SWITCHING TRACKS: COMPLETE PREEMPTION REMOVAL AND THE RAILWAY LABOR ACT

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Under the doctrine of complete preemption, the preemptive power of a statute may be so "extraordinary" as to warrant the removal of state law claims to federal court on the basis of federal question jurisdiction. The Supreme Court has identified three statutes that have complete preemptive force, but has not created a clear test to establish whether a statute has complete preemptive force. This note addresses the question of whether the Railway Labor Act (RLA) operates with complete preemptive force. Lower federal courts have grappled with this issue and are divided as to whether the RLA, which establishes a comprehensive dispute resolution scheme for the rail and air carrier industries, possesses this extraordinary power. Though it has not delineated a clear test, the Supreme Court has identified two factors that are essential—preemption and a federal cause of action—and several factors that are influential to a finding of complete preemption. The author identifies these factors, analyzes their application to the statutes that have been found to have complete preemptive force, and then discusses their application to the RLA in light of the circuit split. The author concludes that the RLA does not operate with complete preemptive force because the essential findings of preemption and a federal cause of action are only questionably satisfied, and other influential factors suggest that RLA disputes were not intended to be heard in federal court.

I. INTRODUCTION

Enacted in a simpler jurisdictional era, the Railway Labor Act of 1926[1] creates a comprehensive framework of arbitration and mediation for the disposition of disputes in the rail and air carrier industries. In that simpler world, a party to a state court proceeding who preferred to litigate in federal court had three potential options: removal on a diversity basis, removal on the basis of a federal question under the well-pleaded complaint rule, or litigating in state court.[2]

1. Railway Labor Act (RLA) of 1926, Pub. L. No. 69-257, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151–164, 181–188 (2000)).

2. *See* 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 101.03, at 3482–84 (1st ed. 1938).

In the 1968 case *Avco Corp. v. Aero Lodge No. 735*, the Supreme Court introduced a new basis for removal to federal court, the doctrine of complete preemption.[3] Under this evolving doctrine, substantially redefined by the Court in 2003 in *Beneficial National Bank v. Anderson*,[4] a federal statute can have such "extraordinary pre-emptive power"[5] that claims pleading only state law, but falling within this power, can be removed to federal court on the basis of a federal question. Though the Court has thus far identified three statutes with complete preemptive force, it has created no clear test to distinguish those statutes that have complete preemptive force.[6]

The intersection of the long-established Railway Labor Act (RLA) and this modern and unsettled jurisdictional doctrine has been a subject of intense litigation. The issue is a simple one: does the RLA, through its provisions creating bodies for the adjustment of labor grievances, operate with complete preemptive force? At stake is the narrow but important question of which court, federal or state, determines if the state law claim is preempted by the RLA.

For a court to uphold removal on the basis of complete preemption, the state law claim must first be preempted by the federal law. Under traditional rules of jurisdiction, preemption is a defense to a state law claim and not a basis for removal.[7] The state court, then, would make the preemption determination. With complete preemption, the federal court must conduct a preemption analysis as a part of the determination whether the state law claim is completely preempted. What makes the situation unique with the RLA is that choice-of-forum preemption favoring RLA adjustment bodies prevents federal and state courts from actually reaching the merits of the claim. Therefore, after a federal court upholds removal of the RLA claim, it must then *dismiss* the claim in favor of the adjustment bodies.

Moore-Thomas v. Alaska Airlines is a typical case.[8] The plaintiffs filed a class action lawsuit against Alaska Airlines (AK Air) in Oregon state court, alleging AK Air violated Oregon law by failing to pay the plaintiffs the contractually obligated wages.[9] AK Air removed to federal court, arguing that the claims were completely preempted by the RLA.[10] On a motion to remand, the federal court found that the claims fell

3. 390 U.S. 557 (1968).

4. 539 U.S. 1 (2003).

5. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987).

6. The Labor Management Relations Act, Employee Retirement Income Security Act, and the National Bank Act have been identified as having complete preemptive force. *See infra* Part III. The lack of a clear test is illustrated by the large number of statutes lower courts have identified as invoking complete preemptive force. *See* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722.1 n.27 (3d ed. 1998).

7. *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.07[5] (3d ed. 2006).

8. No. 06-CV-652-BR, 2006 U.S. Dist. LEXIS 61282 (D. Or. Aug. 28, 2006).

9. *Id.* at *1.

10. *Id.* at *2.

within the scope of the RLA adjustment provisions, that they were preempted by the federal law, and that removal was proper under the doctrine of complete preemption.[11]

AK Air then filed a motion in the federal court to dismiss for lack of subject matter jurisdiction. After the court determined in the removal analysis that the claims were preempted by the RLA adjustment provisions, and found removal jurisdiction proper, the court noted its own lack of jurisdiction due to choice-of-forum preemption and granted the motion to dismiss.[12] While this result may appear contradictory, the federal court's determinations are actually distinct, in response to two questions that must be considered sequentially. First is the federal question of whether federal law preempts the state law, and second the question of whether the federal law permits the federal court to hear the merits of the case.

Most federal circuits have considered whether the RLA creates complete preemption removal, and they are divided.[13] Indeed, two federal circuits have an internal split.[14] Significantly, most of these circuit decisions predate the Court's 2003 reassessment of the doctrine of complete preemption.[15] While the Court has yet to address this issue of RLA complete preemption,[16] the question has been raised repeatedly in peti-

11. *Id*. at *7–13.

12. *Id*. at *4–5.

13. *Compare* Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 276 (2d Cir. 2005) (no complete preemption), Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1356–57 (11th Cir. 2003) (same), *and* Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936, 943 (3d Cir. 1988) (same), *with* Deford v. Soo Line R.R. Co., 867 F.2d 1080, 1086 (8th Cir. 1989) (complete preemption), Graf v. Elgin, Joliet & E. Ry. Co., 790 F.2d 1341, 1346 (7th Cir. 1986) (same).

14. *Compare* Roddy v. Grand Trunk W. R.R. Inc., 395 F.3d 318, 326 (6th Cir. 2005) (no complete preemption), *with* McKinney v. Int'l Ass'n of Machinists & Aerospace Workers, 624 F.2d 745, 747 (6th Cir. 1980) (complete preemption); *compare* Price v. PSA, Inc., 829 F.2d 871, 876 (9th Cir. 1987) (no complete preemption), *with* Schroeder v. Trans World Airlines, Inc., 702 F.2d 189, 191 (9th Cir. 1983) (complete preemption).

15. The Second and Ninth Circuits both addressed this issue following the 2003 *Beneficial* decision. The Second Circuit overturned earlier circuit precedent in light of *Beneficial*. *Sullivan*, 424 F.3d at 274. For a discussion of the impact of *Beneficial* on complete preemption removal in another statutory context, the Copyright Act, see Elizabeth Helmer, Comment, *The Ever Expanding Complete Preemption Doctrine and the Copyright Act*, 7 N.C. J.L. & TECH. 205, 219–31 (2005).

