U.S. at 116–17 & n.11, 114 S.Ct. 2068. Like the NLRA preemption at issue in *Livadas*, RLA preemption cannot result in subjecting union-represented workers to a parallel system of substandard state law rights. *See* 45 U.S.C. § 151a(2); *Livadas*, 512 U.S. at 113–14, 114 S.Ct. 2068; *see also Metro. Life*, 471 U.S. at 756, 105 S.Ct. 2380; *Burnside*, 491 F.3d at 1068–69.

In sum, the only question we are asked here is *who decides* Masserant's claim—L&I or the labor arbitrator.[26] The answer cannot be the Ninth Circuit. L&I and the labor arbitrator have separate and non-overlapping competencies, and each must be respected.[27] *See Steelworkers I*, 363 U.S. at 568, 80 S.Ct. 1363.

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[26] The dissent expresses concern about plaintiffs frivolously asserting independent state law rights so as to evade the jurisdiction of the grievance and arbitration mechanism. Usually, of course, we assume state bodies are capable of applying federal law, including RLA preemption principles, of their own accord, without the need for a federal injunction.

In any event, there is no realistic possibility of evasion. If a state law right is frivolously asserted, the plaintiff's claim will be dismissed by the state body with jurisdiction over it. Furthermore, the usually short limitations period for filing an RLA minor dispute grievance will almost surely run in the interim. An employee has no incentive to forego a possibly meritorious CBA claim in favor a frivolous state action.

[27] Notably, *even if* the WFCA claim required resolution of a CBA dispute, the claim would still not arise entirely from the CBA, and thus would not be fully extinguished by the RLA. The claim would be preempted only to the extent necessary to ensure CBA construction though grievance and arbitration. *Lingle*, 486 U.S. at 413 n.12, 108 S.Ct. 1877; *see also, e.g.*, *Matson*, 840 F.3d at 1135. Accordingly, assuming the elements of injunctive relief could be satisfied, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *eBay Inc. v.*

E

Finally, although, for the reasons given, the merits are not ours to decide,[28] we observe that the dissent's

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MercExchange, L.L.C., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011), the proper approach would be to enjoin L&I only from construing any terms of the CBA. *See Kobold*, 832 F.3d at 1034. We note also that, in light of the Anti-Injunction Act, federal courts are likely barred from issuing injunctions where proceedings purportedly subject to RLA preemption are pending before a state court. *See* 28 U.S.C. § 2283; *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 294, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

[28] The dissent cites *Rawson* as an example of the Supreme Court reaching its own conclusions regarding the validity under state law of a state law claim. But in *Rawson*, the Supreme Court accepted the Idaho Supreme Court's view of state law rights, and disagreed only as to the implications of the Idaho Supreme Court's holding for LMRA § 301 preemption. *Rawson*, 495 U.S. at 370–71, 110 S.Ct. 1904.

The dissent similarly cites *Burnside* as an example of a federal court's authority to construe state law in an RLA or LMRA § 301 preemption analysis. In *Burnside*, however, the question addressed was a jurisdictional one—complete preemption—not here applicable. In that context, we determined only that the interpretation the employer suggested was entirely implausible. *Burnside*, 491 F.3d at 1063 (concluding that "the final choice of language in [the regulation] means what it says rather than the opposite of what it says," and observing that the explanation relied upon by the employer was a scrivener's error "incorrectly paraphras[ing] the [regulatory] language"). Once the jurisdictional question in *Burnside* was answered in the negative, we ordered the merits determination remanded to state court. *Id.* at 1074. That an analysis with jurisdictional implications should invite a threshold inquiry into the plausibility of the parties' views of state law is an unremarkable facet of federal law. *See, e.g.*, *Am. W. Airlines, Inc. v. Nat'l Mediation Bd.*, 119 F.3d 772, 775 (9th Cir. 1997) (holding, in the context of RLA representation disputes, that "a

reading of Washington law is at the very least highly debatable. It is undisputed that Masserant's scheduled vacation was immediately available to her for several purposes, including personal medical leave, maternity leave, or bereavement leave. So the statutory right to freedom in "choice of leave" may well be implicated. Wash. Rev. Code § 49.12.270(1).

On this point, the L&I guidance regarding the WFCA, published in 2009, is informative. It explains that employees "who have access to paid leave for themselves" also have "full access . . . to this leave to care for a sick family member." State of Wash., Dep't of Labor and Indus., Emp't Standards, Frequently Asked Questions About the Family Care Act, Question 17 (December 3, 2009); *see also* Wash. Rev. Code § 49.12.265(5) ("'Sick leave or other paid time off' means time allowed . . . to an employee for illness, vacation, and personal holiday."). Masserant's claim appears consistent with this guidance; her banked vacation days were available to her for unscheduled paid leave for herself.

The same L&I guidance states that CBA provisions "concerning the use of leave, such as . . . advance scheduling of vacation[,] may still be applied." But Masserant did comply with the CBA's requirement for the advance scheduling of vacation, just as the WFCA instructs. Wash. Rev. Code § 49.12.270(1) ("The employee taking leave . . . must comply with the terms . . . applicable to the leave, except for any terms relating to the choice of leave.").

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court may only 'peek at the merits' in order to determine if the [National Mediation Board] committed a constitutional violation or [an] egregious violation of the RLA" that would allow for judicial review of the Board's decision).

She then sought to use her advance-scheduled leave in accordance with her statutory right to flexibility in using earned leave for a different purpose than that assigned by her terms of employment. To require Masserant to do any more—for example, to require that she predict and preschedule her son's emergency medical needs half a year before they occurred—would seem to undermine the WFCA's freedom from restrictions on "choice of leave." *See State v. Keller*, 143 Wash. 2d 267, 277, 19 P.3d 1030 (2001) ("Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous."); *see also* State of Wash., Dep't of Labor and Indus., Emp't Standards, Frequently Asked Questions About the Family Care Act, Question 9 (Aug. 6, 2014) ("While the employer is permitted to establish an advanced scheduling policy generally, the policy cannot bar the employee from using vacation leave for Family Care Act purposes without violating the choice of leave provision.").

The state agency and state courts with jurisdiction over Masserant's claim and the Airline's appeal are, of course, the bodies here entrusted with interpreting and applying state law. Under our ruling, they will have both the first *and* the last word as to what the WFCA means. Our observations on the subject are meant only to show that L&I's interpretation has considerable grounding in the statute's language and purpose.

III

Masserant's state law claim neither arises entirely from the CBA nor requires a construction of it. It is therefore not preempted under the RLA. The district court's order on summary judgment is **AFFIRMED**.

Opinion by Judge Berzon; Dissent by Judge Ikuta

IKUTA, Circuit Judge, joined by TALLMAN, CALLAHAN, BEA, and M. SMITH, Circuit Judges, dissenting:

The preemptive scope of the Railway Labor Act (RLA) is clear: when resolution of a state-law cause of action requires interpretation or application of a collective bargaining agreement, it constitutes a "minor dispute" that must be resolved through the RLA's mandatory arbitral mechanism. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Instead of applying this rule, the majority imposes an unprecedented constraint that effectively eviscerates federal court review. The majority holds that in conducting an RLA preemption analysis, a federal court may not consider the nature and scope of the state cause of action (what the Supreme Court calls the cause of action's "legal character") but must limit itself to determining whether the plaintiff has pleaded a claim that constitutes a minor dispute. Because this constraint is directly contrary to decades of the Supreme Court's preemption decisions and impairs or extinguishes RLA preemption, I dissent.

I

Because the majority fails to include pertinent information about the collective bargaining agreement, the nature of Masserant's complaint before the agency, and the proceedings in federal court, a fuller description of the facts is set out below.

Laura Masserant is a flight attendant with Alaska Airlines, a federally regulated common carrier

operating domestic and international flights that employs over three thousand flight attendants nationwide. Alaska Airlines's flight attendants are represented by the Association of Flight Attendants-Communication Workers of America, AFL-CIO (AFA). In accordance with the provisions of the RLA, Alaska Airlines and AFA entered into a collective bargaining agreement (CBA) detailing numerous aspects of the employment relationship. Among other provisions, the CBA covers sick leave, vacations, and leaves of absence. These provisions are critical to ensuring that Alaska Airlines can meet Federal Aviation Administration (FAA) minimum crew-staffing requirements for each of its thousands of daily flights.

Under the CBA, flight attendants accrue sick leave based on the amount they work, including the number of flights staffed and the flight mileage. Flight attendants may use sick leave in a host of situations defined by the CBA, as well as "pursuant to applicable State law and/or Company policy." Alaska Airlines, headquartered in Washington state, interprets this provision to mean that flight attendants can use sick leave to care for qualifying family members under the Washington Family Care Act (WFCA), Wash. Rev. Code § 49.12.270(1).

In addition to sick leave, flight attendants receive paid vacations. The CBA sets forth how vacations days are scheduled in a detailed process. By October 1 of each year, Alaska Airlines posts the list of available vacation times. Flight attendants have fifteen days in which to sign up for available vacation periods, and vacation days are awarded for the following year based on these preferences and the flight attendant's seniority. Once vacation days are

assigned, a flight attendant may trade these days with other flight attendants, subject to certain limitations. Flight attendants may also request early vacation pay, though the vacation days themselves remain scheduled as unpaid days off.

The CBA enumerates instances when an employee may use vacation time outside of the scheduled period. Among other things, a flight attendant may use sick leave *or* vacation time to cover certain medical leaves of absence, maternity leaves of absence, parental leaves of absence, and bereavement leaves of absence. Under Alaska Airlines's interpretation of the CBA and longstanding practice, flight attendants may not otherwise reschedule vacation. For example, Alaska Airlines contends flight attendants may not reschedule vacation time to care for themselves or a sick family member.[1]

The CBA also contains procedures for resolving disputes as to the meaning of any of the terms in the CBA concerning "rates of pay, rules or working conditions." As required by the RLA, 45 U.S.C. § 184, the CBA establishes a multi-stage process for resolving disputes concerning the interpretation or application of the CBA, culminating in mandatory arbitration before a neutral board of adjustment. Decisions by this board are "final and binding upon the parties."

In October 2010, Masserant signed up for her preferred 2011 vacation schedule. At the beginning of 2011, Masserant was awarded four vacation days in January, and seven in each of February, April,

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[1] If flight attendants take absences that do not meet the criteria specified in the CBA, they incur attendance points, which may become the basis for disciplinary action.

November, and December. As allowed by the CBA, Masserant took her four paid vacation days in January, and then requested early vacation pay for the days scheduled in February, April, and November. Masserant was therefore left with only seven paid vacation days—all scheduled for December.

On May 20, 2011, Masserant needed time off to care for her son, and requested sick leave to cover a two-day trip from May 21–22. Alaska Airlines informed her that she did not have sick leave available for the entire two-day trip, and she was not entitled to reschedule her paid vacation days in December to cover the absence. As a result, she would receive attendance points for an emergency absence.

Ignoring the CBA's grievance procedures for challenging Alaska Airlines's implementation of the contract's sick leave and vacation policy, Masserant, supported by her Union, instead filed a complaint with the Washington Department of Labor & Industries (L&I) on June 16, 2011. In her complaint to L&I, Masserant challenged Alaska Airlines's application of its sick leave policy, arguing that it had both failed to credit her for sick leave accrued in May and failed to let her use accrued sick leave to cover a portion of her absence. Masserant also challenged Alaska Airlines's application of the CBA's vacation policy, stating: "I asked my company to use my remaining week of vacation for this occurrence. This is earned time that I was denied to use."[2]

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[2] At the time of the complaint, Masserant was president of the local AFA chapter, and was well aware that AFA and Alaska Airlines were engaged in discussions regarding whether

In response to L&I's investigation of Masserant's complaint, Alaska Airlines explained that reliable attendance in conformance with FAA safety regulations requiring minimum crew staffing for every flight was vital to "deliver on its mission," and gave details regarding its complex bidding process for vacations. According to Alaska Airlines, under the CBA, "[f]light attendants are not permitted to use vacation on an unscheduled basis when they get sick," and therefore "it is consistent with the WFCA that the flight attendant not be able to use vacation when a family member gets sick."

L&I first acknowledged its "position" that "any policy (including advanced vacation scheduling and medical verification) are allowable as long as they don't relate to the choice of leave." However, L&I concluded that Alaska Airlines's interpretation of the CBA was undercut by the fact that "[t]here are occasions when vacation time is 'available' for flight attendants that are not affected by the seniority based bidding process." Because flight attendants can use "accrued sick leave and/or vacation leave" on an unscheduled basis for medical absences, maternity leave, and bereavement leave, L&I was "troubled" that paid vacation was not offered for family care. Therefore, L&I issued a Notice of Infraction, dated May 31, 2012, stating that "Ms. Masserant was entitled to seven (7) days of vacation," and under WFCA, Alaska Airlines must allow her to use this

the CBA allowed a flight attendant to use vacation time to care for a sick child.

vacation leave to care for her sick child. It ordered Alaska Airlines to pay a $200 penalty.[3]

In March 2012, Alaska Airlines filed an amended complaint in district court against L&I.[4] The complaint sought preliminary and permanent injunctive relief enjoining L&I from continuing to investigate or enforce Masserant's complaint. In support of this request for relief, the complaint alleged that the RLA preempted such enforcement efforts because the mechanisms provided in the CBA were Masserant's exclusive means of resolving this dispute. The district court granted AFA's motion to intervene on behalf of Alaska Airlines's employees in order to defend their members' rights to enforce WFCA using L&I's procedures.

The parties then filed cross-motions for summary judgment on the question whether the RLA preempted Masserant's state-law cause of action and required her to resolve this dispute through the CBA's dispute resolution procedures. In district court, L&I

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[3] Alaska Airlines filed an administrative appeal of the Notice of Infraction, and AFA petitioned to intervene, but the appeal was subsequently dismissed without prejudice pending the resolution of Alaska Airline's action in federal court.

[4] Alaska Airlines first filed a complaint for injunctive and declaratory relief to enjoin L&I from processing flight attendants' WFCA complaints and to declare such complaints preempted in all instances under the RLA. (Formally, the first complaint, as well as the amended complaint, named Judy Schurke, in her official capacity as Director of L&I, and Elizabeth Smith, in her official capacity as Employment Standards Program Manager of L&I, as defendants.) The district court dismissed the complaint on the ground that Alaska Airlines's claims were not fit for judicial decision, because Ninth Circuit case law requires analysis of RLA preemption on a case-by-case basis.

no longer suggested that Masserant was entitled to use vacation time to care for a sick child in this case because the CBA allowed vacation time to be used for medical leave and other purposes. Instead, L&I and AFA argued that the question whether the CBA allowed Masserant to use vacation time for her own illness or that of her child was not material because WFCA gave Masserant an independent right to use her vacation days at any time, whether scheduled or not. The district court ruled in favor of AFA and L&I, concluding that WFCA "may" grant Masserant an independent right to use her December vacation time to care for her sick child in May, and therefore the complaint was not preempted by the RLA.

On appeal, Alaska Airlines argues that Masserant's claim raises the sort of dispute that has to be determined through the CBA's dispute resolution process. In response, L&I and AFA argue that as a matter of law, WFCA gives employees a non-negotiable right, independent of the CBA, to use vacation days to care for sick family members "irrespective of any limitations that an employer would attempt to put on that leave," including "any advance scheduling requirements for the flight attendant's vacation." As explained below, L&I and AFA's litigating position is not supported by the plain language of the statute and regulations, and therefore resolving Masserant's claim requires the interpretation and application of the CBA.

II

The simple question before us is whether the RLA preempts Masserant's cause of action because it is a minor dispute that must be channeled through the RLA's mandatory arbitral mechanism. *See Hawaiian*

Airlines, 512 U.S. at 253, 114 S.Ct. 2239. The majority fails to understand or apply the Supreme Court's direction for determining whether a state-law cause of action is preempted by the RLA, and so reaches the wrong conclusion.

A

Congress enacted the RLA in 1926 "to promote stability in labor-management relations" between railroad companies and their employees. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562–63, 562 n.9, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) (quoting *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978)).[5] To accomplish these goals, "the RLA establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement' of two classes of disputes," major and minor. *Hawaiian Airlines*, 512 U.S. at 252, 114 S.Ct. 2239 (quoting 45 U.S.C. § 151a). Under the RLA, all disputes arising out of the interpretation or application of an air carrier's collective bargaining agreement are minor disputes that must proceed through "RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions." *Id.* at 253, 114 S.Ct. 2239; *see also* 45 U.S.C. § 153(i).

The RLA's mandatory arbitral mechanism is the "heart of the Railway Labor Act," *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377–78, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969), and the key mechanism for "minimizing interruptions in the

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[5] The RLA was amended in 1936 to cover the air transportation industry. 45 U.S.C. §§ 181–188.

Nation's transportation services," *Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 687, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963). Accordingly, the Supreme Court inferred that Congress intended the RLA's mandatory arbitral mechanism to be the exclusive method for resolving minor disputes, and it therefore has preemptive force. *See Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972). A state-law cause of action is preempted if it conflicts with the RLA's mandatory arbitral mechanism for resolving minor disputes. *See Hawaiian Airlines*, 512 U.S. at 252–53, 114 S.Ct. 2239.

The Supreme Court provides for a straightforward preemption analysis in the RLA context (as well as under § 301 of the Labor Management Relations Act (LMRA)).[6] A state-law cause of action that is "founded directly on rights created by collective-bargaining agreements" or that involves claims "substantially dependent on analysis of a collective-bargaining agreement," is governed by federal law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (quoting *Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 859 n.3, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987)). When resolution of the statelaw claim involves "interpretation or application" of a collective bargaining agreement, the claim is not independent of the agreement, but constitutes a minor dispute that must be resolved through the RLA's mandatory arbitral mechanism. 45 U.S.C. § 153(i); *Hawaiian*

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[6] The Supreme Court applies the same preemption standard for the RLA and § 301 of the LMRA. *Hawaiian Airlines*, 512 U.S. at 263, 114 S.Ct. 2239.

Airlines, 512 U.S. at 252–53, 114 S.Ct. 2239. Similarly, when a state-law remedy "turn[s] on the interpretation of a collective-bargaining agreement for its application," the remedy is preempted by the RLA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 n.7, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210–11, 217–18, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). Finally, even "if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be preempted." *Lingle*, 486 U.S. at 407 n.7, 108 S.Ct. 1877.

By contrast, when a state law establishes substantive rights that are independent of a collective bargaining agreement, the enforcement of such rights under state law may not be preempted. *See, e.g.*, *Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 372 U.S. 714, 724, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963); *Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 5–7, 63 S.Ct. 420, 87 L.Ed. 571 (1943). Further, "the Supreme Court has distinguished between claims that require interpretation or construction of a labor agreement and those that require a court simply to 'look at' the agreement." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000) (citing *Livadas v. Bradshaw*, 512 U.S. 107, 123–26, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994)). "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly

does not require the claim to be extinguished." *Livadas*, 512 U.S. at 124, 114 S.Ct. 2068.[7]

B

WFCA gives employees a state-law right which, by its terms, is based on rights provided by a collective bargaining agreement.[8] Wash. Rev. Code

[7] Although we have distinguished between merely referencing a collective bargaining agreement and interpreting its terms, we do not otherwise define the term "interpret" narrowly. *Cf.* Maj. Op. at 19. Under the RLA, minor disputes are the disputes "growing out of grievances or out of the interpretation *or application* of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153(i) (emphasis added). Any state-law cause of action that requires a court to determine how a collective bargaining agreement applies to the facts of a case is a minor dispute that is preempted. *See Hawaiian Airlines*, 512 U.S. at 253, 114 S.Ct. 2239.

[8] Washington Revised Code section 49.12.270 provides, in full:

> (1) If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for: (a) A child of the employee with a health condition that requires treatment or supervision; or (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition. An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.

§ 49.12.270. "If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off," then the employee may use the employee's "choice of sick leave or other paid time off" to care for a qualifying relative. *Id.* § 49.12.270(1).[9] An employee who takes leave "under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, *except for any terms relating to the choice of leave*." *Id.* (emphasis added). In other words, if an employee is entitled to sick leave or other paid time off under the terms of a collective bargaining agreement, WFCA gives that employee the right to choose either sick leave or other paid time off for qualifying family care; the employee must otherwise comply with all other terms of the collective bargaining agreement.

L&I's published regulations directly track the language of the statute, *see* Wash. Admin. Code § 296-130-030, and a number of guidance documents provide a consistent interpretation of the statutes and regulations. One such document, published in December 2009, explains that the state-law right

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> (2) Use of leave other than sick leave or other paid time off to care for a child, spouse, parent, parent-in-law, or grandparent under the circumstances described in this section shall be governed by the terms of the appropriate collective bargaining agreement or employer policy, as applicable.

[9] "Sick leave or other paid time off" is defined, in part, as "time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for illness, vacation, and personal holiday." Wash. Rev. Code § 49.12.265(5).

provided to employees under WFCA gives employees who "have access to paid leave for themselves" the right to "full access to any and all of this leave to care for a sick family member."[10] State of Wash., Dep't of Labor & Indus., Emp't Standards, Frequently Asked Questions About the Family Care Act, Question 17 (Dec. 3, 2009). According to L&I, state law imposes on employers an independent obligation of allowing "use of sick leave and other paid time off to care for a sick family member even if a pre-existing collective bargaining agreement or employer policy prohibited

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[10] The pertinent paragraph in the guidance document states:

> What is meant by the provision that says the employer must allow an employee to use any and all of the employee's choice of sick leave or other paid time off to care for a sick family member?
>
> Employees must have access to any available sick leave or other paid time off to care for a sick family member. If employees have access to paid leave for themselves, then they must have full access to any and all of this leave to care for a sick family member. This law directs the employer to allow employees the choice of available leave to care for a sick family member. Employers must now allow use of sick leave and other paid time off to care for a sick family member even if a pre-existing collective bargaining agreement or employer policy prohibited such use. However, provisions of collective bargaining agreements or employer policies regarding the accumulation of leave and other provisions concerning the use of leave, such as medical certification and advance scheduling of vacation may still be applied.

State of Wash., Dep't of Labor & Indus., Emp't Standards, Frequently Asked Questions About the Family Care Act, Question 17 (Dec. 3, 2009).

such use." *Id.* This right is limited, however, as the guidance explains: "provisions of collective bargaining agreements or employer policies regarding the accumulation of leave and other provisions concerning the use of leave, such as medical certification and *advance scheduling of vacation may still be applied*." *Id.* (emphasis added). In other words, advanced scheduling of vacation time is a term "of the collective bargaining agreement or employer policy applicable to the leave" that an employee "must comply with" in order to take leave under WFCA. *See* Wash. Rev. Code § 49.12.270(1). L&I originally adopted this interpretation in this case, acknowledging that "any policy (including advanced vacation scheduling and medical verification) are allowable as long as they don't relate to the choice of leave."

In the course of litigating Masserant's claim, L&I proffered a new interpretation of the statute, arguing that WFCA "confers on employees the non-negotiable right, independent of collective bargaining agreements, to choose to use any earned leave provided by a collective bargaining agreement to care for sick family members, irrespective of any limitations that an employer would attempt to put on that leave—including any limitation that Alaska might put on a flight attendant's use of leave for the flight attendant's own illness or any advance scheduling requirements for the flight attendant's vacation."[11]

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[11] In August 2014 (two years after issuing the Notice of Infraction, and one year after the district court's decision in this case), L&I issued a modified guidance document, which now states: "[I]f an employer policy requires advanced scheduling for

L&I's interpretation, proffered for the first time as a litigation position, must be rejected because it is contrary to the language of the statute, the regulations, and L&I's own 2009 guidance document, all of which require employees to comply with the terms of the collective bargaining agreement "*except for* any terms relating to choice of leave." Wash. Rev. Code § 49.12.270(1) (emphasis added); *see* Wash. Admin. Code § 296-130-030. Contrary to L&I's litigation position, nothing in WFCA gives employees the right to use vacation leave to care for a qualifying relative when that leave is unavailable under the collective bargaining agreement. In the RLA and § 301 context, the Supreme Court has declined to defer to an agency interpretation that "simply slips any tether to [state] law," where an agency's "late-blooming rationales" create an "awkwardly inexact" overlap between the agency's interpretation and "what the state legislature has enacted into law." *Livadas*, 512 U.S. at 126, 128, 114 S.Ct. 2068. Similarly, in *Burnside v. Kiewit Pacific Corp.*, we

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vacation leave, the policy would be inapplicable to an employee who chooses to use vacation leave to take care of a sick family member. While the employer is permitted to establish an advanced scheduling policy generally, the policy cannot bar the employee from using vacation leave for Family Care Act purposes without violating the choice of leave provision." State of Wash., Dep't of Labor & Indus., Emp't Standards, Frequently Asked Questions About the Family Care Act, Question 9 (Aug. 6, 2014), http://www.lni.wa.gov/WorkplaceRights/files/policies/esc10.pdf. This document does not provide any reasoning or statutory interpretation; nor does L&I explain the reasons for its sharp change from earlier views. Furthermore, as L&I recognizes in its own brief, the FAQs "do 'not replace the applicable RCW and WAC standards[,]' because general policies do not trump the plain language of the statute."

rejected an agency's published interpretation of a wage order on the ground that "it is the plain language of an actual, enacted regulation which must govern, not language that appears in the underlying rationale." 491 F.3d 1053, 1064 (9th Cir. 2007).

The Court has adopted a similar approach in considering federal agency interpretations of federal statutes, and does not defer to agency interpretations that are contrary to the language of the statute, are "nothing more than 'a convenient litigating position,'" or that constitute "a '*post hoc* rationalizatio[n] . . . seeking to defend past agency action against attack.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012) (first alteration in original) (first quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); then quoting *Auer v. Robbins*, 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997))). Washington courts take a similar approach. *See Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wash. 2d 621, 627–28, 869 P.2d 1034 (1994) (Washington courts "will not defer to an agency determination which conflicts with the statute"); *Cerrillo v. Esparza*, 158 Wash. 2d 194, 205–06, 142 P.3d 155 (2006) (holding that absent ambiguity, Washington courts do not defer to agency interpretations; courts will "glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency" (quoting *Agrilink Foods, Inc. v. State, Dep't of Revenue*, 153 Wash. 2d 392, 396, 103 P.3d 1226 (2005))).

In short, to plead a WFCA claim, employees must show they are entitled to sick leave or other paid time off under the terms of their collective bargaining

agreement; only if that threshold qualification is met are employers obliged to let employees choose to use the time off for qualifying family care.

C

Applying these principles here, Masserant must show that she is "entitled to" paid time off "under the terms of [the] collective bargaining agreement," and that she "compl[ied] with the terms of the collective bargaining agreement . . . applicable to the leave," Wash. Rev. Code § 49.12.270(1), including any requirements applicable to rescheduling vacation time. Masserant's WFCA claim therefore turns on whether she was entitled to reschedule her December vacation time under the terms of the CBA.[12] If answering this threshold question requires interpretation or application of the CBA, it must be resolved through the RLA's mandatory arbitral mechanism before she can exercise the state-law right to choose.

The CBA does not expressly address an employee's entitlement to reschedule vacation time. Nor did the parties argue to the district court or in their briefs on appeal that Alaska Airlines's practice—not to allow such rescheduling of vacation time to care for a sick

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[12] The majority asserts that whether Masserant is "entitled" to vacation time is a state-law dispute because the term is "contained within the WFCA," and therefore outside the scope of minor disputes. Maj. Op. at 31. This assertion is meritless. WFCA states that an employee is "entitled to" paid time off only when the "terms of a collective bargaining agreement" so provide. Wash. Rev. Code § 49.12.270(1). Unless a mere look at the CBA establishes Masserant's entitlement, it is necessary to interpret the CBA's terms and apply them to Masserant's situation.

relative—is an implied term of the CBA based on "the parties' 'practice, usage and custom.'" *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n (Conrail)*, 491 U.S. 299, 311, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989) (quoting *Transp. Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 161, 87 S.Ct. 369, 17 L.Ed.2d 264 (1966)).

At oral argument, L&I and AFA asserted for the first time that they are willing to concede that the CBA does not allow flight attendants to reschedule vacation time to take care of family members.[13] Given their concession, they argue, it is not necessary to consult the CBA to determine whether Masserant was entitled to reschedule her December vacation time.

This argument must be rejected. As a threshold matter, neither AFA nor L&I have authority to make such a concession on Masserant's behalf. The question at issue is whether Masserant, not AFA or L&I, must pursue her claim using the RLA's mandatory arbitral mechanism. In her complaint to L&I, Masserant claimed that Alaska Airlines refused her request to use December vacation time to care for her sick child in May. She did not concede that she had no such right under the CBA. Neither AFA nor L&I represent Masserant in this appeal, and neither claims to have authority to waive Masserant's access to the CBA's dispute resolution mechanism.

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[13] This represents a change in L&I's position, which argued to the district court that the CBA does not address the question whether the CBA allows flight attendants to reschedule vacation time to take care of family members. AFA argued to the district court that the CBA does not allow such rescheduling, but in its brief on appeal backed off from this position, stating that its argument was solely for purposes of the summary judgment motion and the issue is irrelevant on appeal.

Moreover, although Alaska Airlines states it has long had the practice of not allowing flight attendants to reschedule vacation time to care for sick family members, unilateral conduct by an employer is not automatically incorporated as an implied term of the CBA. *Id.* at 311, 109 S.Ct. 2477. Rather, as with other disputes requiring an interpretation of the CBA, the question whether a particular entitlement or duty constitutes "the common law of a particular industry or of a particular plant" such that it has become part of the CBA must be determined through the arbitral mechanism. *Id.* at 311–12, 109 S.Ct. 2477 (quoting *Transp. Union*, 385 U.S. at 161, 87 S.Ct. 369).

In short, the question whether Masserant is entitled to reschedule her vacation time under the terms of the CBA cannot be resolved by merely looking to the agreement, but requires interpretation and application of the CBA. Therefore, it is a quintessential minor dispute that must be channeled through the RLA's mandatory arbitral mechanism. *See Hawaiian Airlines*, 512 U.S. at 252–53, 114 S.Ct. 2239.

D

This conclusion is in accord with the purposes of the RLA. In considering common carriers with nationwide operations, Congress recognized the importance of avoiding "any interruption to commerce or to the operation of any carrier engaged therein," by ensuring that disputes would be settled consistently and promptly through the RLA's mandatory arbitral mechanism. 45 U.S.C. § 151a. Here, Alaska Airlines argues that flight attendant absences pose unique concerns in the airline industry. Under FAA

regulations, a plane cannot take off without the requisite number of flight attendants on board; thus, ensuring employee attendance is critical to the basic operations of an air carrier. While Alaska Airlines retains and pays for flight attendants to be on "reserve" to cover for unexpected absences, those reserves are not unlimited. Such backup measures are not intended to ensure consistent day-to-day operations. For that, Alaska Airlines relies on its negotiations with AFA for detailed scheduling of leave, attendance, and absence, as embodied in the CBA. A cornerstone of these negotiations is the mandatory arbitral mechanism, designed for "the prompt and orderly settlement" of disputes concerning the CBA's negotiated leave terms. *Id.* If state courts could apply the potentially conflicting state law of each of the fifty states to interpret the CBA's terms and conditions, the congressional goal of consistent, reliable operation would be threatened, and the application of state law "might lead to inconsistent results since there could be as many state-law principles as there are States." *Lingle*, 486 U.S. at 405–06, 108 S.Ct. 1877.

II

Instead of applying this straightforward analysis, the majority circumvents Supreme Court precedent and offers a series of disconnected arguments for why we must deem Masserant's claim to be a question of state law that is not a minor dispute. First, the majority notes that RLA preemption is a type of "forum preemption," which considers whether a particular cause of action must be heard in a state or federal forum. Maj. Op. at 924–25. Based on this unexceptionable observation, the majority leaps to

the unsupported and untenable argument that unlike "conflict preemption," which allows consideration of state law, RLA preemption precludes any consideration of the state law governing a cause of action. Maj. Op. at 922–24. Any analysis of the nature and scope of the state-law cause of action, the majority asserts, is the same as reaching the merits of the state-law claim. Maj. Op. at 928, 929–30. This approach, the majority urges, is contrary to forum preemption analysis, which allows a court to decide only who the decisionmaker will be. Maj. Op. at 929–30. According to the majority, a federal court's "only job is to decide whether, *as pleaded*," a claim is independent of the CBA. Maj. Op. at 924 (emphasis added). As explained below, each of these conclusions is not only baseless and illogical, but contrary to Supreme Court and our own precedent.

A

The majority's main argument—that RLA preemption precludes consideration of state law, Maj. Op. at 927–28—has no support in any Supreme Court or Ninth Circuit precedent.

As the Supreme Court has framed it, to determine whether "a state cause of action may go forward" or is instead preempted by § 301, a court must consider the "legal character" of a state-law claim. *Livadas*, 512 U.S. at 123–24, 114 S.Ct. 2068.[14] In the RLA and

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[14] The majority concedes that courts must understand the legal character of a state cause of action before it can determine whether the cause of action must be channeled through the RLA's mandatory arbitral mechanism. Maj. Op. at 924, 926–27. But the majority does not attempt to determine the legal character of Masserant's WFCA claim or explain how this determination should be accomplished.

§ 301 context, federal courts must understand the claim's legal character to determine whether the state-law cause of action is "founded directly on rights created by collective-bargaining agreements" or on claims "substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar Inc.*, 482 U.S. at 394, 107 S.Ct. 2425 (quoting *Hechler*, 481 U.S. at 859 n.3, 107 S.Ct. 2161). If it is, dispute resolution is governed by the RLA or § 301. *Id.* As the Supreme Court applies this test, the analysis involves interpreting state law.

In *United Steelworkers of America v. Rawson*, for instance, the survivors of miners who were killed in an underground fire brought a state wrongful death action against the union, claiming it had negligently performed an inspection of the mine. 495 U.S. 362, 364, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990). Although the union had undertaken the inspection pursuant to a collective bargaining agreement, the Idaho Supreme Court held that the union had a state-law duty to perform a reasonable inspection which "arose from the fact of the inspection itself rather than the fact that the provision for the Union's participation in mine inspection was contained in the labor contract." *Id.* at 370–71, 110 S.Ct. 1904. Therefore, the Idaho Supreme Court "rejected the suggestion that there was any need to look to the collective-bargaining agreement to discern whether it placed any implied duty on the Union." *Id.* at 370, 110 S.Ct. 1904. Reading this opinion in light of other state law, however, the Supreme Court rejected the plaintiffs' argument that their tort claim was independent of the collective bargaining agreement. *Id.* at 371, 110 S.Ct. 1904. Based on its understanding of Idaho law, including the state

supreme court decision, the Supreme Court concluded that the union's duty of care arose out of its contractual obligations. *Id.* Therefore, the plaintiffs could not avoid preemption of their state cause of action "by characterizing the Union's negligent performance" as merely a state-law tort. *Id.* at 371–72, 110 S.Ct. 1904.[15]

In reaching this conclusion, the Court rejected Justice Kennedy's dissent, which argued that a state cause of action is saved from preemption by § 301 so long as there is an interpretation of state law that would allow it to operate independently of a collective bargaining agreement. *See id.* at 379, 110 S.Ct. 1904 (Kennedy, J., dissenting) (arguing that because there is a "possibility . . . that the respondents may prove"

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[15] The majority attempts to distinguish *Rawson* on the ground that it "disagreed only as to the implications of the Idaho Supreme Court's holding for LMRA § 301 preemption." Maj. Op. at 930 n.28. This is simply incorrect. *Rawson* carefully analyzed the Idaho Supreme Court's opinion on state tort law (the duty of care) to understand the nature and scope of state law. *Rawson*, 495 U.S. at 371, 110 S.Ct. 1904 ("Nor do we understand the Supreme Court of Idaho to have held that any casual visitor in the mine would be liable for violating some duty to the miners if the visitor failed to report obvious defects to the appropriate authorities."). Having conducted its own analysis of state tort law, *Rawson* rejected the plaintiffs' claim that there was a colorable interpretation of state law which would not require interpretation or application of a collective bargaining agreement. Rather, it held that "[p]re-emption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort." *Id.* at 371–72, 110 S.Ct. 1904. Therefore, the Court concluded that "this suit, if it is to go forward at all, must proceed as a case controlled by federal, rather than state, law." *Id.* at 372, 110 S.Ct. 1904.

their case "without relying on the collective bargaining agreement," the court should allow the respondents to "press their state claims"). Further, the Court rejected Justice Kennedy's suggestion that "[i]f the Idaho Supreme Court, after a trial on the merits, were to uphold a verdict resting on the Union's obligations under the collective-bargaining agreement, we could reverse its decision." *Id.* at 380, 110 S.Ct. 1904. In other words, *Rawson* forecloses the majority's view that a federal court must defer to any proposed interpretation of state law and allow a state-law claim to proceed on that theory. Maj. Op. at 924. Rather, federal courts must analyze state law to determine the legal character of the state-law claim.

The Court takes a similar approach in determining the preemptive force of ERISA, which "mirror[s] the pre-emptive force of LMRA § 301." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004). Like the RLA and § 301, ERISA channels certain disputes into a congressionally mandated mechanism and preempts state causes of action that interfere with this mechanism.[16] *Id.* at 208–09, 124 S.Ct. 2488. The ERISA preemption question asks whether a state-law claim falls "within the scope" of ERISA's civil enforcement remedy and therefore "conflicts with the

[16] Thus the majority's statement that "*Davila* has nothing to do with the subject of the RLA or LMRA § 301 preemption analysis," Maj Op. at 923 n.15, is unsupportable. ERISA protects a congressionally-mandated, "comprehensive remedial scheme." *Davila*, 542 U.S. at 217, 124 S.Ct. 2488. Like the RLA and § 301, ERISA seeks to enforce a federal pathway for resolving disputes, and preempts state causes of action that conflict with that pathway. Therefore, *Davila* is an apt comparison.

clear congressional intent to make the ERISA remedy exclusive." *Id.* at 209, 124 S.Ct. 2488. To determine whether a state-law claim falls within the scope of ERISA's exclusive civil enforcement mechanism, courts "must examine respondents' complaints, *the statute on which their claims are based* . . ., and the various plan documents." *Id.* at 211, 124 S.Ct. 2488 (emphasis added). The same is true in the RLA and § 301 context.

We have likewise construed the nature and scope of state law to rule on preemption in our prior § 301 opinions. *See Burnside*, 491 F.3d at 1064. In *Burnside*, an employee covered by a collective bargaining agreement brought various state-law claims against his employer based on the employer's failure to pay wages for time traveled between company-designated meeting points and actual job sites. *Id.* at 1056, 1058. The state regulation giving employees the right to be compensated for compulsory travel time stated that it applied "to any employees covered by a valid collective bargaining agreement *unless the collective bargaining agreement expressly provides otherwise*" (an "opt-out" regulation). *Id.* at 1062 (quoting Cal. Code Regs. tit. 8, § 11160(5)(D)). But the agency with authority to construe this law held it "*does not apply* to any employee covered by a valid collective bargaining agreement unless the collective bargaining agreement expressly provides otherwise" (an "opt-in" regulation). *Id.* at 1063. *Burnside* viewed the interpretation of this rule to be critical for determining whether the employee could bring a state cause of action. If the agency's interpretation was correct, "the state-law rights can be more readily viewed as existing only if the CBA says so and as therefore dependent on the CBAs," *id.*

at 1064 n.11, which would likely have led to the conclusion it was preempted. Instead of accepting the agency's interpretation, *Burnside* construed the state law, concluded that the agency's interpretation of the regulation was incorrect, and held that "[i]n any event, it is the plain language of an actual, enacted regulation which must govern, not language that appears in the underlying rationale." *Id.* at 1064[17]; *see also Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1077 (9th Cir. 2005) (recognizing that we "begin" § 301 preemption analysis "with an examination of California statutes, regulations, and case law").

Accordingly, contrary to the majority, it is well established that determining the legal character of a state cause of action by interpreting the state law at issue is an essential step in deciding the RLA preemption question.

B

In the absence of any Supreme Court or Ninth Circuit support for its theory that a court may not consider state law in determining whether a state cause of action constitutes a minor dispute, the majority resorts to other arguments: it tries and fails to identify a meaningful distinction between RLA preemption and conflict preemption; cites inapposite

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[17] The majority attempts to distinguish *Burnside* because it considered the preemptive force of § 301 in a jurisdictional context. Maj. Op. at 930 n.28. As explained below, *infra* Section III.B., this distinction is meritless. Indeed, given the majority's reliance on the two-part test adopted in *Burnside*, Maj. Op. at 920–21 (applying *Burnside* and subsequent cases that rely on *Burnside* for its preemption analysis), it is baffling that the majority claims *Burnside* is "not here applicable." Maj. Op. at 930 n.28.

out-of-circuit cases; and analogizes to the inapplicable doctrines of primary jurisdiction and contract analysis in the arbitration context. Each of these efforts fails.