16. The Eighth Circuit in *Deford*, 867 F.2d at 1085, found that the Supreme Court in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972), heard a case where RLA preemption was the jurisdictional basis for removal. While *Andrews* did involve the removal of a state law claim, removal was actually on the basis of diversity jurisdiction. Brief for the Respondents at 4, Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320 (1972) (No. 71-300), 1971 WL 133773. Complete preemption was not implicated. The Second Circuit relied on *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), in finding complete preemptive force. *See* Shaffii v. British Airways, PLC., 83 F.3d 566, 569 (1996). *Hawaiian Airlines*, however, arrived at the Court on certiorari from the Hawaiian Supreme Court. There was no removal, and thus no issue of complete preemption. *See infra* note 239. 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[4][b] n.231 (3d ed. 2005) cites *Lingle v. Norge Division*, 486 U.S. 399 (1988), for the proposition that complete preemption applies to the RLA. *Lingle* was a Labor Management Relations Act case that the Court cited in deciding *Hawaiian Airlines*. It, too, involved only preemption.

tions for certiorari.[17] There is every reason to think the Court will have the opportunity to address this question in the future.

This note asks whether the RLA has complete preemptive force. To begin the inquiry, Part II explores the historical origin of the Act and the mechanism of the Act itself. This Part illustrates how the Act evolved from earlier attempts at railway labor legislation, adopting procedures of arbitration and mediation rather than government compulsion and judicial involvement.

Part III examines the current state of the doctrine of complete preemption in light of the most recent Court decisions. Close analysis of Supreme Court precedent identifies the two essential elements to a finding of complete preemption, ordinary preemption and a federal cause of action to replace plaintiff's state law claim, along with other influential factors including jurisdictional parallels with the Labor Management Relations Act (LMRA), legislative history, and the central concern of the statute.

Part IV considers those essential elements and relevant factors in the context of the RLA. The note identifies the substantial differences between the federal cause of action available under the RLA and those provided in the statutes in which the Supreme Court has found complete preemptive force, and the extended period during which the RLA adjustment board provisions were accorded limited or no preemptive force. The note finds that there are no jurisdictional parallels with the LMRA, that legislative history shows a strong congressional intent that government and judicial process have a limited role in the RLA, and that the state law claims implicated in a preemption determination are not of central concern to the RLA. Considering all of these factors, Part V determines that the RLA does not have complete preemptive force.

II. THE RAILWAY LABOR ACT

The RLA followed four decades of congressional attempts to legislate in the field of railway labor relations.[18] Railways suffered strikes, sometimes violent,[19] and early efforts to restrain labor action through injunctions[20] gave way to this congressional effort to create a comprehen-

17. *See, e.g.*, Petition for Writ of Certiorari, Grand Trunk W. R.R. Inc. v. Roddy, 126 S. Ct. 399 (2005) (No. 05-106), 2005 WL 1703145 (cert. denied); Petition for Writ of Certiorari, Am. Airlines, Inc. v. Geddes, 540 U.S. 946 (2003) (No. 03-52), 2003 WL 22428490 (cert. denied).

18. Senator Watson, sponsor of the RLA, delivered his own summary of prior legislation, and its failings, during a Senate debate. 67 CONG. REC. 8, 8807–09 (1926).

19. LEONARD A. LECHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION 14 (1955).

20. Some of these injunctions were issued under the Sherman Act, which until the passage of the Norris-LaGuardia Act in 1932, restrained union activity as violating antitrust law. FRANK N. WILNER, THE RAILWAY LABOR ACT & THE DILEMMA OF LABOR RELATIONS 22 (1991). Members of the Court disliked this "government by injunction" and urged Congress to legislate. *Id.* at 24. *See generally* Truax v. Corrigan, 257 U.S. 312, 354 (1921) (Brandeis, J., dissenting) (discussing the use of the injunction to restrain labor action).

sive railway labor relations scheme. The RLA combined the more effective attributes of preceding legislation. Section A looks first at the preceding legislation, identifying areas of commonality with the RLA before moving on to now-superseded aspects of the 1926 RLA. Section B describes the current form of the RLA.

A. Historical Background

1. Early Attempts at Railroad Labor Legislation

Congress's first attempt at railway labor legislation was the Arbitration Act of 1888.[21] Although this Act proved a great failure, with its powers invoked only once during the ten years it was in effect,[22] certain features of the Act were later adopted by the RLA. The Act provided for voluntary arbitration in a labor dispute, with each side selecting one arbitrator, and the two arbitrators selecting a neutral member.[23] The Act also empowered the President to create an investigatory body to examine the causes of a labor controversy and issue public, nonbinding recommendations.[24]

Congress took a second stab at legislating labor relations with the Erdman Act of 1898.[25] The Erdman Act, which was utilized to successfully settle labor disputes,[26] introduced several features later incorporated into the RLA. A status quo provision was added to the arbitration provision,[27] and awards were to be filed and enforceable in federal court.[28] The Act introduced a mediation provision, which could be invoked by either party.[29] Small changes were made to this labor frame-

21. Arbitration Act, ch. 1063, 25 Stat. 501 (1888). This Act reflected a compromise between President Cleveland and Congress. The President vetoed an earlier bill with greater powers of enforcement. LECHT, *supra* note 19, at 15.

22. LECHT, *supra* note 19 at 16. That sole occasion was the infamous Pullman strike of 1894, which the provisions of the Act failed to prevent, and which resulted in violence that reached a national scale. WILNER, *supra* note 20, at 13.

23. *Compare* Arbitration Act §§ 1–2, 25 Stat. at 501–02, *with* 45 U.S.C. § 157 First–Second (2000) (RLA arbitration). These voluntary arbitration boards had the power to subpoena witnesses and compel attendance, factors which the Senate sponsor of the RLA viewed as critical in the failure of parties to submit to the Arbitration Act. 67 CONG. REC. 8, 8817 (1926) (statement of Sen. Watson).

24. Arbitration Act §§ 6, 8, 25 Stat. at 503. This power resembles the Emergency Board provided for under the RLA. *See infra* notes 91–94 and accompanying text.

25. Erdman Act, ch. 370, 30 Stat. 424 (1898). The scope of the Erdman Act was limited to those workers actually operating trains, thus excluding shopcraft employees. *See id.* § 1, 30 Stat. at 424.

26. Although the Act went untested for its first eight years, until 1906, sixty-one labor disputes were eventually settled under the Act's framework. THE RAILWAY LABOR ACT 18 n.77 (Douglas L. Leslie ed., 1995) [hereinafter RAILWAY].

27. *Compare* Erdman Act § 3 First, 30 Stat. at 425, *with* 45 U.S.C. § 155 First (RLA mediation status quo), *and id.* § 156 (RLA section 6 status quo). The Act abandoned the compulsory investigatory procedures that proved controversial in the Arbitration Act. *See supra* note 23.

28. *Compare* Erdman Act § 3 Second, 30 Stat. at 425, *with* 45 U.S.C. § 159 First–Third (filing and effect of RLA arbitration award in federal district court).