First, the majority argues that while courts consider state law in determining "typical conflict preemption," courts may not do so in considering "RLA and LMRA § 301 preemption" because they are instead "grounded in the need to protect the proper *forum* for resolving certain kinds of disputes." Maj. Op. at 922. This argument is meritless.[18] In purporting to distinguish between conflict preemption and forum preemption, the majority misses the basic point that all preemption flows from

[18] Indeed, the Court has never suggested that anything other than ordinary conflict preemption principles apply, emphasizing that the question under § 301 (and therefore under the RLA) is whether a state-law claim conflicts with federal labor law. *See Lueck*, 471 U.S. at 209, 105 S.Ct. 1904 (under § 301, federal courts must determine whether a state-law claim "conflicts with federal law or would frustrate the federal scheme" (citation omitted)); *Livadas*, 512 U.S. at 120, 114 S.Ct. 2068 ("In labor pre-emption cases, as in others under the Supremacy Clause," courts must decide if a state-law claim "conflicts with or otherwise 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the federal law." (quoting *Brown v. Hotel Emps.*, 468 U.S. 491, 501, 104 S.Ct. 3179, 82 L.Ed.2d 373 (1984))). The majority asserts that *Livadas* illuminates a distinction between ordinary conflict preemption and § 301 preemption. Maj. Op. at 924–26. *Livadas* does not support the majority's point. Rather, it merely recognizes that the NLRA and § 301 have different preemptive effects. *See Livadas*, 512 U.S. at 116–17, 121–23, 114 S.Ct. 2068. We, of course, agree that the two statutes and their preemptive effects are distinct. *Livadas* does not hold, however, that a proper interpretation of state law is irrelevant to the § 301 preemption question.

the Supremacy Clause, which dictates that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2. To be sure, the scope of preemption is a matter of congressional intent, *see Lueck*, 471 U.S. at 208, and therefore the preemptive force of federal legislation varies depending on that intent. We have used shorthand to refer to our understanding of the preemptive force of certain statutes, referring to *Garmon* preemption[19] and *Machinists* preemption[20] in the labor context, as well as forum preemption, field preemption, conflict preemption, express preemption, and the like. But such labels do not change the basic principle of federal preemption, namely: "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, ––– U.S. ––––, 138 S. Ct. 1461, 1480, 200 L.Ed.2d 854 (2018).

For the same reason, the majority errs in attempting to distinguish cases that considered the preemptive force of federal statutes in a jurisdictional context. The same basic preemption principles apply in the complete preemption context, even though the question is jurisdictional. While we are generally bound by the well-pleaded complaint rule, "which provides that federal jurisdiction exists only when a

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[19] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

[20] *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

federal question is presented on the face of the plaintiff's properly pleaded complaint," *Balcorta*, 208 F.3d at 1106, the preemptive force of some federal statutes, such as § 301 of the LMRA, is "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'" *Caterpillar Inc.*, 482 U.S. at 393, 107 S.Ct. 2425 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). Federal question jurisdiction is supported only when a claim falls within the preemptive scope of federal law. *See Balcorta*, 208 F.3d at 1106. Therefore, courts ask the same question in deciding whether a claim is completely preempted (and thus supports federal question jurisdiction) and in deciding whether a state-law claim is preempted by § 301—whether the state-law claim depends "on rights created by collective-bargaining agreements." *Caterpillar Inc.*, 482 U.S. at 394, 107 S.Ct. 2425. Thus, the majority's attempts to distinguish *Davila* and *Burnside*, Maj. Op. at 923 n.15, 930 n.28, because they considered the preemptive force of federal statutes in a jurisdictional context, is wholly without support. *See, e.g.*, *id.* at 394–95, 107 S.Ct. 2425 (applying the test for § 301 preemption to a complete preemption question).

These basic principles of preemption require federal courts to determine when congressional intent supersedes state requirements. Regardless whether Congress intended to supersede state law regulating behavior (typical conflict preemption) or to supersede state law creating causes of action (typical forum preemption), it is necessary to evaluate the state law in order to determine if it conflicts with the federal law. The majority errs in its apparent belief that

reading state statutes to resolve the forum preemption question is equivalent to reading state statutes to decide the merits of a dispute. Maj. Op. 922–23. Courts are perfectly capable of, and indeed are required to evaluate a state-law cause of action to determine whether it creates a minor dispute without evaluating and deciding the dispute itself. Reading state law is a part of that analysis. *See supra* Section II.A.

Second, in the absence of any Ninth Circuit precedent, the majority points to out-of-circuit cases to support its argument that forum preemption precludes consideration of state law, but they lend no support. Rather, the cases cited by the majority merely articulate the scope of RLA preemption. *See Davies v. Am. Airlines, Inc.*, 971 F.2d 463, 465 n.1 (10th Cir. 1992) (holding that "the RLA vests exclusive and mandatory jurisdiction over certain claims in an arbitral forum," and noting that RLA preemption is different than "the doctrine of field preemption," which addresses whether Congress has "precluded states from regulating a particular area of conduct"); *see also Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 273–74 (2d Cir. 2005) (holding that "state-law claims that are disguised minor disputes" are "preempted by the RLA," but that the RLA does not support federal question jurisdiction); *Ry. Labor Execs. Ass'n v. Pittsburgh & Lake Erie R. Co.*, 858 F.2d 936, 942–43 (3d Cir. 1988) (holding that the RLA does not support federal question jurisdiction); *Miller v. Norfolk & W. Ry. Co.*, 834 F.2d 556, 560–61 (6th Cir. 1987) (distinguishing between complete preemption and "choice of forum" preemption). However, neither the Tenth Circuit in *Davies* nor any other circuit has held, or even hinted, that a proper

construction of state law is irrelevant to RLA or § 301 preemption.

Finally, the majority analogizes to the prudential doctrine of primary jurisdiction and to the contract principles used to determine when issues have been submitted to an arbitrator. Maj. Op. at 922–23. These analogies fail. Primary jurisdiction is "a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). Cases applying primary jurisdiction doctrine do not grapple with the question whether a proper construction of state law is necessary for preemption purposes. The majority also analogizes to arbitrability disputes under the Federal Arbitration Act. *See* Maj. Op. at 922–23 (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). *First Options* uses contract principles to determine whether the parties agreed to submit the issue of arbitrability to the arbitrator. 514 U.S. at 943, 115 S.Ct. 1920. It does not provide any support to the majority's claim that a federal court cannot consider the state cause of action to determine whether it constitutes a minor dispute.[21] Even if the majority's analogies were apt,

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[21] To the extent that analogies to primary jurisdiction and arbitration are relevant, these cases illustrate that courts should err on the side of holding that state law claims are preempted. When protecting the primary jurisdiction of the NLRB for example, the Supreme Court preempts any claim that is even "arguably" within the NLRB's jurisdiction. *See Garmon*, 359 U.S. at 245, 79 S.Ct. 773. And the Supreme Court has long recognized that the FAA preempts state rules that frustrate the

neither doctrine establishes that a court is precluded from construing the state law here.

C

The Supreme Court and Ninth Circuit precedent described above also dispose of the majority's argument that construing WFCA to analyze preemption is the same as reaching the merits of Masserant's WFCA claim. It is evident that the merits of a dispute pose analytically distinct questions from the question of who has the power to decide a particular legal question. *Cf. First Options*, 514 U.S. at 942, 115 S.Ct. 1920. As demonstrated in *Rawson* and *Burnside*, analyzing the state law at issue is the only way to decide whether a state cause of action brings a claim that is "independent of any right established by contract, or, instead, whether evaluation of the . . . claim is inextricably intertwined with consideration of the terms of the labor contract." *Lueck*, 471 U.S. at 213, 105 S.Ct. 1904. It is our task to determine what entity has the power to decide the merits of Masserant's dispute. Maj. Op. at 920; *Lueck*, 471 U.S. at 214, 105 S.Ct. 1904.[22]

"liberal federal policy favoring arbitration." *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346, 352, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

[22] Construing the scope of state law to determine the legal character of Masserant's claim is not a "peek" at the merits of her dispute. *Cf. Am. W. Airlines, Inc. v. Nat'l Mediation Bd.*, 119 F.3d 772, 775–76 (9th Cir. 1997) (holding that because judicial review of the decisions of the National Mediation Board is limited to circumstances when the Board "committed a constitutional violation or egregious violation of the RLA," a court may "'peek' at the merits" to determine if such an error has

In sum, Supreme Court and our precedent dictate that we must understand the nature, or "legal character" of a state-law cause of action before we can address the question whether the cause of action has been displaced by the preemptive force of the RLA. It is the majority that stands alone in suggesting that the proper construction of state law is irrelevant to whether a cause of action, brought under that state law, is preempted by the RLA. Therefore, the majority's crucial presumption—that because of the RLA's unique forum preemption, courts may not consider state law when deciding whether the RLA preempts a state cause of action—is entirely meritless.

IV

The majority's erroneous approach allows Masserant to sidestep the RLA's mandatory arbitral mechanism, and thus is contrary to Supreme Court precedent and common sense.[23] *See Hawaiian Airlines*, 512 U.S. at 252–53, 114 S.Ct. 2239.

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occurred). A determination that Masserant's claim requires an interpretation of the CBA does not require any inquiry into the merits of her claim—that she is entitled to reschedule vacation time. Masserant's ultimate ability to reschedule her vacation time remains unresolved.

[23] The majority claims that preemption here would permit federal courts "to police the development of substantive state law," by "inhibiting the state from creating precedent on the meaning of its own statutes through the ordinary process of state court appeals." Maj. Op. at 929. This is incorrect. For instance, if a state court merely needed to "look to" the undisputed terms of the collective bargaining agreement to ascertain that the employee was entitled to sick leave or other paid time off, the RLA would not defeat the employee's state-law claim, and a state court could enforce the employee's right to choose to use that

The majority claims that because a court cannot look at state law, it is limited to considering whether the claim, as pleaded, constitutes a minor dispute. Maj. Op. at 926–27. Therefore, the majority argues, we must take at face value Masserant's claims that WFCA gives employees the right to reschedule vacation time regardless of any provision to the contrary in the CBA. Maj. Op. at 926–27; *see also* Maj. Op. at 924 ("Our only job is to decide whether, as pleaded, the claim 'in this case is "independent" of the [CBA] in the sense of "independent" that matters for . . . pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.'" (alteration in original) (quoting *Lingle*, 486 U.S. at 407, 108 S.Ct. 1877)).

As shown above, the premises underlying this approach are meritless. To the contrary, the Supreme Court has made clear that a plaintiff cannot avoid the RLA's preemptive effect based on artful pleading. Just as *Rawson* declined to allow plaintiffs to avoid preemption by offering a colorable interpretation of state law through artful pleading, 495 U.S. at 371–72, 110 S.Ct. 1904, the Court has generally refused to adopt a rule that "permit[s] an individual to sidestep available grievance procedures" through clever pleading, *Lueck*, 471 U.S. at 220, 105 S.Ct. 1904; *see*

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time to care for a qualifying relative. *See Livadas*, 512 U.S. at 125, 114 S.Ct. 2068; *Lingle*, 486 U.S. at 407 n.7, 108 S.Ct. 1877. Similarly, a state court would be free to construe WFCA in a preemption analysis when the plaintiff is entitled to sick leave or other paid time off under an employer policy. L&I and Washington courts are merely precluded from deciding whether Masserant is "entitled to" vacation time under the terms of the CBA, and whether she otherwise complied with the terms of the CBA.

also Lingle, 486 U.S. at 411, 108 S.Ct. 1877. As the Court noted in *Lueck*, a gifted lawyer can readily reformulate a minor dispute as a state cause of action, and "[c]laims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court," as a state tort claim for instance. 471 U.S. at 219–20, 105 S.Ct. 1904. The insistence that a court must take a plaintiff's pleadings at face value "would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220, 105 S.Ct. 1904 (citation omitted).[24]

In short, neither the Supreme Court nor we have been hesitant to construe state law in order to determine the legal character of a state-law cause of action, and have certainly not taken the plaintiff's formulation of a state-law complaint at face value. The majority makes a crucial error in reasoning that something about the nature of RLA preemption

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[24] No case cited by the majority, Maj. Op. at 923, supports the proposition that a court must take a plaintiff's pleadings at face value. *See, e.g.*, *Espinal v. Nw. Airlines*, 90 F.3d 1452, 1457 (9th Cir. 1996) (holding that plaintiff's state-law claims were not preempted by the RLA after conducting a three-part analysis into the legal character of the claims, namely: "(1) Does the CBA contain provisions that govern the actions giving rise to the state claim? (2) Is the state statute 'sufficiently clear' so that the claim can be evaluated without consideration of overlapping provisions in the CBA? (3) Has the state shown an intent not to allow the statute to be altered or removed by private contract?" (quoting *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1523 (9th Cir. 1995))).

precludes construing WFCA in order to determine whether a state-law cause of action is actually a minor dispute.

V

The Supreme Court has a well-developed body of case law directing lower courts on how to conduct a preemption analysis, both inside and outside the labor-law context. The majority departs from this precedent on the grounds that courts are precluded from considering state law in deciding whether the state cause of action is actually a minor dispute that requires resolution by the RLA's arbitral mechanism. In doing so, the majority allows plaintiffs to sidestep available, federally-required grievance procedures. This approach is contrary to Supreme Court guidance and Congress's intent. Because all minor disputes must be resolved through the RLA's mandatory arbitral mechanism, the key mechanism for "minimizing interruptions in the Nation's transportation services," *Int'l Ass'n of Machinists*, 372 U.S. at 687, 83 S.Ct. 956, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA AIRLINES INC., an Alaska corporation,
Plaintiff-Appellant,

v.

Judy SCHURKE, in her official capacity as Director of the State of Washington Department of Labor and Industries; Elizabeth Smith, in her official capacity as Employment Standards Program Manager of the State of Washington Department of Labor and Industries, Defendants-Appellees,

Association of Flight Attendants–Communication Workers of America, AFL-CIO, Intervenor-Defendant-Appellee.

No. 13-35574

Argued and Submitted May 6, 2015
Seattle, Washington

Filed January 25, 2017

846 F.3d 1081

Before: J. CLIFFORD WALLACE, ANDREW J. KLEINFELD, and MORGAN CHRISTEN, Circuit Judges.

Dissent by Judge CHRISTEN.

OPINION

KLEINFELD, Senior Circuit Judge:

This is a Railway Labor Act preemption case. We decide, not the merits of the case, but which entity should decide upon the merits, the State of Washington, or the System Adjustment Board established pursuant to a collective bargaining agreement.

Facts.

Though this became a dispute between the airline and a state agency and union, it arises out of a dispute between a flight attendant and the airline about her sick leave. The flight attendant, Laura Masserant, called in sick in May, to care for her son who was ill. She proposed to take two days off as sick leave to care for him. But she had used up all her sick leave. She had vacation leave coming to her, but vacation leave is scheduled the October before the year in which it is to be used. Masserant had cashed out most of her vacation leave, and had scheduled all her remaining vacation leave for December, so she had none available to her in May. If Masserant had called in sick, despite having used up all her sick leave, she would have accumulated "points." Under the collective bargaining agreement between her union and the airline, if a flight attendant calls in sick too many times after using up all her sick leave, accumulating too many points, she is subject to graduated discipline—counseling, warning, and for enough points, termination.

Masserant claimed an entitlement to use her December vacation leave for her child's illness without being charged points, under the Washington Family Care Act. That state statute does not entitle an employee to any leave. But if the employee is entitled to paid time off, the employee is entitled to

use it for a sick child, not just for her own illness or vacation.[1]

Masserant and the airline disagreed on how to interpret her entitlement. They do not dispute that she was entitled to seven days of vacation leave. But she had scheduled it for December. The airline claimed that she could only use it in December, but Masserant claimed that under the Washington statute, she was entitled to use it in May for her child's illness. Masserant would be entitled to more sick leave in June, and the airline retroactively liberalized its policy so that she could use it in May, but even with that, she still did not have enough sick leave to cover the time she off she needed in May. The state agency that administers the Washington statute

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[1] Wash. Rev. Code § 49.12.270(1):

> If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for:
>
> (a) A child of the employee with a health condition that requires treatment or supervision; or
>
> (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition.
>
> An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.

agrees with Masserant's interpretation of the Washington statute.

The Washington statute does not create an entitlement to paid time off, sick leave or otherwise. It limits an employee to whatever her entitlement may be "under the terms of a collective bargaining agreement or employer policy." And it requires that "[t]he employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave."

The Alaska Airlines-Associated Flight Attendants collective bargaining agreement entitles employees to use available leave, however denoted, to take care of a sick child.[2] It expressly provides that "sick leave" is usable for illness of a family member, not just the employee, and that availability of leave to care for family members is as broad as "the most liberal of the States in which flight attendants are domiciled."[3]

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[2] "Sick leave may be used . . . pursuant to applicable State law and/or Company policy . . . . Pursuant to Company policy, *no* attendance points *are assessed* for an absence called in for a sick child *(zero points per day)*."

[3] "Whenever the new collective-bargaining refers to a sick child, it is understood that this is a placeholder for 'family member.' With the Association's agreement, the Company will apply the most liberal of the laws of the states in which Flight Attendants are domiciled in determining the appropriate definition of 'family member.' When this definition is determined, including any subsequent amendments pursuant to changes in law or in the interpretation of the law, the company will publish the definition and distribute it to the Flight Attendants."

The dispute between the parties is not about whether Masserant could take her leave, but when. The collective bargaining agreement is stuffed full of limitations to assure that when a plane is being prepared for takeoff, the requisite number of flight attendants are on board. The important part, for Masserant's purposes, are the provisions on scheduling use of vacation leave. Flight attendants get 14 days after their first year, 21 days after five years, 28 days after 10 years, and 35 days after 18 years. The airline has to post a list of available vacation times by October 1 of the preceding year. Flight attendants have 15 days to sign up, and vacation periods are granted on a seniority basis. Flight attendants may trade vacation days, within stated limits.

What they cannot do is fail, without notice, to show up.[4] They have to call in sick a certain number of hours prior to departure of their scheduled flight,[5] and not do it too often or else suffer "points."[6] There is graduated discipline if too many points accumulate. "Points" are deleted for subsequent periods of proper attendance,[7] and no action is taken for the first few

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[4] "In all cases of absence, a Flight Attendant will be required to call the designated Company representative."

[5] "Sick calls must be made to the designated Company representative at least two (2) hours prior to *check-in (3 hours prior to* scheduled *departure)*."

[6] For example, a "No Show" equals 2 1/2 points, a "Reported Illness Using Quarterly Point Reduction" equals 0 points, a "Reported illness after or without Using Quarterly Point Reduction" equals between 1/2 and 2 1/2 points, and an "Emergency Drop" equals 1/2 point.

[7] "For each calendar quarter during which a Flight Attendant is active for the entire quarter and has no chargeable

points,[8] but Masserant's available and unused sick leave would not have covered her for the two day absence she sought in May. Masserant could have called in sick despite lacking available sick leave, three hours before each flight for which she was scheduled, but apparently the airline would have assessed points against her for absence without available leave. She wanted to take two days from the seven days of vacation leave she had scheduled in December, to avoid points. But the airline would not permit her to take her December vacation time in May. Vacation leave is "banked," that is, treated as an entitlement, on January 1, and can be exchanged for cash in advance of the scheduled vacation, but a flight attendant cannot take the time off in advance of the time slot he or she scheduled the previous autumn. Masserant had taken four days of vacation leave and cashed out 21 days when her child got sick, leaving her only the seven days she had scheduled the previous fall for vacation in December. She claimed entitlement to take it in May instead, under the Washington statute.

As a practical matter, Masserant may be entitled to take time off to care for her sick child without penalty even though she has no sick leave available, because for a flight attendant's first 4 1/2 points, there is no penalty. If a flight attendant gets too many points, they can be reduced by good attendance the next year.

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occurrences during the entire quarter, two (2) points will be deleted from the Flight Attendant's accumulated points until the total reaches zero (0). Time on leave of absence will not be counted toward record improvement."

[8] "0–4 1/2 [points]: No action taken."

Masserant and her union, the Associated Flight Attendants, disagreed with the airline's position. But instead of grieving it under the collective bargaining agreement grievance procedure, they filed an administrative complaint with the State of Washington Department of Labor and Industries. The Department determined that Masserant was entitled to use her December vacation leave to care for her child in May. The airline was fined $200 for violating the statute. The airline, Masserant, and the union have agreed to delay state appellate and other proceedings so that this Railway Labor Act preemption dispute may be adjudicated. The district court granted summary judgment against the airline's preemption claim. We now review the district court decision de novo.[9]

Some of the relevant provisions in the collective bargaining agreement and employer customs are not entirely clear cut. A provision says that "*no* attendance points *are assessed* for an absence called in for a sick child," but it is not obvious how far this reaches. Though sick leave can clearly be used to care for a sick child, no such explicit provision is made for vacation leave and the evidence suggests that vacation leave cannot be so mixed. A flight attendant can trade vacation days with another flight attendant, subject to a deadline and approval. And a flight attendant can accumulate up to 4 1/2 points for absenteeism with no disciplinary action, and subtraction of 2 points per quarter thereafter for quarters in which there are no chargeable occurrences, despite the absence of available leave.

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[9] *Espinal v. Nw. Airlines*, 90 F.3d 1452, 1455 (9th Cir. 1996).