29. *Compare* Erdman Act § 3, 30 Stat. at 425, *with* 45 U.S.C. § 155 First (RLA mediation). Mediation was conducted by the Interstate Commerce Commission, not a board created specifically to handle railway labor disputes.

work with the Newlands Act of 1913,[30] which established a permanent mediation board.[31]

Problems with labor shortages and a lack of coordination among railroads led President Wilson to assume control of the railroads during World War I.[32] The government introduced adjustment boards to handle "all controversies growing out of the interpretation or application of the wage schedule or agreement,"[33] with members of the boards divided equally between labor and carrier representatives.[34] Each board was assigned to hear disputes involving specific groups of railroad employees.[35] These boards were a great success, adjudicating more than 3500 cases with few deadlocks.[36]

After the war, the railroads were returned to private control, and Congress began to draft another comprehensive railroad labor law scheme.[37] Congress considered both voluntary and compulsory arbitration methods[38] before enacting the Transportation Act of 1920, Title III of which governed the railroads.[39] The Act provided for the voluntary creation of adjustment boards to hear disputes involving "grievances, rules, or working conditions."[40]

The significant innovation in the Transportation Act was the creation of the Railway Labor Board. This board, divided equally among labor, carrier, and neutral representatives,[41] was empowered to settle wage

30. Newlands Act, ch. 6, 38 Stat. 103 (1913). The Newlands Act did not include the status quo provision in the Erdman Act. RAILWAY, *supra* note 26, at 20. Congress considered several proposals for more dramatic revision to the Erdman Act, including penalties for refusing to submit to arbitration. LECHT, *supra* note 19, at 24.

31. *Compare* Newlands Act § 11, 38 Stat. at 108 (three members, all presidential appointees), *with* 45 U.S.C. § 154 First (same, RLA). The mediation board was given the power to proffer its own services. *Compare* Newlands Act § 2, 38 Stat. at 104, *with* 45 U.S.C. § 155 First (RLA mediation, power to proffer services).

32. RAILWAY, *supra* note 26, at 24–25.

33. *Id.* at 30. Compare the wartime adjustment boards with 45 U.S.C. § 153 First (i) (RLA adjustment board jurisdiction).

34. LECHT, *supra* note 19, at 25. Compare the division of members on the wartime boards with 45 U.S.C. § 153 First (a) (division of members on RLA adjustment boards).

35. LECHT, *supra* note 19, at 26. Compare the division of disputes among the wartime boards with 45 U.S.C. § 153 First (h) (division of grievances among RLA adjustment boards).

36. RAILWAY, *supra* note 26, at 32. In fact, this cooperation between labor and carrier representatives stands in stark contrast with experience under the RLA. *See* H.R. REP. NO. 89-1114, at 12 (1965).

37. RAILWAY, *supra* note 26, at 34–35. The Newlands Act was not repealed during the war; it remained the law of the land in the immediate post-war period. *See id.* at 35.

38. *See id.* at 35–36.

39. Transportation Act, ch. 91, 41 Stat. 456, 469–74 (1920). The Newlands Act was not repealed, but where it conflicted with the new bodies created under the Transportation Act, the Transportation Act controlled. *Id.* § 316, 41 Stat. at 474.

40. *Id.* §§ 301–303, 41 Stat. at 469. Many carriers failed to set up adjustment boards, burdening the Railway Labor Board with these individual disputes. RAILWAY, *supra* note 26, at 42 The same problem of carriers and labor failing to create adjustment boards arose under the RLA as originally enacted. *See* LECHT, *supra* note 19, at 79.

41. Transportation Act § 304, 41 Stat. at 470.

disputes if requested by the carrier or employees, or on its own motion.[42] The Board had no power to enforce these decisions.[43] This new board proved deeply unpopular with labor and carriers, who resented the intrusion on their collective bargaining power.[44] When it became clear that Board decisions were unenforceable, labor and carriers simply ignored the Board altogether.[45]

A short two years after the enactment of the Transportation Act, the railroads were hit with a nationwide railway strike of unprecedented size, and the executive branch returned to the Sherman Act and the injunction as the means of controlling labor.[46] Labor and the carriers began to call for a repeal of the Transportation Act.[47] In 1924, Congress turned its attention to the railway labor issue, attempting to legislate a comprehensive scheme for the fifth time in less than four decades.[48]

Guiding principles emerged. New legislation would not be a compromise between compulsion and persuasion.[49] Any legislation would be based on an agreement between labor and the carriers.[50] After debate and amendment, in which labor and carriers played an active role,[51] Congress passed the Railway Labor Act of 1926.[52]

42. *Id.* § 307(b), 41 Stat. at 471. This decision-making public body represented a substantial departure from the mediation oriented model in prior legislation. *See* LECHT, *supra* note 19, at 46. The board was also given subpoena powers, a return to the force of compulsory investigation provided for in the earlier Arbitration Act. *See supra* note 23 (problems arising from threat of compulsion under the Arbitration act). *Compare* Transportation Act § 310(a), 41 Stat. at 471, *with* Arbitration Act, ch. 1063, § 2, 25 Stat. 501, 502 (1888).

43. Pa. R. Co. v. U.S. R.R. Labor Bd., 261 U.S. 72, 79 (1923) ("The only sanction of [a Railway Labor Board] decision is to be the force of public opinion."); *see* Transportation Act § 307(c), 41 Stat. at 471.

44. LECHT, *supra* note 19, at 43.

45. 67 CONG. REC. 8, 8809 (1926) (statement of Sen. Watson).

46. LECHT, *supra* note 19, at 44–45; *see supra* note 20.

47. RAILWAY, *supra* note 26, at 41. President Harding likewise sought a revision. WILNER, *supra* note 20, at 46. Both the Democratic and Republican platforms in 1924 advocated revising the Transportation Act. S. REP. NO. 69-606, at 3 (1926).

48. RAILWAY, *supra* note 26, at 43–44.

49. *See* S. REP. NO. 69-606, at 4. As one union president saw it, when the Railway Labor Board members "began deciding disputes they immediately lost standing as mediators. Their peace-power became dependant on force and they had no force to exert." WILNER, *supra* note 20, at 46.

50. This was an explicit condition set forth by President Coolidge. LECHT, *supra* note 19, at 48.

51. 67 CONG. REC. 8, 8806–07 (1926) (statement of Sen. Watson). For a list of railroads and labor organizations involved, see *id.* at 8807. *See also* RAILWAY, *supra* note 26, at 45 (statement of Donald Richberg, attorney for railway labor organizations).

52. RLA, Pub. L. No. 69-257, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151–164, 181–188 (2000)). The Act passed by substantial margins: 381-13 in the House, 67 CONG. REC. 5, 4777–78 (1926); 69-13 in the Senate, 67 CONG. REC. 8, 9207 (1926). The Act was strongly supported by labor and carriers. *Id.* at 8807 (statement of Sen. Watson).