Analysis.

The issue before us is not whether Masserant is entitled to use her vacation leave, scheduled for December, in May, to care for her sick child. Though that is what the case is all about, it is not the issue posed for us. The issue before us is limited to Railways Labor Act preemption, that is, whether the state administrative board or the collective bargaining agreement grievance procedure ought to decide whether Masserant is entitled so to use her December vacation leave in May. This is one of those cases to which the Thomas Reed Powell line applies, "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind."[10]

The most important fact about this case is the circularity between the Washington statute and the collective bargaining agreement. The statute makes the employee's entitlement to leave (as opposed to what the leave may be used for) dependent on the collective bargaining agreement. And the collective bargaining agreement expands use of leave to whatever the state statute says.[11] The point of the statute appears to be that, if an employee is entitled to take paid leave, whether denominated sick leave or any other kind, then the leave may be used to care for a sick relative, not just the employee himself. But entitlement to leave, under the statute, is to be

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[10] Thurman W. Arnold, *The Symbols of Government* 101 (1935) (attributed to Thomas Reed Powell).

[11] "Sick leave may be used . . . pursuant to applicable State law."

defined by the collective bargaining agreement or employer practice. This dependence of the Washington statute on the collective bargaining agreement is established by its command that leave "shall be governed" by the collective bargaining agreement or employer policy.

Masserant's claim can be resolved as a grievance under the collective bargaining agreement. It provides that "any controversy . . . as to the meaning of any of the terms of this agreement" shall be presented as a grievance to a designated individual, with that person's decision appealable to the Flight Attendants' Board of Adjustment (two members appointed by the union, two by the company) and to mediation or arbitration (National Mediation Board under the Railway Labor Act provides a list of seven names, and each party strikes three). The question is not whether Masserant and her union could proceed with the grievance procedure, but whether the state agency is an alternative procedure available to them despite Railway Labor Act preemption.

"The Railway Labor Act was enacted . . . [t]o avoid any interruption to commerce or to the operation of any carrier engaged therein."[12] The Act requires that carriers make agreements and settle disputes with their employees to avoid interruption to commerce.[13] It covers airlines as well as railways.[14] And it

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[12] *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters*, 779 F.3d 1069, 1073 (9th Cir. 2015) (en banc) (quoting 45 U.S.C. § 151a) (internal quotation marks omitted) (alternation in the original).

[13] 45 U.S.C. § 152, First.

[14] *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994).

includes "a *mandatory* system of dispute resolution."[15] "Congress's intent in the RLA [was] 'to keep [carriers'] labor disputes *out of the courts*." [16] To facilitate this process, the RLA provides a "mandatory arbitral mechanism to handle disputes 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'"[17]

Disputes under this regime are generally characterized as either major or minor. "[M]ajor disputes seek to create contractual rights, minor disputes to enforce them,"[18] so disputes about defining the rights guaranteed by a collective bargaining agreement are minor disputes.[19] Minor disputes are preempted by the RLA and must be dealt with first through a carrier's internal dispute resolution process, and then a System Adjustment Board comprised of workers and management.[20] The Act states that among its purposes are to provide for settlement of "all" disputes about "pay, rules or

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[15] *Aircraft Serv.*, 779 F.3d at 1073 (citing *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R.*, 353 U.S. 30, 40, 77, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957) (emphasis added)).

[16] *Fennessy v. Southwest Airlines*, 91 F.3d 1359, 1363 (9th Cir. 1996) (emphasis in original) (quoting *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1289 (9th Cir. 1986)).

[17] *Norris*, 512 U.S. at 248, 114 S.Ct. 2239 (quoting 45 U.S.C. § 153, First).

[18] *See Consol. Rail Corp. v. Ry. Labor Execs. Ass'n.*, 491 U.S. 299, 302, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989) (quoting *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945)).

[19] *Norris*, 512 U.S. at 255, 114 S.Ct. 2239.

[20] 45 U.S.C. § 184.

working conditions," and "all" disputes growing out of interpretation or application of agreements about "pay, rules, or working conditions."[21]

There is an exception to this broad preemption, though, for independent state rights. Some exceptions are obvious, such as when the state right does not concern "pay, rules or working conditions." But there are plenty of possible claims that arguably overlap both collective bargaining agreement provisions and state law. The Supreme Court appears to have evolved from the broadest possible preemption rule toward a more qualified rule, at least with respect to independent state-created rights.

The seminal preemption case, establishing the breadth of Railway Labor Act preemption, is *Teamsters v. Lucas Flour Co.*[22] It holds that federal labor law must be paramount under the supremacy clause in areas covered by the federal statute, to avoid inconsistent state law interpretations under state contract law of collective bargaining agreements.[23]

Allis–Chalmers Corp. v. Lueck holds that an apparently independent state tort unrelated to working conditions, bad faith denial of insurance coverage, was nevertheless preempted, because the bad faith claim was "inextricably intertwined" with the group health policy established pursuant to the collective bargaining agreement.[24] *Lueck* holds that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement

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[21] 45 U.S.C. § 151a(4)–(5).

[22] 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962).

[23] *Id.* at 103–04, 82 S.Ct. 571.

[24] 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985).

made between the parties in a labor contract," the claim is preempted by federal labor law, and a state law suit should be dismissed.[25] A dictum in *Lueck* speaks directly to the case before us. *Lueck* says that "[c]laims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court" were they not deemed preempted.[26] Such state court action would "eviscerate a central tenet of federal labor-contract law under § 301, that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."[27] The question in this case is the one answered by this dictum, though it is merely dictum, because Masserant's claim is precisely that her vacation leave ought to be deemed available in May rather than December, because of state law affecting use of leave.

Though it had been implied in *Lucas Flour* and *Lueck*, the independent state claim limitation on federal preemption was articulated explicitly in *Lingle v. Norge Division*.[28] An employee's claim for wrongful discharge, under state law protecting employees from retaliatory discharge for filing workers compensation claims, was held not to be preempted.[29] The reason was that the state law claim was "independent" of the collective bargaining

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[25] *Id.* at 220, 105 S.Ct. 1904.

[26] *Id.* at 219–20, 105 S.Ct. 1904.

[27] *Id.* at 220, 105 S.Ct. 1904.

[28] *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988).

[29] *Id.* at 401, 108 S.Ct. 1877.

agreement.[30] All that mattered for the fired employee's state law claim was whether she was discharged and whether the employer's motive was to interfere with or deter filing of her workers' compensation claim.[31] This retaliatory discharge claim would be resolved by a "purely factual inquiry" not requiring the court to construe the collective bargaining agreement.[32]

Livadas v. Bradshaw[33] and *Hawaiian Airlines v. Norris*,[34] from almost a quarter century ago, are our most recent guidance from the Court. They expand the independent state right exception to broad Railway Labor Act preemption.

In *Livadas*, a state law required an employer to pay a fired employee's wages immediately, but company practice was to send a check from the central office, which would arrive a few days after termination.[35] The employee filed a claim against her employer in the appropriate state agency, but the state agency, citing its nonenforcement policy, refused to enforce her claim against her employer because it would have to look to the collective bargaining agreement to determine her wage rate.[36] The amount due was undisputed and had in fact already been paid, albeit not immediately.[37] She filed

30 *Id.* at 407–10, 108 S.Ct. 1877.

31 *Id.* at 407, 108 S.Ct. 1877.

32 *Id.*

33 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994).

34 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994).

35 *Livadas*, 512 U.S. at 111, 114 S.Ct. 2068.

36 *Id.* at 112–13, 114 S.Ct. 2068.

37 *Id.* at 113–14, 114 S.Ct. 2068.

a 1983 action against the state agency seeking a declaration that the agency's enforcement policy was preempted by the National Labor Relations Act.[38] We ruled that the policy was not preempted,[39] but were reversed.[40] The Court held that the state agency's policy disadvantaged workers who had entered into collective bargaining agreements, since unrepresented workers could get agency enforcement,[41] so the National Labor Relations Act antidiscrimination provision preempted the state agency from refusing to enforce a claim on account of preemption. The collective bargaining agreement said nothing about when the wages due to fired employees had to be paid. The Court held that a claim under state law was not preempted because the question whether wages really were due immediately was one of state law "entirely independent" of any understanding of the collective bargaining agreement, and the amount the employee was entitled to was undisputed.[42]

Because the collective bargaining agreement was silent, *Livadas* created no tension with most of the previously articulated standards: "inextricably intertwined"; requires "analysis" of the collective bargaining agreement's terms; "independent" and "purely factual"; not requiring that anyone "construe"

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[38] *Id.* at 111–12, 114 S.Ct. 2068.

[39] *Livadas v. Aubry*, 987 F.2d 552, 559–60 (9th Cir. 1991).

[40] *Livadas*, 512 U.S. at 110, 114 S.Ct. 2068.

[41] *Id.* at 128–30, 114 S.Ct. 2068.

[42] *Id.* at 124–25, 114 S.Ct. 2068.

the agreement. Citing to *Lueck*[43] and *Lingle*,[44] *Livadas* holds that federal preemption cannot not be read so broadly as to "pre-empt nonnegotiable rights conferred on individual employees as a matter of state law," regardless of whether the underlying facts could also have given rise to a grievance under the collective bargaining agreement.[45] In the context of a claim where the only reference to the collective bargaining agreement would have been determination of the undisputed fact of Livadas's wage rate, the "bare fact that a collective bargaining agreement will be consulted" though its meaning was undisputed, would not require preemption.[46] The determination whether the employee was entitled to a penalty for not having been paid "immediately" depended only on a calendar, and was "entirely independent of any understanding embodied in the collective bargaining agreement."[47] The agency would merely "look to" the collective bargaining agreement for the wage rates, which was undisputed. [48]

The other preemption case from the 1993 term, *Hawaiian Airlines, Inc. v. Norris*, involved an employee who claimed he was fired in violation of a state "Whistleblower Protection Act" because he

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[43] *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985).

[44] *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988).

[45] *Livadas*, 512 U.S. at 123, 114 S.Ct. 2068.

[46] *Id.* at 124, 114 S.Ct. 2068.

[47] *Id.* at 125, 114 S.Ct. 2068.

[48] *Id.* (citing *Lingle*, 486 U.S. at 413 n.12, 108 S.Ct. 1877).

refused to certify a plane he thought was unsafe.[49] As in *Livadas*, the Court held that even though the basis for an independent state law claim could give rise to a grievance pursuant to the collective bargaining agreement, that did not imply that only a grievance could be brought, to the exclusion of a claim in state court.[50] The "only source" of the right the fired employee sought to enforce, protection of whistle blowers, was state law.[51] "[W]here the resolution of a state-law claim depends on an interpretation of the CBA, the claim is preempted,"[52] but "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement."[53] State law claims "entirely independent" of the collective bargaining agreement are not preempted and subject to Railway Labor Act or LMRA arbitration.[54]

We have had quite a few opportunities in the decades since these decisions to try to apply them, and have articulated varying formulas for adjudication. In so doing, we have recognized that distinguishing preempted from non-preempted claims under state

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[49] 512 U.S. 246, 249–51, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994).

[50] *Id.* at 261, 114 S.Ct. 2239 ("[T]he existence of a potential CBA-based remedy d[oes] not deprive an employee of independent remedies available under state law.").

[51] *Id.* at 258, 114 S.Ct. 2239 (quoting *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 324, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972)).

[52] *Id.* at 261, 114 S.Ct. 2239.

[53] *Id.* at 262, 114 S.Ct. 2239 (quoting *Lingle*, 486 U.S. at 408–10, 108 S.Ct. 1877 (1988)).

[54] *Id.* at 259 & n.10, 114 S.Ct. 2239.

law "is not a task that always 'lends itself to analytical precision.'"[55] The fundamental question is always whether the state right is sufficiently independent of the collective bargaining agreement to avoid the broad preemption of the National Labor Relations Act and Railway Labor Act. That is a question requiring judgment about the facts and agreement in the particular case, and cannot be resolved merely by relying on one or another of the varying words and phrases in the cases: "inextricably intertwined," "analysis of the terms," "entirely independent," "interpretation," and "look to."

We have developed, as our tool for making that unavoidable judgment, a three-step decision tree. The background is the broad preemption of the Supreme Court decisions discussed above. Our three-step decision tree says when the exception to preemption for an independent state right can be made:

> [The] court must consider: (1) whether the CBA contains provisions that govern the actions giving rise to a state claim, and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and (3) whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract. A state law will be preempted only if the answer to the first

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[55] *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1060 (9th Cir. 2007) (quoting *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 689 (9th Cir. 2001) (en banc)).

> question is "yes," and the answer to either the second or third is "no."[56]

Since a "yes" answer to the first question, and a "no" to either of the other two, compels preemption, we often have not needed to address all three.

In the cases in which we identified an independent state claim that was not preempted, most frequently the dispute was the extent to which the collective bargaining agreement had to be considered to decide whether the state claim was so independent as not to be preempted. The California disability discrimination claims were not preempted in *Jimeno* and *Espinal*, because the collective bargaining agreement contained no general antidiscrimination clause, and the state discrimination claim could be evaluated without construing the collective bargaining agreement.[57] In *Balcorta v. Twentieth Century–Fox Film Corp.*, we held that a California statute requiring motion picture employees to be paid within 24 hours of discharge was not preempted, because a cursory examination of the collective bargaining agreement showed that it did not say what "discharge" meant or when a discharged employee had to be paid.[58] The state law claim did not "require us even to refer to the collective bargaining

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[56] *Miller v. AT&T Network Sys.*, 850 F.2d 543, 548 (9th Cir. 1988) (footnote omitted); *see also Espinal v. Nw. Airlines*, 90 F.3d 1452, 1457 (9th Cir. 1996) (quoting the *Miller* standard); *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1523 (9th Cir. 1995) (same); *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 240 (9th Cir. 1990) (same).

[57] *Espinal v. Nw. Airlines*, 90 F.3d 1452, 1457 (9th Cir. 1996); *Jimeno*, 66 F.3d at 1524.

[58] 208 F.3d 1102 (9th Cir. 2000).

agreement, let alone interpret it."[59] In *Cramer v. Consolidated Freightways, Inc.*, a California law prohibiting two-way mirrors that allowed observation of toilets was not preempted, because the employees' privacy claims were "not even arguably covered by the collective bargaining agreement."[60]

Burnside v. Kiewit Pacific Corp. perhaps goes the furthest of any of our cases in rejecting preemption, since the employees' state law claim for additional compensation for daily meetings and travel time was addressed to some extent in the collective bargaining agreement.[61] But state law provided that the state rule applied "unless the collective bargaining agreement *expressly* provides otherwise."[62] The union and employer could opt out of the state law rule, but the collective bargaining agreement did not expressly so provide. Thus the state rule required only a look at the collective bargaining agreement to see whether there was an express "opt-out," and no further analysis of it was needed to adjudicate the state claim. We limited our decision: "Our decision today reaches only opt-out, not opt-in statutes."[63]

On the other hand, we held that the state claim was preempted in *Firestone v. Southern California Gas Co.*[64] The state law claim was for overtime at time and a half, but had an exemption for collective

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[59] *Id.* at 1111.

[60] 255 F.3d 683, 688 (9th Cir. 2000) (en banc).

[61] 491 F.3d 1053 (9th Cir. 2007).

[62] *Id.* at 1062 (emphasis added).

[63] *Id.* at 1064 n.11.

[64] 219 F.3d 1063 (9th Cir. 2000).

bargaining agreements that met certain terms.[65] Because the claim required "the collective bargaining agreement [to] be interpreted to determine . . . whether California's overtime exemption provision applies," it was not sufficiently "independent" to avoid preemption.[66] We distinguished *Livadas* because there the collective bargaining agreement had no terms that needed to be "interpreted."[67]

The words used to describe what distinguishes an independent state right are not talismanic, and are not consistent from case to case. The Supreme Court has used "analysis of the terms," "construe," requiring "interpretation," and other phrases, and we have likewise used "consult," "interpret," "look at," "analysis," and others.[68] We have recognized the opacity of these attempts to draw a line between independent and intertwined state claims. In *Balcorta*, we called the line "hazy."[69] In *Cramer* and *Burnside*, we said it was not "a line that lends itself to analytical precision."[70]

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[65] *Id.* at 1066.

[66] *Id.* at 1066–68.

[67] *Id.* at 1067.

[68] Many cases also tell us that we may not allow the scope of preemption to grow from an "acorn" into a "mighty oak." *See, e.g.*, *Livadas v. Bradshaw*, 512 U.S. 107, 122, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005).

[69] *Balcorta v. Twentieth Century–Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000) (quoting *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 749 (9th Cir. 1993)).

[70] *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001) (en banc); *see Burnside v. Kiewit Pacific Corp.*,

What we wind up with from all these cases is the need to exercise judgment, not a mechanical rule. Our three part test and words and phrases establish only a "hazy" and indeterminate line between independent state rights and state rights inextricably intertwined with the collective bargaining agreement. In this case, the sounder view is that the state law right and the collective bargaining agreement are indeed inextricably intertwined.

The Washington statute says that whatever right to leave to care for family members the employee has depends on her collective bargaining agreement. We held in *Burnside* that "if the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there."[71] In this case, the right established by state law is a right to use paid leave to take care of a sick child or other designated family members:

> (1) If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for:
>
> > (a) A child of the employee with a health condition that requires treatment or supervision; or

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491 F.3d 1053, 1060 (9th Cir. 2007) (quoting *Cramer*, 255 F.3d at 691).

[71] *Burnside*, 491 F.3d at 1059

> (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition.
>
> An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.
>
> (2) Use of leave other than sick leave or other paid time off to care for a child, spouse, parent, parent-in-law, or grandparent under the circumstances described in this section shall be governed by the terms of the appropriate collective bargaining agreement or employer policy, as applicable.[72]

The statute expressly limits the right it establishes to employees "entitled" to leave "under the terms of a collective bargaining agreement or employer policy." The employee "must comply" with those terms "except for any terms relating to the choice of leave." This dependence of the state claim on the terms of the collective bargaining agreement means that the collective bargaining agreement has to be analyzed to see whether the employee is entitled to paid leave as in *Firestone*. If the flight attendant is entitled to leave under the collective bargaining agreement, she can use it to care for her son when he is ill. If not, not. The statute directs us to the collective bargaining agreement to determine whether the employee is entitled to any leave.

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[72] Wash. Rev. Code § 49.12.270.

Under the three part test, "if the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there."[73] Since the statute creates no right to any kind of paid leave, and conditions its expansion of rights upon an employee entitlement under the collective bargaining agreement, "the analysis ends there." The right to leave in this case is "substantially dependent on analysis of a collective-bargaining agreement."[74] Therefore it is preempted.

The union and the state agency argue that no "analysis" of the collective bargaining agreement is needed because of "the undisputed restrictions" the collective bargaining agreement places on use of prescheduled vacation leave. Because they do not dispute that Masserant was *not* entitled to use her vacation leave scheduled for December to care for her sick child in May, they argue, no analysis is necessary. They argue that because a mere "look to" the collective bargaining agreement and employer practice establishes that she is not entitled to use her December leave in May, no "analysis" is needed, so they avoid preemption under the second prong of the three part test. Whatever right she has, they argue, arises solely out of the Washington statute.

That argument would fit a statute saying "regardless of whether an employee is entitled to paid leave under a collective bargaining agreement or

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[73] *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007).

[74] *Id.* at 1059 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)); *see Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985).

employer policy, the employee is nevertheless entitled to up to ten days of leave per year to care for sick family members," because it would establish a right independent of the collective bargaining agreement. But the Washington statute says the opposite, that the employee entitlement is conditioned upon her entitlement to paid time off under the collective bargaining agreement. She has to show an entitlement to leave under the collective bargaining agreement to use her leave to care for her sick child, according to the statute. Thus whatever right Masserant has cannot, by the terms of the statute, arise "solely" out of the statute.

The argument for Masserant seems to be that no "analysis" of the collective bargaining agreement is needed because it is plain and undisputed that she is not entitled to paid leave under it. That argument is mistaken for two reasons. First, it ignores the purpose of the distinction between "analysis" and mere "looking at." The purpose is to distinguish independent state rights from rights intertwined with the collective bargaining agreement. The purpose is not to distinguish hard from easy analysis. "Analysis," in the context of determining whether the state right is independent of the collective bargaining agreement, refers to whether the state claim cannot logically be determined independently of the provisions of the collective bargaining agreement. If the right is not logically independent, it's not "independent," whether the analysis is intellectually challenging or not. Otherwise, the point of the distinction, preserving a uniform meaning to the collective bargaining agreement, would be defeated. Any analysis can be made to sound simple or complex.

Second, the argument overlooks the first part of the three part test, a barrier which, if not overcome, precludes any need to ask whether the collective bargaining agreement would be analyzed in the state proceeding. Preemption applies because the right to take paid leave arises solely from the collective bargaining agreement. This statute only applies if the employee has a right conferred by the collective bargaining agreement, so the state right is intertwined with, and not independent of the collective bargaining agreement.