2. *Evolution of the Railway Labor Act*

With the 1926 RLA, persuasion carried the day. The RLA included mediation, in a form similar to that of the Newlands Act.[53] Voluntary arbitration was an option, as in the Act of 1888. The RLA included adjustment boards in the mold of those established under the Transportation Act, rather than those in effect during the war period.[54] The Act did not contemplate the arbitral intrusion into collective bargaining that had occurred with the Railway Labor Board. The RLA also did not confer the strong investigatory powers that created problems under the Arbitration Act.[55]

The original 1926 Act differs in several substantive ways from the current RLA, which is described below in Part II.B. The 1926 Act relied upon labor and carriers to establish their own adjustment boards.[56] There was no provision for a nonpartisan neutral if a board deadlocked.[57] Although an adjustment board decision was "final and binding" on the parties, no means of enforcement was specified.[58] Few adjustment boards were actually established,[59] and unresolved grievances raised the threat of strikes.[60]

The 1934 and 1966 amendments to the RLA addressed these problems, creating the national arbitration board structure that exists today.[61] In light of the failure to establish adjustment boards, carriers and employees recognized a need to make the establishment of adjustment boards compulsory.[62] The 1934 amendment responded by creating the National Railroad Adjustment Board (NRAB).[63] The amendment also

53. *See supra* note 31. There was a proposal to return the hearing of labor disputes to the Interstate Commerce Commission, as under the Newlands Act, but before a to-be-created labor division of the Commission. LECHT, *supra* note 19, at 47.

54. Congress considered and rejected a proposal to establish a National Board of Adjustment. LECHT, *supra* note 19, at 48–49. Carriers objected strongly for, among other reasons, the concern that national boards would not have representatives from company unions. *Id*. at 49. While the carriers won this battle, they lost the war. The 1934 RLA amendment created the National Board of Adjustment and established stronger labor freedoms that finished the company union as a collective bargaining force. *See infra* note 63.

55. *See supra* note 23; *see also supra* note 42 (discussing subpoena powers under the Transportation Act).

56. RLA § 3, 44 Stat. at 578.

57. In the case of a deadlock, the dispute could be heard by the Board of Mediation, the forerunner of today's National Mediation Board. *Id*. § 5 First (a), 44 Stat. at 580.

58. *Id*. § 3 First (e), 44 Stat. at 579.

59. LECHT, *supra* note 19, at 73. This was a predictable result. The same failing occurred under the Transportation Act, which had a very similar adjustment provision. *See supra* note 40 and accompanying text.

60. LECHT, *supra* note 19, at 74–75.

61. *See infra* Part II.B.3.

62. S. REP. NO. 73-1065, at 1 (1934). Industry leaders did not agree that these boards should be national in scope. LECHT, *supra* note 19, at 81.

63. Act of June 21, 1934, Pub. L. No. 73-442, § 3, 48 Stat. 1185, 1189–93. The 1934 amendment also conferred substantially greater freedoms on labor's right to organize. Prior to the 1934 amendment, company unions had substantial influence. LECHT, *supra* note 19, at 75. The amendment gave a majority of workers the right to select their bargaining representatives and prevented carriers from

provided that an adjustment board award would be enforceable in federal court where, with the exception of monetary awards, it would be final and binding upon the parties.[64]

Over time, the NRAB developed a lengthy backlog of unadjusted claims.[65] Dissatisfaction also materialized with the scope of judicial review of NRAB awards.[66] The 1966 amendment offered parties a new form of adjustment board to help alleviate the NRAB backlog and provided limited, but equal review of all NRAB decisions.[67] No substantive revisions to the RLA have taken place since the 1966 amendment.

B. The Railway Labor Act

With the overarching goal of avoiding interruption to commerce or to a carrier engaged therein,[68] the RLA created a comprehensive mechanism for resolving labor disputes involving railroad, and later air transport, carriers.[69] Its powers extend widely to include shop-craft workers and the broadest range of rail and air commerce.[70] To operate these RLA mechanisms, two administrative bodies were formed: the National Mediation Board (NMB), with overarching responsibilities in all areas of the RLA,[71] and the NRAB, which deals with a narrower class of labor disputes.[72]

The RLA addresses three major areas of labor relations: self-organization;[73] changes in working conditions, commonly called major disputes;[74] and disputes arising out of an existing collective bargaining agreement (CBA), commonly called minor disputes.[75] This Section will address each of these three areas in turn, and then highlight significant differences in the way the RLA handles air, rather than rail, labor dis-

collecting dues for, or requiring membership in, any union; these restrictions eliminated carrier influence from the choice of representatives. *Id.* at 82–83.

64. Act of June 21, 1934 § 3(m), 48 Stat. at 1191.

65. *See* H.R. REP. NO. 89-1114, at 4–5 (1965).

66. *See* Union Pac. R.R. Co. v. Price, 360 U.S. 601, 621 (1959) (Douglas, J., dissenting); *infra* notes 285, 287, 306.

67. Act of June 20, 1966, Pub. L. No. 89-456, § 2, 80 Stat. 208, 209–10. For a discussion of Congress's intent in altering judicial review, see *infra* notes 304–09 and accompanying text.

68. 45 U.S.C. § 151a (2000).

69. RLA, Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 150–164, 181–188 (2000)).

70. 45 U.S.C. §§ 151 First (rail), Fifth (workers), 181 (air). The reach of the Erdman Act, maintained in the Newlands Act, was more limited. *See supra* note 25.

71. 45 U.S.C. § 155. The NMB is a form of independent executive agency, with members appointed by the President for three year, staggered terms. *Id.* § 154 First. The appointees are presumptively political, with no more than two members of a single party represented, but members may not have any interest in carriers or employees. *Id*. § 154 First. The NMB has broad power to hire employees and delegate duties. *Id*. § 154 Third–Fourth.

72. *Id*. § 153. The NRAB construction is discussed *infra* notes 99–102 and accompanying text.

73. 45 U.S.C. § 151a(2)–(3).

74. *Id.* § 151a(4); *see* Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711, 724–25 (1945) ("major disputes").

75. 45 U.S.C. § 151a(5); *see Burley*, 325 U.S. at 724–25 ("minor disputes").

putes. Finally, this Section will summarize the role the judicial system plays in the RLA scheme.

1. Self-Organization

The RLA guarantees employees the right to organize and bargain through representatives of their own choosing, free from interference from a carrier.[76] Where a dispute arises as to the authorized representatives of employees, it is the "duty" of the NMB, at the request of either party, to investigate and certify the authorized representative of the employees.[77] There is no mechanism for review of an NMB certification.[78]

2. Major Disputes

The primary goal of the RLA is to avoid interruptions to commerce resulting from strikes. It is during major disputes, where parties seek to change the rates of pay, rules, or working conditions, that strikes most often occur.[79] The RLA handles major disputes differently than minor disputes, making it important to distinguish between the two categories. The Supreme Court has supplied a test: if the employer's action is arguably justified by the terms of the parties' CBA, it is a minor rather than major dispute.[80]

The statutory construct for handling major disputes is relatively simple. The RLA provides for a drawn-out process of mediation, and potentially arbitration, to deter strikes by forcing parties to continue to negotiate while maintaining the status quo.[81] These requirements are court enforceable; only at the end of the major dispute process is self-help allowed.[82]

Before beginning efforts to change agreements affecting rates of pay, rules, or working conditions, a party must give a "section 6" thirty-day written notice.[83] The parties are then required to confer, after which either party may request the services of the NMB or the NMB may proffer its own services.[84] The NMB provides only mediation, though it must

76. 45 U.S.C. § 152 Fourth–Fifth. This right was greatly restricted by the addition of § 152 Eleventh, a 1951 amendment, which permitted a carrier to require employees to join a union, and allowed employers to deduct union dues from wages. Rather than go to the trouble of rewriting the existing, and conflicting, RLA statute, the amendment stated "any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended." *Id*. § 152 Eleventh (d).

77. *Id.* § 152 Ninth.

78. *See* RAILWAY, *supra* note 26, at 198 n.11, 218.

79. *Burley*, 325 U.S. at 723–24.

80. Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 307 (1989). This is a "light burden" on the carriers to establish NRAB jurisdiction. *Id.*

81. RAILWAY, *supra* note 26, at 2.

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

83. 45 U.S.C. § 156 (2000); *see id*. § 152 Seventh.

84. *Id.* § 156. The NMB's role is limited by this discretion. If the parties do not request mediation, and the NMB does not proffer, the NMB's role in the dispute is over. *Id*. § 156.

"endeavor . . . to induce the parties to submit their controversy to arbitration."[85] Self-help is permitted thirty days after failed mediation.[86]

The parties may mutually agree to arbitration.[87] The two parties each select one-third of the arbitrators, who then select the remaining third of the board of arbitration.[88] The arbitration award is filed with the appropriate district court,[89] and is final and conclusive upon the parties as to the facts and merits.[90]

Should the parties fail to reach agreement, and reject arbitration, the RLA provides for "emergency boards" as a last-ditch procedure to avoid self-help.[91] These boards are created by the President after notification from the NMB that the dispute threatens interstate commerce.[92] An emergency board has thirty days to issue a report to the President, followed by a thirty-day status quo period before self-help is allowed.[93] The report's recommendation is not binding upon the parties.[94]

3. Minor Disputes

Minor disputes, involving the interpretation of terms of an existing CBA,[95] are treated very differently than major disputes under the RLA.[96] The RLA first requires that parties to a minor dispute meet in conference, in the "usual manner," in an initial attempt to resolve their dispute.[97] If the parties fail to reach a resolution through their internal process, either party may refer the dispute to the NRAB.[98]

The NRAB is an arbitral body with thirty-four members, half of whom are chosen by national labor organizations of railroad employees

85. *Id.* § 155 First.

86. *Id*.

87. *Id*. If the arbitrators cannot agree on third parties, the NMB decides. *Id*. § 157 Second.

88. *Id.* § 157 Second.

89. *Id.* § 157 Third (f).

90. *Id.* § 158(*l*). The finality of such award follows from mandatory language in the agreement to arbitrate and the statutory language of the RLA. *Id.* § 159 Second. Grounds for appeal are limited. *Id.* § 159 Third. *Compare id.* § 159 Third, *with id.* § 153 First (p)–(q) (NRAB award conclusive on the parties).

91. *Id.* § 160.

92. *Id*.

93. *Id*.

94. *Id*. There is a separate, more lengthy emergency board proceeding for commuter rail, providing for a status quo period of up to 240 days. *Id.* § 159a. While none of the major dispute proceedings involve compulsory arbitration, this commuter-rail provision is unique in penalizing parties in a major dispute for resorting to self-help after the status-quo period. *Id*. § 159a(i)–(j).

95. *See* Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 723 (1945) (describing minor disputes). This RLA mechanism for handling minor disputes has evolved significantly since the Act was originally enacted. *See supra* Part II.A.2.

96. For example, there is no status quo provision. *Compare* 45 U.S.C. § 156 (status quo obligation in major dispute), *with id.* § 153 First (i) (no status quo component to minor dispute procedure).

97. 45 U.S.C. § 152 Sixth (setting forth conference time and place requirements); *id*. § 153(i) (requirement that minor disputes first be handled in the "usual manner").

98. *Id.* § 153 First (i).

and half by rail carriers.[99] The board is subdivided into four divisions, each responsible for the adjudication of grievances involving specific sectors of the railroad labor force.[100] Parties present their case before the NRAB and have broad freedom as to representation.[101] The NRAB arrives at a decision; where there is deadlock, the division members are empowered to select a neutral referee to review and decide the case.[102]

Two alternative arbitral bodies, also consisting of labor and carrier representatives, may be used by the parties in lieu of the NRAB: a system board of adjustment or a public law board. A system board of adjustment is created by agreement of one or more carriers and one or more classes of employees, for the purpose of deciding minor disputes.[103] If either party is dissatisfied by such arrangement, it may elect to come under NRAB jurisdiction.[104]

Upon the request of a labor representative or of the carrier, the RLA requires a Public Law Board to be established.[105] The board consists of one labor and one carrier appointee, along with a neutral member.[106] Public law board awards are enforceable in the same manner as NRAB awards.[107]

Where a carrier does not comply with an award, or petitioner wishes to challenge an adverse ruling, the RLA allows review in federal district court.[108] Although the suit "proceeds in all respects as other civil suits," the findings and order of the NRAB are conclusive on the par-

99. *Id.* § 153 First (a); *see id.* § 153 First (b)–(g) (selection of representatives).

100. *Id.* § 153 First (h). The divisions have limited authority to delegate fact-finding, but final awards must be issued by the full statutory compliment of division members. *Id.* § 153(k); *see id.* § 153(h) (restricting eligible voters among division members).

101. *Id.* § 153 First (j). Representation may be by a union representative, as well as an attorney. RAILWAY, *supra* note 26, at 280.

102. *Id.* § 153 First (*l*). Over one ten-year period, carrier representatives on the First Division agreed to pay only twenty-one employee claims out of nearly 5000 submitted, some indication of how commonly carrier and labor NRAB members disagreed, and how the referee role mattered. *See* H.R. REP. NO. 89-1114, at 7, 12 (1965). Where the parties fail to select a referee, the NMB will name one. 45 U.S.C. § 153(*l*). Only when the parties fail to follow RLA procedure, by failing to select a referee, is the dispute taken out of the hands of the labor and carrier representatives.

103. 45 U.S.C. § 153 Second. These are similar to the types of boards utilized in the airline industry. *See infra* note 116 and accompanying text.

104. 45 U.S.C. § 153 Second.

105. *Id.* The jurisdiction of a Public Law board may be determined by the parties; it need not encompass all disputes arising at a particular carrier or from a particular union. RAILWAY, *supra* note 26, at 284. The individual employee has no statutory right to demand a public law board, nor a right to opt out of a public law board into the NRAB. Bhd. of Locomotive Eng'rs v. Denver & Rio Grande W. R.R. Co., 411 F.2d 1115, 1118 (10th Cir. 1969).

106. 45 U.S.C. § 153 Second.

107. *Id.* Courts have also interpreted this to mean that review of such awards is limited as with NRAB awards. *Compare* Bhd. of Locomotive Eng'rs v. St. Louis Sw. Ry. Co., 757 F.2d 656, 661 (5th Cir. 1985) (applying same limitations), *with* Employees Protective Ass'n v. Norfolk & W. Ry. Co., 511 F.2d 1040, 1045 (4th Cir. 1975) (applying "review similar to the review accorded awards of the several divisions of the National Railroad Adjustment Board").