Our dissenting colleague relies heavily on our recent decision in *Kobold*,[75] but, as *Kobold* says, that case was "similar to *Livadas* in all pertinent respects" because the outcome was controlled by the calendar, not the collective bargaining agreement.[76] *Kobold* did not expand Railway Labor Act preemption. The Oregon statute required the employer to pay the deducted amount within seven days of when the wages were due.[77] "Seven days" could be counted out on a calendar and needed no analysis of the collective bargaining agreement. Likewise, *Kobold* held that the breach of fiduciary duty claim, relying on two Oregon statutes, was not preempted because "[t]he statutory provisions create and impose duties on an employer independent of a CBA."[78] By contrast, the Washington statute at issue in this case creates a duty conditioned and dependent on the collective bargaining agreement.

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[75] 832 F.3d 1024 (9th Cir. 2016).

[76] *Id.* at 1040.

[77] *Id.*

[78] *Id.* at 1041.

Preemption of course does not mean that Masserant was not entitled to use her December vacation time in May to care for her son. All it means is that the question whether she could use her vacation leave in advance of her scheduled time for this purpose is to be determined by the dispute resolution process in the collective bargaining agreement, not by the state claim resolution process. All we decide is which dispute resolution process must be used, not what result it must reach.

The district court erred by rejecting preemption. Accordingly, we reverse and remand for appropriate resolution so that the dispute can be resolved by the process established in the collective bargaining agreement.

REVERSED AND REMANDED.

CHRISTEN, Circuit Judge, dissenting:

The district court recognized that the underlying issue in Masserant's claim is not what benefits the collective bargaining agreement provides, it is whether the terms of the parties' CBA violate the Washington Family Care Act. Masserant argues that the WFCA creates "non-negotiable rights" that Alaska Airlines and AFA could not bargain away. To resolve Masserant's claim, the CBA need not be interpreted. The parties agree that the CBA identifies circumstances under which accrued and scheduled leave may be used, and using scheduled leave to care for an employee's sick child is not one of those circumstances. In my view, the district court correctly ruled that the right Masserant asserts arises from the WFCA, if it exists at all. Masserant's claim is not dependent upon the CBA; it is not

preempted; and she should be allowed to pursue it in the state administrative and judicial process. For these reasons, I respectfully dissent.

I. Masserant's claim is not preempted by the Railway Labor Act.

Masserant filed a Personal Leave Complaint with the Washington Department of Labor & Industries in which she argued that the terms of the parties' CBA violate the WFCA. She prevailed at the first level of the Department's administrative process and the Department issued a $200 notice of infraction to Alaska Airlines for denying her leave request. Alaska Airlines filed this action in federal court seeking a declaration that Masserant's claim and the WFCA choice-of-leave provisions are preempted by the Railway Labor Act (RLA). *See* 45 U.S.C. § 151–188; Wash. Rev. Code § 49.12.265–.295. The district court agreed with Masserant, her union, and the Department of Labor & Industries that the RLA does not preempt state enforcement of the WFCA because Masserant's WFCA claims are independent of the parties' CBA.

On appeal to our court, Alaska Airlines argues that the RLA requires Masserant to litigate her dispute via the mandatory grievance procedures outlined in the CBA, rather than through state administrative procedures. The RLA requires that minor disputes, such as the one at issue here, must first be addressed in the carrier's internal dispute resolution process and, if not resolved there, presented to an Adjustment Board comprised of

workers and management.[1] *See* 45 U.S.C. § 184; *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). The RLA preempts state law claims that interfere with the Adjustment Board's exclusive jurisdiction to resolve minor disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). If a claim is based on rights independently conferred by state law, not by a CBA, it is not preempted. *See Livadas v. Bradshaw*, 512 U.S. 107, 125, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). We examine Masserant's claim closely because the Supreme Court has cautioned that federal laws "cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of state law." *Livadas*, 512 U.S. at 123, 114 S.Ct. 2068.

In *Burnside v. Kiewit Pacific Corp.*, our court articulated a two-part test for determining whether a state law claim that appears to implicate a collective bargaining agreement is preempted by § 301 of the Labor Management Relations Act (LMRA). *See* 491 F.3d 1053. The *Burnside* test is critical to the

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[1] The RLA divides labor disputes into "major" and "minor" disputes. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562–64, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). "Major disputes" are "those arising 'out of the formation or change of collective bargaining agreements.'" *Id.* at 563, 107 S.Ct. 1410 (quoting *Detroit & T.S.L.R. Co. v. Transp. Union*, 396 U.S. 142, 145 n.5, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969)). "Minor disputes" are those "'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'" *Id.* (quoting 45 U.S.C. § 153). The parties agree that only the minor dispute procedures are relevant to this appeal.

outcome of this appeal because the Supreme Court has held that the preemption standard under LMRA § 301 is the same one that applies to the RLA. *See Hawaiian Airlines*, 512 U.S. at 260, 114 S.Ct. 2239. Under *Burnside*, the court first inquires whether the asserted cause of action involves a right conferred on the employee by virtue of state law or by the terms of a CBA. *Burnside*, 491 F.3d at 1059. "If the right exists solely as a result of the CBA, then the claim is preempted, [ ] our analysis ends there," and the claim must be resolved under the RLA's mandatory arbitral mechanisms. *Id*; *see Hawaiian Airlines*, 512 U.S. at 252, 114 S.Ct. 2239 ("[Claims preempted under the RLA] must be resolved only through the RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions."). Even if the asserted right does exist independently of the CBA, at step two the court must "consider whether it is nevertheless 'substantially dependent on analysis of a collective-bargaining agreement.'" *Burnside*, 491 F.3d at 1059 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)). Claims that are substantially dependent on an analysis of a CBA are also preempted. *Id.* at 1060.

This court recently explained the policies underlying *Burnside*'s two-part test:

> The *Burnside* factors reflect two driving concerns of preemption doctrine: first, preventing "parties' efforts to renege on their arbitration promises by 'relabeling' as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements," *Livadas*, 512 U.S. at 123, 114 S.Ct. 2068, and second, preserving "a

> central tenet of federal labor-contract law . . . that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance," *Lueck*, 471 U.S. at 220, 105 S.Ct. 1904.

Kobold v. Good Samaritan Reg'l Med. Ctr., 832 F.3d 1024, 1033 (9th Cir. 2016). Masserant's claim implicates neither of the aforementioned concerns: she does not claim under the guise of a tort lawsuit that Alaska Airlines breached its contract with her, nor does she ask the court to interpret her CBA.

A. Masserant's complaint with the Department of Labor & Industries involves a right that exists, if at all, by virtue of state law.

Burnside made clear that the operative inquiry at the first step of this preemption analysis is whether the right at issue is conferred by state law or by the CBA. *See Burnside*, 491 F.3d at 1059. "[T]o determine whether a particular right inheres in state law," courts "consider 'the *legal* character of [the] claim, as independent of rights under the collective-bargaining agreement [and] not whether a grievance arising from precisely the same set of facts could be pursued.'" *Id.* at 1060 (second alteration in original) (quoting *Livadas*, 512 U.S. at 123, 114 S.Ct. 2068).

It is easy to imagine another similarly situated flight attendant who might be bound to arbitration, such as an employee who contests whether she had accrued the leave at issue. Because the CBA determines how available leave should be calculated, this hypothetical flight attendant's asserted right would arise from the CBA, and, at step one our analysis would end. *See Burnside*, 491 F.3d at 1059.

Masserant's claim is different because she asserts a different right, and to apply the *Burnside* test properly, it is critical to identify the precise right asserted.[2] Masserant prescheduled her accrued vacation leave for December, but sought to use it early to care for her sick child. She claims the right to *use* accrued leave in a certain way, not the right to additional accrued leave. Notably, Alaska Airlines does not dispute that Masserant's leave had accrued; it objects to Masserant's insistence that she should be free to reschedule it. The district court recognized that the right at issue is the right to use accrued leave, as do the parties. Masserant describes her claim as a violation of the WFCA based on "earned time that [she] was denied to use [by Alaska Airlines]"; Alaska Airlines acknowledges that the asserted right is Masserant's "claimed right to reschedule her December vacation days for May"; and the Department of Labor & Industries frames the question as whether the WFCA "confers an independent statutory right of *flexibility* that is superimposed on whatever leave is available to an employee under a collective bargaining agreement or employer policy."

The majority concludes that Masserant asserts a right that is not independent from the CBA because "the [WFCA] creates no right to any kind of paid leave, and conditions its expansion of rights upon an

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[2] The Supreme Court has cautioned that this preemption analysis must be conducted on a case-by-base basis. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) ("The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."); *see Adkins v. Mireles*, 526 F.3d 531, 541 (9th Cir. 2008).

employee entitlement under the collective bargaining agreement." Because Masserant does not argue that the WFCA creates a right to paid leave, or claim to be entitled to additional leave, or even that she is entitled to use her accrued leave early under the terms of the CBA, the court's reasoning misses the mark. Masserant asserts the right to use her accrued vacation leave as family medical leave, a right that *might* arise from the statutory protections within the WFCA, but one that certainly is not provided by the CBA.

The majority reasons that because the WFCA refers to leave provided under the terms of a CBA, "whatever right Masserant has cannot, by the terms of the statute, rise 'solely' out of the statute." But under *Burnside*'s first step, the question is whether the asserted right "exists independently of the CBA," not whether it arises solely out of statute. *Burnside*, 491 F.3d at 1059 ("If the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there."). A claim is not preempted just because it is based on a state statute that refers to rights included in a CBA. For example, in *Livadas*, the Supreme Court concluded that LMRA § 301 did not preempt a claim challenging an employer's failure to promptly pay wages at the time of severance. 512 U.S. at 125, 114 S.Ct. 2068. The court recognized that the employee's right to be paid arose from the CBA, but because the employee contested the failure to pay severance wages *promptly*, and the right to prompt payment was afforded only by the state statute, the claim was not preempted. *Id.* (holding the right at issue arose out of state law because "[b]eyond the simple need to refer to bargained-for wage rates in

computing the penalty, the collective-bargaining agreement [wa]s irrelevant to the dispute").

Our recent decision in *Kobold* supports Masserant's position. *See* 832 F.3d 1024. In one of the appeals consolidated in *Kobold*, the court addressed an Oregon statute that permitted employers to deduct a portion of employees' wages as health insurance premiums if authorized to do so by a CBA. *Id.* at 1037–42. The statute made such deductions unlawful if the funds were not properly applied to pay insurance premiums within the time specified by the CBA or, if the CBA was silent, within the statutory limit of seven days. *Id.* at 1038. The allegation in *Kobold* was that the employer failed to transmit the withheld insurance premiums to the health insurance plan in a timely manner. *Id.* at 1037. Our court held that the claim was not preempted, even though the CBA provided for this type of pay deduction, because the asserted claim was for the failure to remit the deductions in a timely manner, and only the statute specified a seven-day limitation for transmitting the withheld premiums. *Id.* at 1040. The CBA did not specify a time period. *Id.* Our court also held that the *Kobold* plaintiff's breach of fiduciary duty claim was not preempted because the Oregon statute governing such claims "create[d] and impose[d] duties on an employer independent of a CBA." *Id.* at 1041. In contrast, the *Kobold* court ruled that the same plaintiff's claim for money had and received was preempted, because "[the employer's] authority to deduct funds from [the plaintiff's] paychecks and [the plaintiff's] right to have those funds applied toward his health insurance premiums" were based on the CBA and without the

CBA, the plaintiff "would have no basis upon which to bring the money had and received claim." *Id.*

It is not enough that a CBA refers to a right that is provided by statute. Our court has held that a claim based on a statutorily guaranteed right is not preempted, even when the CBA generally provides for a similar right. *See Balcorta v. Twentieth Century–Fox Film Corp.*, 208 F.3d 1102 (9th Cir. 2000). In *Balcorta*, we held that a California law requiring employers to pay certain employees in the film industry within twenty-four hours of their discharge was not preempted by LMRA § 301. *Id.* The right to payment and the timeliness of the payments were addressed by the CBA, but we concluded the claim for failure to tender payment within twenty-four hours was not preempted because "whether a violation has occurred is controlled only by the provisions of the state statute and does not turn on whether the payment was timely under the provisions of the collective bargaining agreement." *Id.* at 1111; *see also Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1082 (9th Cir. 2005) (holding claim was not preempted where it was based on a statutorily guaranteed right to work-free meal periods even though the CBA purported to waive the right to work-free meal periods).

Like the rights at issue in *Livadas*, *Kobold*, and *Balcorta*, if Masserant has the right to use her vacation time for family leave, it arises from a state statute, here, the WFCA, and not from the parties' CBA.

B. The right Masserant asserts is not substantially dependent on analysis of the CBA.

The second step of the *Burnside* analysis requires a "determin[ation] whether a state law right is 'substantially dependent' on the terms of a CBA."[3] *Burnside*, 491 F.3d at 1060 (citation omitted). To apply this part of the test, a court must "decide whether the claim can be resolved by 'look[ing] to' versus interpreting the CBA." *Id.* (alteration in original) (citation omitted). The line between "looking to" and "interpreting" is sometimes less than clear-cut, but "'when the meaning of contract terms is not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.'" *Id.* (alteration in original) (quoting *Livadas*, 512 U.S. at 125, 114 S.Ct. 2068); *see Hawaiian Airlines*, 512 U.S. at 262, 114 S.Ct. 2239 ("[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for . . . pre-emption purposes." (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 408–10, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988))).

In *Kobold*, where the state law required employers to transmit paycheck deductions to health insurance plans in a timely manner, we held that the claim was not preempted at *Burnside*'s second step because the CBA "unambiguously specif[ied]" the parties' rights and obligations and therefore did not require interpretation. 832 F.3d at 1040; *see also Balcorta*,

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[3] Although the majority analyzes Masserant's claim in the context of *Burnside*'s step two, it ultimately relies on step one to conclude that Masserant's claim is preempted.

208 F.3d at 1109–10 (holding claim not preempted where court is required to "read and apply" CBA provisions that are "neither uncertain nor ambiguous"). In *Matson v. United Parcel Service, Inc.*, 840 F.3d 1126 (9th Cir. 2016), we held that a hostile work environment claim only "peripheral[ly]" involved the CBA and was not preempted because no interpretation of the CBA was required. *Id.* at 1134–35. *Matson* involved an employee who claimed that she was subject to a hostile work environment, in part because her supervisors assigned "extra work" in a way that favored male co-workers. *Id.* at 1129. The employer argued that the employee's claim was preempted because the term "extra work" appeared in the CBA and her claim could not be resolved without interpreting the term. *Id.* at 1133. But the employee's hostile work environment claim was not dependent upon consideration of the extra work assignments because her contention that extra work was disproportionately assigned to male coworkers was just one example of ways in which the employee argued her male coworkers were favored. *Id.* We explained that the hostile work environment claim was not preempted at *Burnside*'s second step because "[t]he correct interpretation of the CBA . . . [was] purely peripheral to the relevant question with respect to assigning work." *Id.* at 1134–35.

In Masserant's case, the key provisions of the CBA are also wholly undisputed and do not require interpretation. As of May 2011, when her child was ill, Masserant had an accrued paid vacation scheduled for December. The CBA permits vacation leave to be used at unscheduled times in certain circumstances, but does not address whether vacation leave may be used for an absence due to a flight

attendant's own illness or a child's illness. Because "[t]here is nothing in the . . . CBA to interpret," the WFCA's state-law right is not substantially dependent on the CBA. *See Kobold*, 832 F.3d at 1040.

The majority concludes that because Masserant refers to the CBA's leave provision to argue that it violates the WFCA, some "analysis" is required. But it does not explain why the CBA must be consulted, much less analyzed. On this record, I conclude that Masserant's claim does not "substantially depend" on analysis of the CBA, and that it is not preempted under the second prong of *Burnside*.

There is persuasive force to Alaska's argument that "crew absences present unique concerns in the airline industry," because "without the requisite number of flight attendants on board, a plane cannot take off." But the limited question before this panel is the proper forum for resolving the important underlying questions raised by Masserant's claim. I would hold only that the district court correctly concluded that the Washington Department of Labor & Industries' enforcement of Masserant's WFCA complaint is not preempted by the RLA, and that the correct forum for resolving the parties' dispute is the state administrative process.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALASKA AIRLINES, INC., Plaintiff, v. JUDY SCHURKE, et al., Defendants, and ASSOCIATION OF FLIGHT ATTENDANTS – COMMUNICATION WORKERS OF AMERICA, AFL-CIO Intervenor.	CASE NO. C11-0616JLR ORDER GRANTING DEFENDANTS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the court are three cross motions for summary judgment filed by Plaintiff Alaska Airlines ("Alaska") (2d Alaska SJ Mot. (Dkt. # 78)), Defendants Judy Schurke and Elizabeth Smith (collectively "Defendants") (2d Def. SJ Mot. (Dkt. # 82)), and Intervenor Association of Flight Attendants – Communication Workers of America, AFL-CIO ("AFA") (AFA SJ Mot. (Dkt. # 87)). This is a preemption case, arising out of a dispute between Alaska and the Washington State Department of Labor and Industries ("the Department"). (1st Am. Compl. (Dkt. # 49) ¶ 3.) The Department investigated complaints filed by Alaska flight attendants, who

alleged that Alaska violated the Washington Family Care Act ("WFCA"), RCW 49.12.265-290. (1st Am. Compl. ¶ 28.) Defendants Judy Schurke and Elizabeth Smith have been named in their official capacities as the Department's Director and Employment Standards Program Manager, respectively. (*See generally*, *id.*).

Alaska does not dispute its obligation to comply with the WFCA and admits that the statute confers "nonnegotiable" rights on employees. (1st Alaska SJ Mot. (Dkt. # 4) at 7; Resp. to 1st Def. SJ Mot. (Dkt. # 26) at 11.) According to Alaska, however, flight attendant complaints regarding compliance with the WFCA should be resolved through the mandatory grievance procedures established in the collective bargaining agreement between Alaska and AFA ("Alaska CBA"). (1st Am. Compl. ¶¶ 13, 14.) In a previous order, the court dismissed Alaska's first complaint (Compl. (Dkt. # 1)) on ripeness grounds, holding that it could not conduct a case-by-case preemption analysis because no actual employee's complaint was before the court. (*See generally* 2/14/12 Order (Dkt. # 47).) Alaska then filed an amended complaint, this time challenging Department enforcement of the WFCA both generally and with respect to a specific employee—Laura Masserant—an Alaska flight attendant. (1st Am. Compl. ¶ 3.)

In its present motion for summary judgment, Alaska seeks a declaratory judgment that the Department's enforcement activities against it with respect to the WFCA are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, both

generally and with respect to Ms. Masserant.[1] (2d Alaska SJ Mot. at 7.) Alaska also seeks a permanent injunction enjoining the Department from investigating or enforcing Ms. Masserant's WFCA complaint or other complaints filed by Alaska's flight attendants. (*Id.*) In its motion, the Department asks the court to find that the RLA does not preempt its enforcement of the WFCA with respect to Ms. Masserant's complaint as a matter of law. (2d Def. SJ Mot. at 2.) Alternatively, even if the court finds that the RLA preempts the Department's enforcement efforts with respect to Ms. Masserant, the Department asks the court to grant partial summary judgment to the Department and allow it to continue enforcing the WFCA on a case-by-case basis. (*Id.* at 2-3.) AFA, in its motion for summary judgment, asks the court to dismiss Alaska's amended complaint with prejudice. (AFA SJ Mot. at 20.)

The court has considered the parties' submissions filed in support of and opposition to the cross motions for summary judgment and the applicable law. For the reasons stated below, the court GRANTS Defendants' motion for summary judgment, GRANTS AFA's motion for summary judgment, and DENIES

[1] Alaska alleges in its first amended complaint that the Department's enforcement of the WFCA both violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and is preempted by the RLA. (1st Am. Compl. at ¶¶ 29-40.) However, the court has already explained that these causes of action are "grounded in the same theory, namely that the Department's enforcement of the WFCA conflicts with Congress' purpose in passing the RLA" and are therefore "subject to the same analysis." (2/14/12 Order at 11 n.7.) Alaska recognized the court's determination on this point in its motion. (2d Alaska SJ Mot. at 9 n.4.) The court therefore considers Alaska's Supremacy Clause argument as part of Alaska's RLA preemption argument.

Alaska's motion for summary judgment. The court rules that the RLA does not preempt state enforcement of the WFCA because Ms. Masserant's state law claims are independent of the collective bargaining agreement between Alaska and AFA.

II. BACKGROUND

A. The Washington Family Care Act

The WFCA provides that an employee who is entitled to paid time off under a collective bargaining agreement or other policy may use that paid time off to care for certain sick family members:

> (1) If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for:
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> (a) A child of the employee with a health condition that requires treatment or supervision; or
>
> (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition.
>
> An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.
>
> (2) Use of leave other than sick leave or other paid time off to care for a child, spouse, parent, parent-

> in-law, or grandparent under the circumstances described in this section shall be governed by the terms of the appropriate collective bargaining agreement or employer policy, as applicable.

RCW 49.12.270. The WFCA defines "sick leave or other paid time off" by reference to substantive leave guarantees in other sources, specifically: "time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for illness, vacation, and personal holiday." RCW 49.12.265(5). The Department is charged with enforcing the WFCA: it investigates complaints filed by employees and may issue notices of infraction if it reasonably believes the employer has failed to comply with these statutory requirements. RCW 49.12.280; RCW 49.12.285.

B. Alaska's Collective Bargaining Agreement and Leave Policies

Alaska is a federally regulated common carrier that employs over 3,000 flight attendants. (3d Link Decl. (Dkt. # 81) Ex. K) ¶ 4.) A collective bargaining agreement between Alaska and the AFA governs the flight attendants' employment. (Skey Decl. (Dkt. # 6) ¶ 8.) The parties entered into this CBA pursuant the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, which regulates collective bargaining agreements in the railroad and airline industries. (*Id.*) The RLA creates "a comprehensive framework for the resolution of labor disputes" arising out of the interpretation of CBAs in these industries. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987). Pursuant to this statute, CBAs must establish an arbitration board chosen by the parties, called a Board of Adjustment, and disputes encompassed by

the RLA must be resolved by this Board. *Id.* The Alaska CBA established a mandatory grievance procedure to provide employees with a venue for resolving these grievances, as required by the RLA. (3d Link Decl. ¶¶ 3, 8.)

The Alaska CBA also contains provisions outlining the rules for flight attendant absences. (*See generally id.*) The Alaska CBA lays out how sick time and vacation time are calculated, and also assigns disciplinary consequences for repeated absences.[2] (*Id.* ¶ 5.) Specifically, under Alaska's attendance control program, flight attendants are assessed points for absences and are disciplined when they accrue too many points. (1st Link Decl. (Dkt. # 5) ¶ 11.) According to Alaska, these disciplinary consequences do not accrue when a flight attendant's absence falls under the terms of the WFCA. (3d Link Decl. ¶ 6.) Alaska maintains it does not penalize a flight attendant who requests leave to care for a family member if, on the date of the requested leave, the flight attendant is "entitled to use" accrued vacation time to cover the absence. (*Id.* ¶ 7.) However, Alaska does not permit flight attendants to use vacation time for WFCA leave on days when they have not previously scheduled vacation time. (2d Alaska SJ Mot. at 10.)

The Alaska CBA sets out how flight attendants earn sick leave and vacation time. (3d Link Decl.

[2] At oral argument the parties acknowledged that the current dispute with respect to Ms. Masserant's complaint is limited to the use of Ms. Masserant's vacation time for family leave. The court thus limits its analysis to whether Ms. Masserant had a right to use her banked vacation time to cover her May 2011 absence and does not address the use of Ms. Masserant's sick leave to cover this absence.

¶ 11.) Alaska flight attendants accrue sick leave in terms of "trips for pay" ("TFP") based on the distance of flights they complete during a calendar month. (2d Alaska SJ Mot. at 13.) The Alaska CBA also outlines the bidding process used to determine flight attendant vacation time. (3d Link Decl. ¶¶ 11-15.) In October or November, flight attendants bid for vacation time for the following calendar year, and receive their vacation schedule based on seniority. (*Id.* ¶ 11.) Flight attendants earn vacation time during the previous calendar year, bid for specific vacation days in the fall, and on January 1 receive their vacation schedule for the entire following calendar year. (*Id.*) From January 1 forward, flight attendants may "cash out" their vacation time and receive all of their vacation pay upfront, but that means they will not receive any pay during their scheduled vacation time later in the year. (*Id.* ¶ 15.)

Other than cashing out, there are only limited circumstances under which Alaska permits flight attendants to use scheduled vacation time for other purposes. (*Id.* ¶ 12.) Alaska's longstanding practice is to only permit flight attendants to use scheduled vacation at a non-scheduled time in situations specifically outlined in the Alaska CBA. (*Id.*) The Alaska CBA specifically allows flight attendants to use vacation time for contractually covered medical, maternity, or bereavement leave, or flight attendants may trade vacations through a contractually negotiated process. (*Id.* ¶ 13.) Thus, although the Alaska CBA does not specifically address whether flight attendants may use vacation time for family leave, pursuant to its longstanding practice, Alaska does not permit flight attendants to use scheduled

vacation time for WFCA leave on unscheduled days.[3] (*Id.* ¶ 12.) Flight attendants, including Ms. Masserant, filed complaints with the Department alleging these leave practices violated the WFCA. (2d Def. SJ Mot. at 4, 7.)

C. The Department's Actions Enforcing the WFCA

During 2010, the Department began investigating complaints filed by several flight attendants who alleged Alaska violated the WFCA. (1st Am. Compl. ¶ 28.) Alaska filed its first complaint challenging the state's ability to engage in these enforcement actions on April 11, 2011 (Compl.), but the court dismissed this complaint as not ripe. (*See generally* 2/14/12

[3] Alaska concedes that the CBA does not expressly address whether flight attendants may use scheduled vacation time for family leave. (2d Alaska SJ Mot. at 23.) However, Alaska's longstanding practice is to prohibit the use of vacation time for WFCA leave (*id*), and collective bargaining agreements include implied terms arising from "practice, usage, and custom." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 264 n.10 (1994) (quoting *Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 311-12 (1989)); *see also Capraro v. United Parcel Serv.*, 993 F.2d 328, 332 (3d Cir. 1993). Indeed, at oral argument, the AFA agreed that for purposes of summary judgment, Alaska's practice regarding vacation time was part of the Alaska CBA. The Department, however, took a different position, arguing that Alaska's practice was not part of the CBA. Based on the case law cited in this footnote, for purposes of the present summary judgment motions, the court will proceed with the understanding that Alaska's longstanding practice not to permit flight attendants to use scheduled vacation time for WFCA leave on unscheduled days is an implied term of the Alaska CBA. Based on the analysis of this order, whether or not Alaska's vacation practice is incorporated into the Alaska CBA ultimately provides unimportant.

Order.) Specifically, the court found that Alaska's complaint was not prudentially ripe because courts must determine RLA preemption on a case-by-case basis. (*Id.* at 12 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)).) Alaska did not base its initial complaint on any particular flight attendant's WFCA complaint. (*Id.*) Instead, Alaska sought a wholesale ruling that the Department's enforcement of the WFCA was preempted in all instances, making this case-by-case analysis impossible. (*Id.*) The court granted leave to amend, and Alaska filed an amended complaint on March 14, 2012. (1st Am. Compl.)

In its amended complaint, Alaska challenged the Department's enforcement of the WFCA generally and with respect to a specific employee: Laura Masserant. (*Id.* ¶¶ 15-25.) Alaska argues that the RLA preempts Department enforcement of the WFCA and that the proper forum for resolving Ms. Masserant's complaint is the Board of Adjustment established by the Alaska CBA. Ms. Masserant is a flight attendant with Alaska. (*Id.* ¶ 16.) In May 2011, Ms. Masserant took time off work to care for her sick child, reporting absent for a two-day trip worth 12.2 TFP. At that time, Ms. Masserant had seven days of vacation time and 10.6 TFP of sick leave in her leave bank.[4] The seven vacation days in her leave bank

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[4] Ms. Masserant had bid for her 2011 vacation time during the fall of 2010 and received her scheduled vacation time for all of 2011 on January 1, 2011. On January 1, 2011, Ms. Masserant was scheduled for four days of vacation in January, seven days in February, seven days in April, seven days in November, and seven days from December 3 through 9, 2011. Before May 2011, Ms. Masserant took her January vacation time and cashed out her time for February, April, and November. Thus, as of May 2011, Ms. Masserant only had the seven vacation days in her

were scheduled for December 3 through 9, 2011. Pursuant to its longstanding practice, Alaska did not permit Ms. Masserant to use her vacation time scheduled for December for family leave in May. Alaska did allow Ms. Masserant to credit her 10.6 TFP of banked sick leave toward her absence, leaving her 1.8 TFP short of covering two-day trip. Later, in June 2011, Alaska allowed Ms. Masserant to cash out her December 2011, vacation time.

Believing Alaska's actions violated the WFCA, Ms. Masserant filed a complaint with the Department on June 16, 2011. The Department investigated these claims, and issued a notice of infraction against Alaska in May 2012. Specifically, the Department determined that Ms. Masserant had seven days of banked vacation time and was thus "entitled to sick leave or other paid time off" under the terms of the WFCA. According to the Department, Alaska's refusal to allow Ms. Masserant to use her banked vacation time, scheduled for December, to cover her May family sick leave violated her rights under the WFCA. The Department based these conclusions on Ms. Masserant's leave balance sheet, provided by Alaska, and maintains it did not rely on the Alaska CBA.

III. ANALYSIS

A. The Legal Standard

The parties filed cross motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. (*See generally* 2d Alaska SJ Mot.; 2d Def. SJ Mot.; AFA SJ Mot.) Courts must grant a motion for

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leave bank and those seven days were scheduled for December 2011.

summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). There is no genuine issue of material fact when the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

On a motion for summary judgment, the moving party bears the initial burden of showing there is no genuine issue of material fact and that she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets her burden, then the non-moving party "must make a showing sufficient to establish a genuine issue of material fact regarding the existence of the essential elements of the case that he must prove at trial" in order to withstand summary judgment. *Galen v. Cnty of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The court must "view the facts and draw reasonable inferences in the light must favorable to the [nonmoving] party." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

B. RLA Preemption

Under the Supremacy clause of the U.S. Constitution, art VI, cl. 2, "[a] state law is preempted when (1) Congress has expressly superseded state law, (2) Congress has regulated a field so extensively that a reasonable person would infer that Congress intended to supersede state law, and (3) [] there is a conflict between federal and state laws." *Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 748 (9th Cir. 1996) (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). Alaska does

not allege that Congress expressly preempted the Department's enforcement of the WFCA. Moreover, the enactment of the RLA "was not a preemption of the field of regulating working conditions themselves." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254 (1994) (quoting *Terminal R.R. Ass'n of S. Louis v. Trainmen*, 318 U.S. 1, 7 (1943)). Alaska's claims thus arise under the third category, so-called conflict preemption. The court must determine whether the WFCA "conflicts with or otherwise 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the [RLA]" such that it is preempted. *Livadas v. Brandshaw*, 512 U.S. 107, 120 (1994) (quoting *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local*, 468 U.S. 491, 501 (1984)).

Conflict preemption ultimately depends on congressional intent. *Norris*, 512 U.S. at 252 (citing *Lueck*, 471 U.S. at 208). Courts do not lightly infer preemption of employment standards within a state's traditional police powers, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987), and will only read a federal statute to preempt state law if this is "the clear and manifest purpose of Congress." *Norris*, 512 U.S. at 252 (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)). Congress's purpose in passing the RLA was "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Id.* Labor law uniquely requires uniform dispute resolution and contract interpretation because "the possibility that individual contract terms might have different meaning under state and federal law would inevitably exert a disruptive influence upon the negotiation and

administration of collective agreements." *Lueck*, 471 U.S. at 210.

To promote stability and uniform law, "the RLA establishes a mandatory arbitral mechanism for the prompt and orderly settlement of two classes of disputes"—major and minor. *Norris*, 512 U.S. at 252 (internal citation and quotation omitted). Major disputes relate to "the formation of collective bargaining agreements or efforts to secure them." *Norris*, 512 U.S. at 252 (citation omitted). Minor disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Id.* at 252-53 (citation omitted). In *Norris*, the Court explained that if a plaintiff's state-law claim is in fact a major or minor dispute it must be resolved through the mandatory arbitral mechanism established by the RLA, and the plaintiff's claim is preempted. *Id.* However, there is no preemption when a plaintiff's claim is not a minor or major dispute because "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 412 (1988) (quoting *Buell*, 480 U.S. at 564-65). Alaska does not claim that this case involves a major dispute and instead argues that Ms. Masserant's complaints are minor disputes that must be resolved by the procedures established in the Alaska CBA. (2d Alaska SJ Mot. at 21.)

To determine whether the RLA preempts state law, courts must look to the source of the right asserted. *Espinal v. Nw. Airlines*, 90 F.3d 1452, 1456 (9th Cir. 1996). The RLA preempts claims that are "grounded in the CBA" and that involve "the

interpretation or application of existing labor agreements." *Norris*, 512 U.S. at 256. By contrast, the RLA does not preempt a state-law cause of action "if it involves rights and obligations that exist independent of the CBA." *Id.* at 260. There is no RLA preemption where a statute "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract." *Lueck*, 471 U.S. at 213.

Based on these principles, the Ninth Circuit Court of Appeals articulated a two-part test to determine if the RLA preempts state law. First, courts inquire "into whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA." *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). Second, even if "the right exists independently of the CBA, [the court] must still consider whether [the right] is nevertheless substantially dependent on analysis of a collective-bargaining agreement." *Id.* Courts apply this preemption test on a case-by-case basis, looking to the actual claims and facts at hand. *See, e.g.*, *Lueck*, 471 U.S. at 220 ("The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."); *Adkins v. Mireles*, 526 F.3d 531, 541 (9th Cir. 2008) ("Preemption analysis should take place on a case by case basis."). Alaska now challenges the Department's enforcement of the WFCA with respect to a specific employee, Ms. Masserant. For this reason, the court finds that Alaska's claims are prudentially ripe, and turns to whether the RLA preempts state enforcement of the WFCA under the *Burnside* two-part test.

1. Whether Ms. Masserant's Rights Derive from the Alaska CBA

The parties agree that the central issue in this case is whether Ms. Masserant had a right to use the vacation time in her leave bank, scheduled for December 2011, to care for her sick child in May 2011.[5] (2d Alaska SJ Mot. at 22; 2d Def. SJ Mot. at 14; AFA SJ Mot. at 14-15.) The court must first determine whether this asserted right arises from state law or from the Alaska CBA itself. *Burnside*, 491 F.3d at 1059. "If the right exists solely as a result of the CBA, then the claim is preempted, and [the court's] analysis ends there." *Id.* To determine whether a right arises from state law or a CBA, courts consider "the *legal* character of a claim, as 'independent' of rights under the collective-bargaining agreement [and] not whether a grievance arising from 'precisely the same set of facts' could be pursued" via the dispute resolution mechanism established by the CBA. *Id.* at 1060 (quoting *Livadas*,

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[5] In its motion for summary judgment, Alaska argues that the Department could not investigate Ms. Masserant's complaints about the use of her vacation time or the use of her sick leave to cover her two-day absence. (2d Alaska SJ Mot. at 21-23.) Alaska argues that any right Ms. Masserant may have to use her sick leave before it is credited to her leave bank derives from the Alaska CBA, or is at least substantially dependent on interpreting the Alaska CBA. (*Id.* at 21-22.) However, the Department only determined that Alaska violated the WFCA by disallowing the use of her banked vacation time to cover her absence. (2d Def. SJ Mot. at 13.) The court thus limits its analysis to whether Ms. Masserant had a right to use her banked vacation time independent from the Alaska CBA and does not address the use of Ms. Masserant's sick leave not yet credited to her leave bank.

512 U.S. at 123 (citation omitted)) (emphasis in *Burnside*).

Alaska argues that this dispute arises from the CBA because, under the terms of the CBA and Alaska's longstanding practice, Ms. Masserant was not "entitled to use" her vacation time for WFCA leave on dates other than those scheduled. (2d Alaska SJ Mot. at 22.) However, this argument fundamentally misunderstands the rights guaranteed by the WFCA. The WFCA does not guarantee a substantive right to family care leave. Instead, it provides employees with the right to *use* any leave guaranteed by other sources to care for sick family members: "If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for [certain family members]." RCW 49.12.270.

As Alaska correctly points out, Ms. Masserant had no right arising from the Alaska CBA to use her December 2011 vacation time to care for her sick child in May 2011. However, Ms. Masserant may have had such a right arising from the WFCA itself. The court need not determine whether Alaska's restrictions on the use of banked vacation time violated the WFCA and does not reach the merits of that issue. It is sufficient that a court could determine that the WFCA independently guaranteed Ms. Masserant the right to use her accrued leave, whatever the source, for family leave. For these reasons, the court finds that the right at issue—Ms. Masserant's asserted right to use her vacation time for family leave under the WFCA—may

arise from the WFCA but certainly does not arise from the Alaska CBA.

2. Whether Ms. Masserant's Rights Substantially Depend on the Alaska CBA

The court's conclusion that Ms. Masserant's asserted right does not arise from the Alaska CBA does not end the RLA preemption analysis. Applying the second part of the *Burnside* test, the RLA preempts state law if the right at issue is "substantially dependent on analysis of a collective-bargaining agreement." 491 F.3d at 1059. "[T]o determine whether a state right is 'substantially dependent' on the terms of a CBA, [the court must] decide whether the claim can be resolved by 'looking to' versus interpreting the CBA." *Id.* at 1060 (internal citation omitted). The Ninth Circuit has "stressed that, in the context of [RLA] preemption, the term 'interpret' is defined narrowly—it means something more than 'consider,' 'refer to,' or 'apply.'" *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir. 2000). Moreover, "[w]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Lividas*, 512 U.S. at 124 (citing *Lingle*, 486 U.S. at 413 n.12; *see also Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 992 (9th Cir. 2007) ("The parties do not dispute the meaning of these provisions [of the CBA] . . . . There is thus no need to 'interpret' these aspects of the CBAs in assessing whether there were wages 'due' at the time of Soremekun's resignation.").

Alaska argues that Ms. Masserant's complaint with the Department requires interpreting the CBA

for two reasons. First, Alaska argues that "in order to determine whether Masserant was *entitled to* vacation time off at all, one must first refer to the CBA" because "[t]he CBA sets forth in detail the bidding and scheduling process for flight attendant vacations." (2d Alaska SJ Mot. at 22 (emphasis added).) Second, Alaska argues that "in order to determine whether Masserant was *entitled to use* her scheduled December vacation time in May, one must interpret the CBA." (*Id.* at 22-23 (emphasis added).)

First, the court rejects Alaska's argument that determining whether Ms. Masserant was entitled to any vacation time in 2011 requires interpreting the Alaska CBA. "Interpreting" a collective bargaining agreement requires more than just "referring to" that agreement. *Balcorta*, 208 F.3d at 1108. The WFCA requires referring to a CBA or other employer policy in order to determine if an employee is "entitled to" sick leave or other paid time off. RCW 49.12.270. In this case, however, the parties do not dispute that Ms. Masserant was entitled to vacation time off at some point during 2011. All of Ms. Masserant's vacation days for 2011 were scheduled and credited to her leave bank on January 1, 2011, she could cash out all of her vacation days at that time, and she had seven days of vacation time in her leave bank in May 2011. There is no dispute as to "whether Masserant was entitled to vacation time off at all" (2d Alaska SJ Mot. at 22), and "[w]hen the meaning of contract terms is not subject to dispute, the bare fact that a collective bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas*, 512 U.S. at 124; *see also Firestone v. S. Cal. Gas Co.*, 281 F.3d 801, 802 (9th Cir. 2002) (holding that federal labor law

preempted state law because the plaintiffs' claim "cannot be decided by mere reference to unambiguous terms of the agreement"). Thus, no interpretation of the Alaska CBA is necessary to determine whether Ms. Masserant was entitled to vacation in May 2011 under the WFCA.

Second, the court rejects Alaska's argument that "in order to determine whether Masserant was entitled to use her scheduled December vacation time in May, one must interpret the CBA." (2d Alaska SJ Mot. at 22-23.) The Alaska CBA, informed by longstanding custom, prohibits the use of scheduled vacation time for WFCA leave. (*Id.* at 23.) Alaska asserts that because the CBA did not allow Ms. Masserant to use her vacation time for this type of family leave, interpretation of the CBA is necessary to adjudicate Ms. Masserant's claim. (*Id.*) In other words, Alaska argues that the RLA preempts state enforcement of the WFCA because the terms of the CBA govern the manner in which Ms. Masserant may use her vacation time. (*Id.*) As explained below, this argument misreads the WFCA because this statute does not limit an employee's use of her paid time off to uses allowed under a CBA.

The Ninth Circuit in *Balcorta* rejected a similar preemption argument and concluded that federal labor law did not preempt a state statute. 208 F.3d at 1111. In that case, plaintiff employee worked in the film industry as an electrical rigger. *Id.* at 1104. A collective bargaining agreement between defendant movie studio and the plaintiff's union governed the conditions of his employment. *Id.* The plaintiff claimed the studio violated a state statute requiring timely payment of wages after discharging employees. *Id.* at 1104-05. The studio argued that to

resolve the plaintiff's state law claims the court must interpret the CBA to determine whether the plaintiff was paid within the time allowed by the CBA. *Id.* at 1110.