108. 45 U.S.C. § 153 First (p) (carrier's failure to comply); *id.* § 153(q) (failure of NRAB to make an award).

ties.[109] The statutory limits on a district court's power to review an NRAB award are so strict that the power to review has been described as "among the narrowest known to the law."[110] Courts may set aside an order only for failure of the NRAB to conform to the RLA requirements, failure of the NRAB to confine itself to matters within the NRAB's jurisdiction, or fraud or corruption by a member of the NRAB making the order.[111] There is no inquiry into the substantiality of the evidence or the merits of the NRAB award.[112]

4. Subchapter II, Carriers by Air

In 1936, the RLA was amended to regulate carriers by air.[113] The same substantive procedures governing carriers by rail were applied to carriers by air. However, air carriers are not governed by the provisions establishing the NRAB.[114]

Air carriers were excluded from the NRAB not because Congress intended to create a different type of arbitral mechanism, but to create a parallel system to handle air carrier disputes.[115] The major difference is a compulsory requirement that employers and carriers establish boards of adjustment similar to the system boards of adjustment that are optional for rail carriers.[116] Subchapter II gave the NMB the power to form a National Air Transport Adjustment Board, with the powers and procedures of the NRAB, if "necessary . . . for the prompt and orderly settlement of disputes between said carriers by air . . . and its or their employees . . . ."[117] The NMB has not established a National Air Transport Board.[118]

109. *Id.* § 153 First (p)–(q).

110. Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 563 (1987).

111. 45 U.S.C. § 153 First (p)–(q). Some circuits have added a fourth, due process basis for review. *See* English v. Burlington N. R.R. Co., 18 F.3d 741, 744 (9th Cir. 1994). Where the suit is for failure to make an award, the Court may set the order aside in whole or in part, or remand for further proceedings. 45 U.S.C. § 153 First (q). Before the 1966 amendment, review was sometimes substantive. *See infra* notes 285–88 and accompanying text.

112. *See* Diamond v. Terminal Ry. Ala. State Docks, 421 F.2d 228, 233 (5th Cir. 1970).

113. *See* Act of Apr. 10, 1936, Pub. L. No. 74-487, 49 Stat. 1189 (1936) (codified as amended at 45 U.S.C. §§ 181–188 (2000)).

114. *See* 45 U.S.C. § 182; *cf. id.* § 183 (describing role for NMB under subchapter II, but then stating the "services of the [NMB] may be invoked . . . in the same manner and to the same extent as are the disputes covered by [subchapter I]").

115. *Compare id.* §§ 184–185, *with id.* § 153. It would have been inconsistent with the goals of the RLA to submit airline grievances to a board made up of railway employees and carrier representatives. *See infra* Part IV.D. Some new body was a necessity.

116. *Compare* 45 U.S.C. § 184, *with id.* § 153 Second. The compulsory nature of these boards helped ensure the problems under the 1926 Act, where carriers and labor failed to establish boards, would be avoided. *See supra* note 59 and accompanying text.

117. 45 U.S.C. § 185.

118. Mark L. Kahn, *Labor Management Relations in the Airline Industry*, *in* THE RAILWAY LABOR ACT AT FIFTY 97, 103 (1976).

5. Injunctive Powers: A Limited Role for the Federal Courts

Although the judiciary's role in the RLA statutory scheme is limited, courts have developed an "extremely narrow" range of injunctive relief to aid the functioning of the RLA scheme.[119] The Supreme Court authorized the use of injunctive relief to enforce RLA obligations regarding the certification of bargaining representatives,[120] and later recognized an equitable power to enforce the status quo provisions for major disputes.[121] The Court has also recognized equitable power in the context of minor disputes, both to enjoin strikes pending an NRAB adjustment[122] and to prevent changes in conditions by a carrier that might render an NRAB award meaningless.[123] The Court based such equitable relief on the need to protect the "jurisdiction of the Board," while explicitly disavowing any implied encroachment on NRAB power.[124]

III. THE DOCTRINE OF COMPLETE PREEMPTION

Federal statute establishes removal jurisdiction where a federal court would have possessed original jurisdiction over the relevant claim.[125] One basis for original jurisdiction is the existence of a federal question.[126] The determination of whether a claim raises a federal question is ordinarily made under the well-pleaded complaint rule: "A suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."[127] That a federal defense may exist, or that the plaintiff may rely on federal law to challenge a defense, does not establish federal question jurisdiction under the well-pleaded complaint rule.[128]

119. *See* Local 19, Int'l Bhd. of Teamsters v. Sw. Airlines Co., 875 F.2d 1129, 1136 (5th Cir. 1989).

120. Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 549–50 (1937).

121. Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142 (1969) (upholding status quo injunction).

122. Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co., 353 U.S. 30, 32, 39–42 (1957). *Railroad Trainmen* dealt with a strike order issued while NRAB adjudication was pending, and the Court later extended the holding to cover relief enjoining a strike after an NRAB money award. Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co., 373 U.S. 33, 40 (1963).

123. Bhd. of Locomotive Eng'rs v. Mo.-Kan.-Tex. R.R. Co., 363 U.S. 528, 531 (1960). This decision recognized the traditional power of the equity court to grant relief subject to conditions that protect all the parties. *Id.* The Court has left open the question of whether courts can require a carrier to maintain the status quo at a union's behest where the carrier has not first sought a strike injunction. Consol. Rail Corp. v. Ry. Labor Executives Ass'n, 491 U.S. 299, 304 (1989). *But see* Westchester Lodge 2186, Bhd. of Ry. & Steamship Clerks v. Ry. Express Agency, 329 F.2d 748, 752–53 (2d Cir. 1964) (finding power to issue status quo injunction).

124. *Mo.-Kan.-Tex. R.R. Co.*, 363 U.S. at 534; *see* Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 821 n.14 (1973).

125. 28 U.S.C. § 1441(a)–(b) (2000).

126. *Id.* § 1331; *see* U.S. CONST. art. III, § 2.

127. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

128. *Id*.

There is an exception to the well-pleaded complaint rule in the removal context: the doctrine of complete preemption. This relatively recent development in jurisdictional jurisprudence, introduced in *Avco Corp. v. Aero Lodge No. 735*, permits the removal of claims from state court, pleaded in terms of state law, under a limited set of circumstances.[129] In short, where a statute has a "preemptive force . . . so powerful as to displace entirely any state cause of action," such action arises under federal law.[130] Because the claim arises under federal law, it falls within the removal jurisdiction of a federal court.[131]

The Supreme Court has identified only three statutes as having complete preemptive force: the LMRA, the Employment Retirement Income Security Act (ERISA), and the National Bank Act.[132] A clear understanding of these prior determinations is essential to evaluate the applicability of this doctrine to other statutes.[133] This Part looks at the rationale behind the Court's finding of complete preemptive power in each of the three statutes and concludes by contrasting the reasoning in the three determinations to discern some common doctrine.

A. Section 301 of the Labor Management Relations Act

In *Avco*, a dispute arose between a union and the union members' employer concerning the enforceability of a no-strike clause in the CBA.[134] The employer filed suit in state court, pleading only state law, to enjoin a threatened union strike.[135] The union then removed to federal court on the basis of a federal question.[136]

Although the plaintiff's complaint made no reference to federal law, the Court treated this case as invoking section 301 of the LMRA.[137] Section 301 provides a federal cause of action for the breach of a CBA, a cause of action under which this *Avco* dispute could have been filed.[138] The only explanation for the decision to uphold removal jurisdiction was that "an action arising under § 301 is controlled by federal substantive law even though it is brought in state court."[139] Under traditional juris-

129. 390 U.S. 557, 560 (1968). The jurisdictional concept of artful pleading has merged with the concept of complete preemption. *See* Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998).

130. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23–24 (1983).

131. 28 U.S.C. § 1441(b).

132. *Avco*, 390 U.S. at 560 (Labor Management Relations Act); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987) (Employment Retirement Income Security Act); Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10–11 (2003) (National Bank Act).

133. *Cf. Beneficial*, 539 U.S. at 9 (explaining that previous complete preemption cases "provide the framework for answering the . . . question" whether the National Bank Act operates with complete preemption).

134. 390 U.S. at 558.

135. *Id.*

136. *Id.*

137. *Id*. at 560.

138. 29 U.S.C. § 185 (2000).

139. *Avco*, 390 U.S. at 560. This holding rested on an earlier case, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456–57 (1957), in which the Court ruled that section 301 intended the creation

dictional analysis, the assertion that section 301 preempted the plaintiff's state law claim would be a potential defense to the state law claim, but it would not establish removal jurisdiction.[140] A defense does not satisfy the well-pleaded complaint rule.[141]

Fifteen years after *Avco*, in *Franchise Tax Board v. Construction Laborers Vacation Trust*, the Court returned to the topic of complete preemption, supplying a rationale for the *Avco* holding.[142] The Court explained that in *Avco*, the enforcement of the labor agreement was of central concern to the LMRA.[143] Section 301 provided the plaintiff in *Avco* with a federal cause of action.[144] Federal law, in spite of the plaintiff "undoubtedly" pleading an adequate claim for relief under state law and seeking a remedy only available under state law, would have controlled any action in state court.[145] "The preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization."[146]

B. Employment Retirement Income Security Act

The Court had its reasons for using *Franchise* to expound on the doctrine of complete preemption. In *Franchise*, the agency charged with the enforcement of California's tax code sought to levy funds held in trust under an ERISA-covered benefit plan.[147] The agency sought a declaratory judgment in state court "that defendants . . . are obligated and required by law to pay over to the Board [ERISA funds] . . . ."[148] Defendant removed to federal district court.[149]

The defendant argued an *Avco*, state-law-claim as federal-claim rationale as a basis for jurisdiction, and the Court gave this argument serious attention. The Court noted the ERISA express federal cause of action in section 502,[150] and that ERISA contained a "unique pre-emption provision," under which a body of federal common law would be devel-

of federal common law. *Avco*, 390 U.S. at 559–60. Justice Scalia has argued the section 301 language meant only that when federal courts applied the law of other jurisdictions in the section 301 context, that law would also become a part of federal common law. *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 13 (2003). As the complete preemption doctrine has developed, the existence of federal common law has become a factor courts look for when determining whether a statute has complete preemptive force. *See infra* note 262 and accompanying text.

140. *Beneficial*, 539 U.S. at 12–13.
141. *Id.*
142. 463 U.S. 1, 25–26 (1983).
143. *Id.* at 25–26.
144. *Id*. at 26.
145. *Id.* at 23.
146. *Id*. This opinion introduced the phrase complete preemption. *See id.* at 24.
147. *Id*. at 6.
148. *Id*.
149. *Id*. at 7.
150. Employment Retirement Income Security Act of 1974 (ERISA) § 502, 29 U.S.C. § 1132(a) (2000); *Franchise*, 463 U.S. at 24.

oped.[151] "It may be that any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court . . . ."[152]

This was not such an action, however. The Court explained that the right of a state to enforce tax levies was not of central concern to the ERISA statute.[153] ERISA's enforcement section, section 502, specified who could bring an action for relief, and did not include state governments.[154] Absent a federal cause of action, there would be no complete preemption.[155] Still, the Court's hint was none-too-subtle, and in *Metropolitan Life Insurance Co. v. Taylor*, a removal jurisdiction dispute falling under the section 502 enforcement mechanism of ERISA reached the high Court.

In *Metropolitan*, a beneficiary of an ERISA plan filed suit in state court.[156] The defendant removed to federal court alleging federal question jurisdiction by virtue of ERISA preemption.[157] The plaintiff's claim could be sustained under section 502 of ERISA, the enforcement provision, like the scenario the Court raised in *Franchise*.[158] Touching on the factors absent in *Franchise*, the Court noted that the state law remedies that Congress rejected in enacting ERISA threatened to undermine the federal remedial scheme.[159] A replacement federal civil remedy existed, enabling "participants and beneficiaries to bring suit to recover benefits denied contrary to the terms of the plan."[160]

The Court added two new ingredients to the complete preemption mix, relying on specific similarities between the LMRA and ERISA. These statutes had similar jurisdictional language, and the Court proceeded under the presumption that similar language in two statutes has similar meaning.[161] The Court also identified explicit direction from Congress that ERISA have complete preemptive status.[162] Legislative history contained direct statements that benefit claims under ERISA should be regarded as arising under federal law in a similar fashion to section 301 of the LMRA.[163] "No more specific reference to the *Avco*

151. *Franchise*, 463 U.S. at 24 n.26.
152. *Id*. at 24.
153. *Id*. at 25.
154. ERISA § 502; *Franchise*, 463 U.S. at 25.
155. *Franchise*, 463 U.S. at 26–27.
156. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 61 (1987).
157. *Id*.
158. *Id*. at 64.
159. *Id.* at 64–65 (distinguishing non-central concern in *Franchise*).
160. *Id*. at 65–66 (referring to comments by Sen. Williams, a sponsor of ERISA).
161. *Id*. at 65.
162. *Id.* at 64. The majority does not hold this intent is required. "In the absence of explicit direction from Congress, this question would be a close one." *Id*. The concurring justices, *id.* at 67–68 (Brennan, J., concurring), would require a clear manifestation of congressional intent that a cause of action be removable. As *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003), unambiguously holds, intent to remove is not required. However, the post-*Beneficial* opinion in *Aetna Health Inc v. Davila*, 542 U.S. 200, 209 (2004) describes the basis for *Metropolitan* as the "clear intention" of Congress to confer removal jurisdiction in a like manner to section 301.
163. *Metro.*, 481 U.S. at 65–66.

rule can be expected."[164] Based on the presence of an express civil remedy, use of language similar to that in section 301 of the LMRA, and legislative history suggesting an intent to create removal, the Court found that the doctrine of complete preemption applied to claims falling under section 502 of ERISA.[165]

C. National Bank Act

In *Beneficial National Bank v. Anderson*, the plaintiffs brought suit in state court against a national bank to recover damages for usury in violation of common law and state statute.[166] The defendant removed to federal court, asserting that the National Bank Act was the exclusive law governing the rate of interest that a national bank might lawfully charge.[167] Two sections of the National Bank Act were relevant. Section 85 set limits on the rate of interest that a national bank could charge.[168] Section 86 specified the penalty for exceeding the limits in section 85.[169] After the court of appeals found jurisdiction lacking, the Supreme Court granted certiorari.[170]