The court in *Balcorta* acknowledged that "the collective bargaining agreement contains a paragraph that sets forth time requirements governing the payment of wages after discharge." *Id.* However, the court concluded that it "need not decide whether the collective bargaining agreement's provision governing the payment of wages is ambiguous and requires interpretation" because the state statute—not the CBA—"governs the timeliness of payment following discharge." *Id.* at 1110-11. Whether the studio violated the statute "is controlled only by the provisions of the state statute and does not turn on whether payment was timely under the provisions of the collective bargaining agreement." *Id.* at 1111. In other words, federal law did not preempt state law—despite apparently conflicting provisions in the CBA and the state statute regarding timeliness of payment—because resolving the plaintiff's claims required only interpreting the state statute, not the CBA. *Id.* at 1111-12.

As explained previously, Alaska, like the defendant in *Balcorta*, misunderstands the rights guaranteed by the state statute at issue. The WFCA does not itself define whether an employee is "entitled to" leave, but does establish when an employee may *use* the leave to which she is entitled. RCW 49.12.270. Whether Alaska violated the WFCA "is controlled only by the provisions of the state statute and does not turn on . . . the provisions of the collective bargaining agreement." *Balcorta*, 208 F.3d at 1111. In other words, determining whether Alaska violated

the WFCA requires only a "purely factual" inquiry "about an employee's conduct or an employer's conduct" which does not "require [the decisionmaker] to interpret any term of a collective-bargaining agreement." *Norris*, 512 U.S. at 261 (quoting *Lingle*, 486 U.S. at 407). Indeed, here the decisionmaker will determine whether Alaska's refusal to allow Ms. Masserant to use her accrued vacation leave to care for her sick child violated the relevant portions of the WFCA discussed above. The WFCA creates a nonnegotiable state right, and parties cannot agree to a CBA that contradicts those state rights. *See Balcorta*, 208 F.3d at 1111 ("The rights granted to employees by California labor Code § 201.5 are not subject to negotiation, and § 301 of the LMRA does not grant private parties the power to waive nonnegotiable state rights.").

The fact that both state law and the CBA (implied provisions included) address when an employee may use vacation leave does not mean the RLA preempts the WFCA. The court concludes that the WFCA is independent of the Alaska CBA because "even if [a decisionmaker] should conclude that the contract does not prohibit a particular [employer action], that conclusion might or might not be consistent with a proper interpretation of state law." *Lingle*, 486 U.S. at 413. In other words, by refusing to allow Ms. Masserant to use her vacation time for WFCA family leave, Alaska's conduct may be consistent with the CBA and yet still violate state law. In cases like this, preemption is inappropriate. *See*, *e.g.*, *id.* (holding that the LMRA did not preempt a state retaliatory discharge statute even though provisions of the CBA covered the same factual scenario because a plaintiff could maintain separate and independent actions for

violation of the CBA and state law); *Balcorta*, 208 F.3d at 1111 (finding no preemption where an employer could violate state law while still acting in accordance with a CBA).

Alaska directs the court to three cases (Alaska Resp. (Dkt. # 92) at 15), which it asserts support preemption of enforcement by the Department of Ms. Masserant's complaint under the WFCA: *Firestone v. Southern California Gas Co.*, 281 F.3d 801 (9th Cir. 2002); *Blackwell v. Skywest Airlines, Inc.*, No. 06cv0307 DMS (AJB), 2008 WL 5103195 (S.D. Cal. Dec. 3, 2008); and *Fitz-Gerald v. SkyWest Airlines, Inc.*, 65 Cal. Rptr. 3d 913 (Cal. Ct. App. 2007). The court finds these cases distinguishable because the courts in each of these cases determined that resolving the plaintiff's state law claims required interpreting provisions of the applicable CBA, with different results required by different CBA interpretations. *Firestone*, 281 F.3d at 802 ("The agreement would be enforced differently depending on which party's interpretation [of the CBA] is accepted."); *Blackwell*, 2008 WL 5103195, at * 12 ("Given the many applicable pay rates, categories, and differentials, any attempt to determine whether, when, and how much compensation is owed to Blackwell necessarily requires an interpretation of the CBA's provisions."); *Fitz-Gerald*, 65 Cal. Rptr. 3d at 918-20 (holding that interpretation of the CBA was necessary to adjudicate plaintiff's state law claims). Contrary to the cases cited by Alaska and as explained above, resolving Ms. Masserant's complaint requires interpreting only the WFCA and not the Alaska CBA. Different interpretations of the Alaska CBA will not lead to different results in Ms.

Masserant's case. Accordingly, preemption is inappropriate.[6]

IV. CONCLUSION

Based on the foregoing, the court concludes that the RLA does not preempt enforcement by the Department of the WFCA with respect to Ms. Masserant's claims. Accordingly, the court GRANTS Defendants' motion for summary judgment (Dkt. # 82), GRANTS AFA's motion for summary judgment (Dkt. # 87), and DENIES Alaska's motion for summary judgment (Dkt. # 78).

Dated this 31st day of May, 2013.

/s/ James L. Robart
JAMES L. ROBART
United States District Judge

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[6] Alaska also analogizes to *Adames v. Executive Airlines, Inc.*, 258 F.3d 7 (1st Cir. 2001). (Alaska Resp. (Dkt. # 92) at 15.) In that case, the court determined that the RLA preempted a Puerto Rican vacation leave statute. The parties disagreed about the amount of vacation leave the terms of the CBA entitled plaintiff flight attendant to take. For this reason, the court concluded that "determining entitlement to vacation leave requires interpretation of the Agreement rather than mere reference to it." By contrast in this case, as explained above, the parties agree that the Alaska CBA entitled Ms. Masserant to seven days of vacation time as of May 2011, scheduled for the following December, and only disagree about whether Ms. Masserant was entitled to use this vacation time for family sick leave in May 2011. Thus, this case, unlike *Adames*, does not require interpreting a CBA to determine whether an employee was entitled to vacation leave.

29 U.S.C. § 185

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the

district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

45 U.S.C. § 151a

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) 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.

45 U.S.C. § 184

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of

their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

Washington Revised Code § 49.12.270

49.12.270. Sick leave, time off--Care of family members

(1) If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for: (a) A child of the employee with a health condition that requires treatment or supervision; or (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition. An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.

(2) Use of leave other than sick leave or other paid time off to care for a child, spouse, parent, parent-in-law, or grandparent under the circumstances described in this section shall be governed by the terms of the appropriate collective bargaining agreement or employer policy, as applicable.

[Exhibit B to Complaint for Injunctive and Declaratory Relief: Collective Bargaining Agreement]

* * *

SECTION 10

SCHEDULING

A. The Company will utilize and maintain a Preferential Bidding System (PBS), meeting the requirements in this Section and any other terms, which have been mutually agreed upon by the Company and Association, for the construction and awarding of flight schedules and Reserve Lines of Time. The Company will provide monthly bid packages and awards.

1. Flight Attendants will use the electronic bid system agreed to by the parties unless an alternative method has been approved by the Company and the Association. Provision for alternative bidding will be made available to Flight Attendants in the event of a system failure.

B. A bid line shall be a monthly line composed entirely of published sequences with a monthly schedule of no more than 10 TFP above or below the monthly bid line average in the domicile. Each domicile's line average will not go below seventy-eight (78) TFP nor above eighty-five (85) TFP. A Flight Attendant will bid in her/his specific domicile.

C. All contractual limitations on the construction of bid lines shall remain in effect.

D. Lines shall be constructed preferentially, in order of seniority, one Flight Attendant at a time, with the Flight Attendant holding as many sequences available at her/his seniority that meet her/his specific preferences, such preferences being stated in priority order provided that those sequences do not conflict with any known absences.

E. Line Construction

1. All Flight Attendants will be guaranteed a minimum of twelve (12) days off per month. Reserves will be guaranteed a minimum of thirteen (13) days off in a 31-day month. Recurrent Training is not considered one of a Flight Attendant's minimum days off. The number of days off per month will be reduced by 0.4 day(s) for each day of a planned absence, excluding Recurrent Training and month-end carry-in flying.

2. A bid line will contain no reserve days and a reserve line will contain only reserve days and days off.

3. A bid line will not contain any out of domicile sequences, including charters.

4. In LAX, bid lines may consist of sequences with check-ins at LAX and one, and only one, co-terminal.

5. All known flying, including charters, shall be placed in the PBS program for bid.

F. The Company will apply any known absence(s) to a Flight Attendant's schedule. Carry-in(s)/absence(s)/pre-award(s) that are known at the

time of bidding, will be pre-planned in the bid process, and credited in the new month. The credit value of the known absence(s) will be reflected in the total value of the line for purposes of the line building parameters according to the below schedule, and will have the following credit value applied towards a Flight Attendant's line credit:

1. Planned absences and/or the following TFP value: Training: 0 trips per day (6 TFP per day); Vacation: 4 trips per day (4 TFP per day); Leaves: 2.75 trips per day. (Pay, if applicable, will be based upon the type of leave).

G. A Flight Attendant who will be available to work less than an entire month will be allowed to bid during the bidding process, and will be awarded a schedule for that portion of the month during which she/he will be available, with the number of minimum days off prorated based upon the numbers of days available: *e.g.*, a Flight Attendant returning from maternity leave mid-month.

H. Flight Attendants on a no-bid status, but otherwise eligible to bid, will be scheduled outside of the PBS system (e.g. Trainers).

I. If a Flight Attendant is withheld from service by the Company at the time of bid closing s/he will be allowed to bid for a schedule for the following bid period in accordance with this section.

J. Bid packages will be made available electronically via a home access computer system and the Company computer terminals located in

each domicile on or before the date of bid package distribution. One hard copy of the bid package will be available at each domicile or co-terminal. Bid packages shall contain all of the sequence information, for all of the scheduled sequences in a given domicile and its co-terminals. Each domicile's bid package shall state the anticipated number of bid lines and reserve lines that will be awarded in that domicile, the line average for the month in the domicile, the minimum and maximum TFP's a line can be built to in the domicile, and the training dates and locations for the domicile for the following month .

1. Bid packages will be made available to all Flight Attendants at each domicile on or before 9 AM hours local domicile time on or before the fifth (5th) of the month prior to the bid period. In the event of a major, previously unknown airline schedule change, after pairings are constructed, the Company and the Association may agree to modify the Bid Timeline as appropriate.

2. A Flight Attendant must submit her/his bid by 9 AM local domicile time on the tenth (10th) of the month prior to the bid period.

3. Should there be a "system failure" at a base or co-terminal, the Company will extend the acceptance of bids by twenty-four (24) hours at the affected base or by as long as the system failure exists, whichever is longer. The Company shall determine when a "system failure" exists. A "system failure" may include, *e.g.*, those times when the service provider's system is not generally

available for access for a significant period due to a failure of the system itself; or when access routes to the system, e.g. telephone service, power, etc., is not available on a broad geographic scale. Failure of a Flight Attendant's personal computer or failure due to the error of a user will not be considered a "system failure."

4. The system will allow a Flight Attendant to revise her/his bid. The last bid submitted will be honored.

5. The PBS System will generate, track, and provide each Flight Attendant a bid confirmation for each bid supplied by the Flight Attendant.

6. The bid award for lines of time will be made available to all Flight Attendants by 9 AM hours local domicile time on or before the thirteenth (13th) of the month prior to the bid period, but as soon as possible.

7. Reserve Lines will be awarded twenty-four (24) hours after Bid Lines are awarded.

8. Bid Lines are final as of 9 AM local domicile time on the fifteenth (15th) of the month prior to the bid period.

K. A standing bid may be submitted at any time by a Flight Attendant, and will remain in effect until it is changed by the Flight Attendant, but no later than the date bids must be submitted for a given month. A Flight Attendant failing to make a bid or failing to meet the deadline will be assigned a line in the awards as per her/his standing bid. If

no standing bid exists, the Flight Attendant will be assigned a reserve line.

L. All monthly lines shall be awarded in accordance with seniority and bid preferences. In cases where a Flight Attendant is denied a bid preference to ensure adequate daily work coverage such assignment shall be in accordance with the bid preferences of the Flight Attendant and forced in inverse order of seniority.

M. An individual Report will be made available to each Flight Attendant each month that reconciles the Flight Attendant's bid to her/his awarded schedule on a preference by preference basis.

1. Any Flight Attendant who has an inquiry or believes s/he may have received a mis-award on her/his award shall notify Crew Planning prior to 9 AM local domicile time on the 15th of the month prior to the bid period.

2. Crew Planning shall promptly review any inquiry submitted. If a programming or system error occurred, the affected Flight Attendant will be made whole. No remedy will be available if the subject of the inquiry was due to the Flight Attendant's choice of bid preferences.

3. Where there is a programming error that affects substantial numbers of Flight Attendants in a domicile(s), there may be a re-award upon agreement between the Company and the Association.

4. If, after the final bids have been awarded, any errors are subsequently discovered that

makes any bid illegal in any manner, the Company will pull the Flight Attendant from sufficient flights with pay to be made legal.

N. PBS Bid Line Options/Preferences:

1. Types of bid requests:

a. Global -- A bid request that sets overall guidelines for the bidder's schedule.

b. Prefer Off -- A bid request used to request dates or days off during the month.

c. Avoid -- A bid request used to define unwanted sequences or sequence criteria during the month.

d. Award -- A bid request used to define preferences for work during the month.

e. Instruction -- A bid request that provides special instructions to change or remove prior restrictions when processing your bid.

2. Specific agreed upon bid line request choices (the terminology in PBS may differ):

a. Prefer Off
b. Departing On
c. Specific Aircraft Type
d. Average daily TFP
e. Sequence Check-in Time
f. Sequence Release Time
g. RON Check-in Time
h. RON Release Time
i. Sequence length
j. Maximum Legs per Duty Day

- k. Duty Time
- l. Fly with/Avoid Employee (Arctic) #
- m. Landings In
- n. Layover Date
- o. Layover In
- p. Layover Time
- q. Sit Time
- r. Time away from base (TAFB)
- s. Sequence Number
- t. Sequence Credit
- u. TFP value per TAFB
- v. Sequences including specific Flight Number
- w. Minimum Days Off/Maximum Days On (Pattern)
- x. Minimum Schedule
- y. Maximum Schedule
- z. Minimum Domicile Rest
- aa. Front-end loading of flying on multi-day sequence
- bb. Bid position
- cc. Spanish-qualified Flight Attendant (LAX only)
- dd. Co-terminal flying (LAX only)
- ee. Reserve
- ff. BuddyBidding
- gg. Followed By

3. It has been recommended by the PBS vendor that the implementation start with the most significant of these preferences, with the remainder being phased in over time. The

Association will explore this option to determine if it will provide better line building during the initial months of PBS line building. If less than the full number of preferences are initially offered, the remainder will be phased in over a period of time as Flight Attendants gain experience in bidding. All preferences will be offered no later than six (6) months after full implementation. Preferences/avoidances can be conditioned on other preferences/ avoidances.

4. Specifically agreed upon reserve bid request choices (blocks of reserve days will be pre-built, just as sequences are pre-built):

   a. AM, PM and ER
   b. Days on and off
   c. Length of block
   d. Month end carry-over

O. Other preferences may be mutually agreed upon prior to PBS implementation and request for said preferences will not be unreasonably denied. Up to two additional preferences may be added each calendar year, and said preferences will not be unreasonably denied.

P. All Flight Attendants will bid for positions flown on aircraft. The A Flight Attendant will be primarily responsible for the first class cabin. The B & C Flight Attendants will be primarily responsible for the main cabin. The A Flight Attendant will be responsible for the first class galley, first class liquor and associated paperwork. The B & C Flight Attendants will

share responsibility for the main cabin galley and share responsibility for the main cabin liquor and associated paperwork. Additional Flight Attendants (e .g., D and/or E), when assigned, will perform duties as outlined in the Flight Attendant Manual.

Q. Flight Attendants may buddy bid (double and triple). The Flight Attendants who wish to bid together may try to do so by bidding the seniority number of the most junior Flight Attendant. If buddy bidding is not awarded, line preferences will be awarded at the lower seniority number.

R. At the Company's discretion, it may offer a low bid option. Bid packets will reflect the number of available low bid options that would allow a Flight Attendant to bid a line between five (5) TFP over or under one-half of the line average in the domicile. If the Company offers a low bid option in a specific domicile, it will specify the number of Flight Attendants who will be able to hold that option, and conduct a bid, based upon seniority, by the 5th of the month prior. Flight Attendants awarded the low bid option will know their status prior to the PBS bid process. They will bid in the PBS, and their lines will be built to between one-half of the minimum/maximum TFP parameters for the domicile for that month. A Flight Attendant may not bid for a low bid option until s/he is off probation. A Flight Attendant who is awarded a low bid option will continue to receive all Company benefits, if otherwise eligible.

S. All same day scheduling changes involving a move up will be requested to the Flight

Attendants having like sequences in order of seniority and assigned in reverse order of seniority.

1. A move-up is to be utilized for vacancies that occur within two hours of departure after reserves, and airport standby reserves, have been utilized. The Company may maintain no more than one airport standby reserve at each domicile prior to moving up a Flight Attendant under this Paragraph.

2. If the Company utilizes move-up to fill a vacancy, it will first offer the vacancy in seniority order to any crew on a sequence with greater than minimum staffing. If the vacancy is not accepted, or if there is no crew over the minimum, the Company will assign the vacancy to the most junior Flight Attendants in crew(s) assigned to like sequences.

3. For determining like sequences in a moveup, Scheduling will first consider sequences with an equal number of days, then sequences with more days, and finally sequences with fewer days.

4. All same day scheduling changes or reassignments requiring an entire crew but not involving a moveup will be made based upon availability and legality of the crews.

5. All same day scheduling changes or reassignments involving less than an entire crew will be requested of the Flight Attendants involved in order of seniority and assigned in reverse order of seniority.

a. When two or more crews, upon check-in at domicile, learn that flights have been cancelled or a same-day schedule change has occurred, resulting in two or more crews available to fly, the surviving sequence that has been constructed of equal parts of the original sequences, will be staffed as a move-up. The Flight Attendants will be offered the assignment in order of seniority and assigned in reverse order of seniority. The remaining Flight Attendants will be released and pay protected for the value of their original sequence.

6. A Flight Attendant will be paid for her/his actual or scheduled flying, including surface deadhead, whichever is greater. If the schedule change or reassignment results in the Flight Attendant flying, including surface deadhead, more than scheduled, the flying, including surface deadhead, above schedule will be paid at one and one-half (1.5) times the applicable trip rate or, if the flying, including surface deadhead, exceeds three (3) flights above schedule or the reassigned sequence involves more days of flying, including surface deadhead, such Flight Attendant will, at her/his option, be entitled to a day off in lieu of one and one-half (1.5) times pay.

a. The Company will not include any TFP added to reach the four TFP minimum when calculating the pay for a schedule change or reassignment in accordance with Paragraph 10.S. For each duty

period in which the actual flying exceeds the scheduled flying, the Company will pay the difference between the TFP value of flying in the Flight Attendant's original schedule and the TFP value of actual flying at 1.5 times the applicable step rate.

7. Once a lineholding Flight Attendant is reassigned and completes the reassigned sequence, such Flight Attendant will not be responsible for any other scheduled or unscheduled sequence if the Flight Attendant has flown flights equal to or greater than such Flight Attendant's original assignment. Unscheduled overnights are covered under Section 21, Paragraph O.

T. Pre-Cancellations

1. a. When flights are cancelled from the Flight Attendant's line of time in advance of the day of departure, the Company will make every effort to give notice of such cancellation by the end of the next calendar day via Company e-mail followed by primary phone contact in reverse order of seniority, if applicable. Assignments will be offered on a first-come, first-served basis. If the Flight Attendant does not contact Crew Scheduling, the Flight Attendant will be required to check-in as originally scheduled.

   b. If a Flight Attendant reports a cancellation, Crew Scheduling will

confirm or deny the cancellation with DSO. Once the cancellation is confirmed, the Company will notify the Flight Attendant in the same manner as for any other cancellation.

2. When Crew Scheduling makes contact with the Flight Attendant regarding the cancellation(s), the Company may offer the Flight Attendant an alternate assignment to open positions that may include multiple sequences on the same day or days as the flights cancelled from the Flight Attendant's line of time. The Flight Attendant may select from the following options:

   a. Accept the alternate assignment.

   b. Decline the alternate assignment and waive pay protection.

   c. In the event that the alternate assignment contains a check in that is more than two hours earlier and/or a release time that is more than two hours later than those contained in the Flight Attendant's line of time, the Flight Attendant may decline and agree to contact Crew Scheduling between 6 pm and 8 pm on the night before the first day of the flights canceled from the Flight Attendant's line of time to receive an alternate assignment. Such assignment must operate within the check-in and release times at domicile of the flights cancelled from the Flight Attendant's line of time. If no such assignment is

available at that time, the Flight Attendant will be pay protected under Section 21.N. and will be relieved from further obligation on the days of the flights cancelled from the Flight Attendant's line of time. In the case of co-terminals, if the assignment does not check-in and release at the same co-terminal as the flights cancelled from the Flight Attendant's line of time, the Company will pay pursuant to Section 21.M. and, at the Flight Attendant's request, provide surface deadhead transportation to and from the terminal of the reassigned flight.

3. If no alternate assignment is offered at the time of notification, the Flight Attendant may:

   a. Waive pay protection and be relieved of any further obligation; or

   b. Agree to contact Crew Scheduling between 6 pm and 8 pm on the night before the first day of the flights canceled from the Flight Attendant's line of time to receive an alternate assignment. Such assignment must operate within the check-in and release times at domicile of the flights cancelled from the Flight Attendant's line of time. If no such assignment is available at that time, the Flight Attendant will be pay protected under Section 21.N. and will be relieved from further obligation on the days of the flights cancelled from the Flight

Attendant's line of time. In the case of co-terminals, if the assignment does not check-in and release at the same co-terminal as the flights cancelled from the Flight Attendant's line of time, the Company will pay pursuant to Section 21.M, and, at the Flight Attendant's request, provide surface deadhead transportation to and from the terminal of the reassigned flight.

4. A Flight Attendant who has agreed to contact Crew Scheduling as set forth in Paragraphs T.2.c or T.3.b may be removed from the obligation by calling Crew Scheduling no later than 00:01 on the day before the check-in at domicile of the flights from the Flight Attendant's line of time. · In this event, no pay protection will apply.

5. Under the provisions of Paragraphs T.2.c or 3.b, the Flight Attendant will only be required to contact Crew Scheduling one time.

6. If a Flight Attendant has agreed to Paragraph T.2.c or 3.b, the Flight Attendant's schedule will reflect a scheduled duty obligation.

7. If under Paragraph T.2.c or T.3.b the Flight Attendant is on duty with the Company between 6 pm and 8 pm, s/he will contact crew scheduling no later than release at domicile.

8. a. If a Flight Attendant fails to call Crew Scheduling as agreed under Paragraph 2.c or 3.b, the Flight Attendant will not

be pay protected. If the Flight Attendant subsequently reports at the time originally scheduled, the Flight Attendant may be given an alternate assignment.

b. If the Flight Attendant calls Crew Scheduling after 8 pm, the Company may offer a new sequence for the same day or days of the original assignment. The Flight Attendant may accept or decline the assignment. If declined, the Flight Attendant will be required to be at domicile as originally scheduled. Failure to do so will be subject to the provisions of Section 32. If the Flight Attendant reports at the time originally scheduled and is not given an alternate assignment, the Flight Attendant will be released without pay protection and without further reporting obligations.

c. If the Flight Attendant fails to call Crew Scheduling and does not report by the original time, the Flight Attendant will be subject to the provisions of Section 32.

9. When an alternate assignment is given, the duty period commences with the check-in for the newly assigned sequence(s).

10. Notwithstanding the provisions of Section 8.O, the Company will make every effort to notify the Flight Attendant of appreciable delays affecting the Flight Attendant's arrival or departure at domicile.

11. A Flight Attendant cannot be junior assigned on a day s/he waived cancellation pay protection.

U. The Company may utilize a Flight Attendant who is traveling non-revenue to work a flight when circumstances at an out station present the need to delay or cancel a flight due to in-flight staffing shortage. The non-revenue Flight Attendant is not under any obligation to work the flight. Should the Flight Attendant accept the flight:

1. S/he will be paid at one and one-half (1.5) times the applicable trip rate for all flights flown with a minimum duty period guarantee of four (4) TFP. Reserve Flight Attendants will be paid above guarantee.

2. Duty time will start at the time the Flight Attendant accepts the assignment, or one hour before original scheduled departure from the out station, whichever is later.

3. If more than one non-revenue Flight Attendant is available, assignment will be offered in seniority order taking into account the Flight Attendants' legalities.

4. Once the assignment is accepted, all applicable contact provisions will apply. The Flight Attendant will be pay protected for any other loss of flying as a result of accepting the assignment, and be paid the greater of what was flown or credited.

V. A Scheduling Committee composed of Flight Attendant representatives will be established for the purpose of reviewing at appropriate intervals,

the rules and procedures, other than those set forth in this Agreement, affecting scheduling procedures; to maintain written Flight Attendant Scheduling Policy and to adopt and implement such action as may be necessary to accomplish these things. This committee will meet monthly for the purpose of reviewing problems with scheduling.

W. The responsibility of Crew Scheduling is to carry out the provisions of the Agreement and Schedule Policy only. Any differences with a Flight Attendant as to the meaning or application of the Agreement, compensation, or Schedule Policy shall be referred to a supervisor in the appropriate department.

1. Crew Scheduling will be responsible for approving sequence trades and giveaways, keeping reserve board updated, sick calls, Open Time and any emergencies that may arise out of rescheduling.

2. The Company will provide a toll free 800 number for Flight Attendants to use only in checking on reserve assignments, reroutes or reassignments.

X. Flight Attendants will not be disciplined for scheduling and/or dispatch mistakes. Flight Attendants will be pay protected for TFP lost as a result of scheduling errors. If the sequence at issue involves premium pay, the Flight Attendant will be pay protected as follows:

1. Charter at 2.0 for charter flights;

2. JA at 1.5 for all flights flown, and at 1.0 for TFP lost if no flying is done or for the difference between flights flown and the TFP value of the original sequence.

Y. A scheduled deadhead to or from protecting a flight requires positive space seating, including the fourth flight attendant seat, for all Flight Attendants on the next available departure to the home domicile. On an unscheduled deadhead from protecting a flight, all Flight Attendants will be treated as revenue standby passengers. If the flight is full the most senior Flight Attendants will occupy seats and the most junior deadheading Flight Attendant will occupy the 4th Flight Attendant seat, if available. When a flight is not available after four (4) hours, the Flight Attendant will be given a hotel room and remain overnight, if s/he so chooses.

1. A Flight Attendant with deadhead only on the last day of a sequence will be allowed to deadhead either earlier or later than the scheduled deadhead. A Flight Attendant will be subject to reroute if contacted by Crew Scheduling. A Reserve Flight Attendant may deadhead home on an earlier flight but is still governed by the contact periods and duty limitations for the remainder of the Reserve period. When a sequence ends with a day consisting only of deadhead, lineholding and Reserve Flight Attendants will be treated the same.

Z. SCHEDULING POLICY

1. Sequence Construction

a. Turnarounds will consist of a maximum of eight (8) flights and a minimum of four (4) TFP.

b. No Flight Attendant will be scheduled for an eight (8) flight sequence on a Friday or Sunday night.

c. Each duty period of a multi-day sequence will be scheduled for a maximum of eight (8) flights and a minimum of four (4) TFP, except that sequences may be constructed with three (3) full days of flying with deadhead only on the first or last day.

d. In building sequences including charter flights which are to be put out for bid as charter flying, the Company shall refrain from including any regularly scheduled flying, except:

(1) If such regularly scheduled flying is included solely to directly and efficiently position a crew for the charter flying or to return a crew from the charter flying.

(2) Such regularly scheduled flying shall be limited to those flights that terminate, or begin, at a reasonably proximate location to the charter flying to efficiently locate a crew for the flying of the charter or return a crew to domicile from the charter.

(3) In those duty periods when regularly scheduled flying is included in charter sequences, the duty day may not be scheduled to exceed 10½ hours, and the four TFP minimum will apply.

AA. Personal Drops. Personal drops will be granted if staffing levels permit, as determined by Crew Scheduling, and are subject to the following:

1. No picked up flying of any sort, whether from other Flight Attendants, Open Time, VJA or charters is allowed on a Personal Drop day.

2. Personal drops are unpaid.

3. Personal drop requests must submitted by noon on the day prior to the day requested to be dropped, in order for the request to be processed in seniority order.

   a. Personal drops will be granted in domicile seniority order, no later than 8:00 P.M. on the day prior to the day requested to be dropped. If additional drops become available after this time, Crew Scheduling will first grant them to Flight Attendants who submitted requests before noon the day prior to the day requested to be dropped, in seniority order. For Reserves, awards may go outside seniority order based on staffing as determined by Crew Scheduling, such as number of days available and/or AM/PM shift available. (Example: one Reserve available for four days, versus several Reserves available for one day. The Company reserves the right to retain the four-day Reserve and grant the Drop to the one-day Reserve.)

   b. Flight Attendants may submit requests for drops after noon on the day prior to the day requested to be dropped. After all

requests submitted by noon the day prior have been honored in seniority order, late requests will be granted on a first-come, first-served basis. For Reserves, requests will be granted on a first-come, first-served basis, according to AM/PM classification.

c. Requests for personal drops may be withdrawn any time prior to awarding of the drop requests.

d. Once granted, the request cannot be withdrawn and the Flight Attendant will be removed from duty for the requested day(s).

ADDENDUM TO SECTION 10

SCHEDULING

1. Explain how 10.Z.1.a & d impact scheduling and pay?

The language in 10.Z.1.a & c has been defined to mean that the eight (8)-flight restriction is a scheduled flying limitation to eight (8) take-offs per duty period, and the four (4) TFP requirement is a pay minimum for four (4)TFP per duty period.

The procedure for applying the terms of Section 10.Z.1.a and c is as follows:

Turn-around sequences - i.e. one duty period

1) For turn-around sequences, one four (4)-TFP minimum will apply.

2) For all-nighters, one duty period falling in two calendar days, one four (4) TFP minimum will apply.

Multi-day sequences

1) For multi-day sequences, a four (4)-TFP minimum will be applied to each duty period, making a two (2)-day sequence worth a minimum of eight (8) TFP.

2) If there is a full calendar day (midnight to midnight) within a sequence which has no duty, an additional four (4) TFP minimum will be applied to that day. However, the four (4) TFP minimum does NOT apply to a 24-hour or longer period within a sequence which has no duty, but does NOT span midnight to midnight.

   Example 1: 28-hour layover from 11:00 p.m. to 3:00 a.m. the following day, four (4) TFP minimum applies.

   Example 2: 28-hour layover from 1:00 a.m. to 5:00 a.m. the following day, four (4) TFP minimum does NOT apply.

3) Two sequences separated by legal rest yet falling in a single calendar day will be considered two separate duty periods. The four (4) TFP minimum applies to EACH duty period totaling a minimum of eight (8) TFP.

2. What is a move-up?

A move-up is when Crew Scheduling assigns you to a different sequence on a day you are scheduled to work, also called a “reassignment” or “same day

schedule change." Move up occurs at check-in. (Section 10.S.)

3. Explain reassignment and same day schedule changes.

Reassignments or same day schedule changes can occur before or during the scheduled sequence; you can be assigned to different flights, or the flights to which you are assigned may be altered. Reassignment occurs on day(s) when already scheduled to work. Reassignments or same day scheduling changes will not schedule you to be on duty for longer than twelve hours thirty minutes (12:30). (Section 10.S.) Junior Available occurs on days off or at the end of a completed sequence. (See Section 9 for rules governing JA.) See Arbitration #48-98 (Knowlton 2/23/99).

Unscheduled overnights are covered under Section 21.O. Reassignments or reschedule which results in a RON on a scheduled day off is covered in Section 9.C.1.i. Reassignment or reschedule which does not result in flying into a scheduled day off is covered under Section 21.O.

4. If due to operations I don't get home in time to fly a sequence I picked up, am I pay protected for the second sequence? Am I given points for a No Show?

If you pick up a sequence with the required domicile crew rest and No Show due to operations or a reassignment to alternate flights on the earlier sequence, you are pay protected for what you cannot fly, and there is no impact on your attendance record. (Sections 8.Q, 10.S, 21.N and 32)

5. If I'm deadheading, will I be seated in a passenger seat?

Yes. In the event of a full flight, you may be reseated in one of the jumpseats. (Section 10.Y)

6. Can I be required to work on my scheduled day off due to a scheduling change?

Yes, if you are a lineholder. See Q & A Addendum to Section 9, #3 for compensation. No, if you are a reserve. See Section 11.B.3.

7. What happens if I'm a lineholder and due to operations, a duty period carries into a day off?

When operations cause the duty period of a lineholder to carry into a day off, the lineholder will be assigned an additional day off in the same lineholder month, provided the following conditions are met:

a. The lineholder's schedule for the month contains no more than 12 days off at the time of the assignment that carries the lineholder into a day off.

b. The lineholder's schedule has a sufficient number of days remaining to allow for an additional day off in the same lineholder month. If assignment of the day off requires that a multi-day sequence be broken, the lineholder will be placed back on the sequence at a SIP, if possible, and pay protected only for the first day dropped. If the Company determines that it is necessary to drop the entire multi-day sequence, the lineholder will

be pay protected only for the first day of the sequence.

c. The lineholder may opt to be paid four (4) TFP for pay in lieu of an additional day off. The lineholder must inform crew scheduling of her/his choice of pay instead of an additional day off immediately upon return to the domicile. If the lineholder's schedule does not have a sufficient number of days remaining to allow for an additional day off in the same lineholder month, s/he will be paid four (4) TFP.

8. Can I be required to fly eight (8) flights on a Friday or Sunday night?

No.

9. Can I ever be scheduled over ten hours and thirty minutes (10:30) duty?

Yes, on days where flights are flown to, within or from Russia, you may be scheduled over ten hours and thirty minutes (10:30) duty, or for Charters placed up for bid.

10. When do I receive a four (4)-TFP minimum per duty period pay guarantee?

Lineholder and Reserve Flight Attendants will be paid a minimum of four (4) TFP for each duty period of a sequence that contains less than four (4) TFP, except where a Flight Attendant elects to break a sequence at a SIP, in which case the Flight Attendant will be paid for flights actually flown. This includes charter flying, Reserve flying assignments, additional duty periods on days off and Open Time sequences. Only those

SIP'ed sequences that the Company has put into Open Time will be eligible for the four (4) TFP minimum. (Section 10.Z.1.a and c and Q & A Addendum to Section 10, #1.) See also Arbitration #54-94 (Wollett 6/29/96) and #55-94 (Gaunt 4/7/97).

11. Can the Company change a scheduled deadhead flight to a working flight on a sequence dropped into Open Time?

Yes, as long as the change occurs prior to the sequence being picked up. All other reassignments are subject to the provisions of Section 10.S.

12. If my original assignment is a three-day sequence, can I be reassigned to three turns?

Yes. However, once you have flown flights equal in number to or greater than your original assignment, you are not required to fly another sequence as part of the reassignment.

13. Do I have to sit and work the associated safety and service position?

Yes.

14. Can I be requested to assist in boarding a flight I am not assigned to fly?

Yes. If you are on duty, you may be required to assist in boarding and will be paid one-half (.5) TFP for each boarding. If assisting in boarding the flight extends past the end of your debrief period, your schedule will be adjusted to provide you with the amount of rest required by Section 8.Q. However, if you waived contractual rest

because you picked up a sequence, your schedule will be adjusted to provide you with no less than the amount of rest on your schedule before being assigned to board a flight, unless you elect otherwise. You will not suffer a loss of pay as a result of a schedule adjustment necessitated by a boarding assignment which extends beyond your debrief. The resulting schedule adjustment may include reassignment to a new sequence, or assignment to position you for your original sequence. If assisting in boarding a flight extends past the end of your debrief period causing the duty period to exceed twelve hours and thirty minutes (12:30), the reassignment provisions of 8.G. and H. apply. See also Arbitration decision #77-97 (Horowitz, 8/19/98). For Reserves see Section 11.F.8.

If you are not on duty, your assistance may be requested, and if you agree, you will be paid one-half (.5) TFP.

15. How are my minimum days off affected by planned absences?

Your minimum days off are reduced by 0.4 day(s) for each day of planned absence. This number will be rounded down if it is at or below 0.4 (1.4, 2.4, etc) and rounded up if at or above 0.5 (1.5, 2.5, etc).

Example: You have 7 days of vacation in a 31-day month. Your minimum days off will be prorated as follows:

7 x 0.4 = 2.8, round up to 3.0
Minimum days off (excluding vacation) are 12-3 = 9 for a lineholder and 13-3 = 10 for a Reserve.

Example: 13 days of medical leave in a 30-day month:

13 x 0.4 = 5.2, round down to 5.0
Minimum days off (excluding medical leave) are 12-5 = 7 for both lineholders and Reserves

* * *

SECTION 14
VACATIONS

A. Flight Attendants will be entitled to and will receive vacations with pay as follows:

1. A Flight Attendant who, as of December 31 of any year, has had less than one (1) calendar year of employment with the Company will be entitled to a vacation on the basis of one and one-sixth (1-1/6) days for each month of employment, rounded to the nearest full day. A Flight Attendant who does not have any paid time during that month will have her/his vacation entitlement reduced by 1/12 the annual entitlement for each such month.

2. As of December 31 of each year, a Flight Attendant who has one calendar year or more of employment with the Company will be entitled to fourteen (14) days vacation. Employees employed five (5) years or longer will be entitled to twenty-one (21) days vacation. Employees employed ten (10) years or longer will be entitled to twenty-eight (28) days vacation. Employees employed eighteen (18) years or longer will be entitled to thirty-five (35) days vacation. A Flight Attendant

who does not have any paid time during that month will have her/his vacation entitlement reduced by 1/12 the annual entitlement for each such month.

3. Employment begins with the first day a Flight Attendant is placed on the Company payroll.

B. By October 1 of each year, the list of available vacation times will be posted. Flight Attendants will be given fifteen (15) days in which to sign up for available vacation periods. Vacation periods will be granted on a seniority basis. Once assigned, vacation days may be traded subject to the provisions of Section 12, paragraph F. Trading will be unlimited, but a Flight Attendant may not have more than three (3) vacation periods in any month, unless the vacation periods were awarded during the vacation-bid award process.

C. 1. A Flight Attendant, while on vacation, shall be paid four (4) TFP per day. Pay shall be at the rates in this agreement applicable to her/his status.

2. A Flight Attendant who is credited fewer than 480 TFP in the previous year will not have her/his vacation entitlement reduced but will not be paid for such vacation. A Flight Attendant on an unpaid personal, military, extended, medical, maternity, FMLA, Alaska Family Leave, worker's compensation or parental leave of absence, or on a furlough (including voluntary furlough), will have the 480 TFP threshold reduced by

one and one-third (1.333) TFP for each day on which s/he was on the leave of absence or furlough. A Flight Attendant with less than one calendar year of service will have the 480 TFP threshold reduced by one and one-third (1.333) TFP for each day from January 1 to her/his hire date.

D. Vacations shall not be cumulative and a vacation to which a Flight Attendant becomes entitled on December 31 of any year shall be forfeited unless taken during the following calendar year. However, a Flight Attendant may be requested by the Company to forego her/his vacation if such request is in writing and agreed to by the affected Flight Attendant. In such event, the Flight Attendant shall be paid double, with vacation time to be taken later in the year at Flight Attendant choosing or accumulated to be used during succeeding year. If, due to error by the Company, the Flight Attendant is not given accrued vacation to which s/he is entitled, such Flight Attendant shall be deemed to have been requested by the Company to forego her/his vacation and will be treated accordingly.

E. A Flight Attendant who is terminated or furloughed by the Company due to a reduction in force, or who has been employed by the Company for six (6) months and resigns with two (2) weeks or more notice shall receive pay at her/his applicable rate as of such date for all vacation to which s/he is entitled under Paragraph A or B, and unused to the date of resignation, termination or furlough.

F. Flight Attendants with two (2) weeks or more vacation may split vacation into increments of not less than seven (7) days. Any Flight Attendant splitting fourteen (14) days or more will receive their first two (2) choices in order of seniority. Any Flight Attendant splitting her/his vacation into more than two (2) segments will bid the remaining slots after all other slots have been awarded.

G. There will be available vacation days in all fifty-two (52) weeks of the year. At least 5% of the annual vacation allotment for the year will be scheduled during each month, in each domicile.

H. Flight Attendants may request early vacation pay at the rate specified in Paragraph C. The request must be made at least seven (7) days before vacation. Early vacation pay will be paid on the first paycheck due the Flight Attendant that is more than seven (7) calendar days after the date of the request.

I. Any Flight Attendant taking vacation which interferes with recurrent training will rebid recurrent training in keeping with staying legal.

J. A Flight Attendant may fly during her/his vacation provided the sequence(s) or reserve day(s) are picked up or traded with another Flight Attendant or Open Time, or are awarded as a VJA. Compensation for flying will be paid in addition to vacation pay.