The Court noted that the LMRA and ERISA statutes provided a federal cause of action as well as procedures and remedies to govern that action.[171] If Congress intended to provide the exclusive cause of action for usury claims against federal banks, that cause of action would also be removable.[172] Exclusivity would be determined by congressional intent.[173] The Court referred to longstanding judicial construction of the Act as the exclusive cause of action for usury.[174] "In any view that can be taken of [§ 86], the power to supplement it by State legislation is conferred neither expressly nor by implication."[175] The Court also returned to the issue of central concern that was found lacking in *Franchise* but present in *Metropolitan*. Possible unfriendly state legislation posed a

164. *Id*. at 66.
165. *Beneficial*, 539 U.S. at 7–8.
166. *Id*. at 4.
167. *Id*. at 4–5.
168. 12 U.S.C. § 85 (2000).
169. *Id.* § 86.
170. *Beneficial*, 539 U.S. at 6. The court of appeals based its holding on the lack of evidence of congressional intent to permit removal under § 85 or § 86. Anderson v. H&R Block, Inc., 287 F.3d 1038, 1044–48 (11th Cir. 2002). The court's mistake was in looking for intent to remove, an understandable mistake given the language of *Metropolitan*: "Congress has clearly manifested an intent to make causes of action . . . removable to federal court." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987).
171. *Beneficial*, 539 U.S. at 8.
172. *Id*. at 9.
173. *Id.* at 9. The critical intent is not intent to allow removal, although such intent would certainly be a compelling factor suggesting complete preemption. *Id*. at 9 n.5.
174. *Id*. at 10.
175. Farmers' & Mechs. Nat'l Bank v. Dearing, 91 U.S. 29, 35 (1875).

threat to the banking system, a threat limited by uniform rules of liability.[176]

D. So What Is the Supreme Court Looking for?

After *Beneficial*, it is clear that complete preemption requires a federal cause of action available to the plaintiff, and that this be the exclusive cause of action, preempting state law, for the claim asserted. What this requires in the statutory context is less clear. Section 301 of the LMRA and section 86 of the National Bank Act provide a procedure for recovery but do not, by their express statutory language, preempt state law.[177] ERISA has a more complex code section setting forth procedures and remedies and includes an express preemption provision.[178]

The existence of these two fundamental requirements of complete preemption may also be evidenced by congressional intent, the "touchstone of the federal district court's removal jurisdiction."[179] While evidence of a specific intent to authorize removal is a positive factor, intent that the federal civil remedy be the exclusive remedy is the relevant inquiry.[180] Finding evidence of this congressional intent is not essential; there was no such finding in *Avco*, and the Court indicated in *Metropolitan* that the absence of explicit direction from Congress would not be conclusive.[181]

Turning to policy arguments, the Court has identified a central concern in each of the complete preemption cases.[182] These arguments have been used to limit the breadth of complete preemption, as in *Franchise*.[183] Policy has also been used to infer an intent by Congress to create an exclusive cause of action, as in *Metropolitan*.[184]

Statutory similarity to the LMRA, particularly if explicitly intended by Congress, is relevant to finding complete preemption. Although *Beneficial* did not identify any statutory similarities between the National Bank Act and the LMRA, the Court again acknowledged the significance of the parallels between ERISA and the LMRA that underlie *Met-*

176. *Beneficial*, 539 U.S. at 10.

177. Labor Management Relations Act (LMRA) § 301, 29 U.S.C. § 185 (2000); National Bank Act § 30, 12 U.S.C. § 86 (2000).

178. *See* 29 U.S.C. §§ 1132, 1144.

179. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987).

180. *Beneficial*, 539 U.S. at 9 n.5. Intent to create removal would likely be conclusive. In explaining *Metropolitan*, the Court reinterprets that case as relying on congressional intent to align the jurisdictional scope of section 301 and ERISA. *Id.* at 8. Of course, the reason for that congressional intent would be to confer removal as under section 301.

181. *Metro*., 481 U.S. at 64.

182. *Id.* at 64–65.

183. The Court notes that the right of a state court to enforce its tax levies is not of central concern to the ERISA statute. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 25 (1983).

184. *See Metro.*, 481 U.S. 58, 64–65 (finding that federal policy would be completely undermined by allowing state law remedies Congress rejected).

ropolitan.[185] Since *Beneficial*, the Court has even cited *Metropolitan* with reference only to the similarity rationale.[186]

Looking at this amalgam of factors, it is clear there is no simple test for complete preemption. The key is an unusually powerful preemptive force, the abstract concept to which the Court has returned in each of its decisions involving *Avco* and its progeny.[187] If this indefinite concept is the underlying principle, it helps explain the factors the Court has relied upon.

The Court is looking for persuasive grounds on which to distinguish a statute invoking complete preemption from a run-of-the-mill statute with preemptive power. Were the required combination of preemption and an exclusive remedy sufficient justification, the Court would not have consistently identified other factors when finding complete preemption.[188] Even where the Court, in *Beneficial*, framed the question in terms of the existence of an exclusive remedy, the Court still identified a strong, central-concern type of policy interest in removing all such claims from state court.[189] Legislative history may be used to identify relevant congressional intent.[190] Statutory parallels with a statute upon which the Court has already conferred complete preemptive power would also be a significant factor. If there is a final insight to be gleaned from these cases, it is that the Court, as shown in *Beneficial*, is willing to consider new factors. The key is that the evidence establish, in some way, that the statute has that "extraordinary pre-emptive power."[191]

IV. COMPLETE PREEMPTION AND THE RAILWAY LABOR ACT

This Part examines the RLA in light of the Supreme Court's current complete preemption jurisprudence. First, this Part looks for the attributes the Court has identified as essential to finding complete preemption: a federal cause of action available to a plaintiff and preemption making the federal cause of action the exclusive cause of action. Then, this Part explores three other areas of significance to a complete preemption de-

185. *See Beneficial*, 539 U.S. at 7–8.

186. Aetna Health Inc. v. Davilla, 542 U.S. 200, 209 (2004); *see supra* note 162.

187. *See, e.g.*, *Beneficial*, 539 U.S. at 6–7.

188. As Justice Scalia's dissent in *Beneficial* notes, if exclusivity were the sole criterion, the court would not have "taken pains to emphasize the 'clos[e] parallels'" in the statutes of ERISA and the LMRA. 539 U.S. at 16. The *Beneficial* majority did not reject the significance of the close parallels, citing it as a significant (if perhaps now nonessential) factor. *Id*. at 7–8. In *Aetna*, 542 U.S. at 209, an opinion written by Justice Thomas who joined Justice Scalia's dissent in *Beneficial*, the court summarizes the reasons for finding complete preemption in ERISA as the similar language between ERISA and the LMRA, along with congressional intent that the statutes be treated similarly. Conspicuously absent is any mention of an exclusive cause of action.

189. *Beneficial*, 539 U.S. at 10.

190. *See, e.g.*, Metro. Life Ins. Co v. Taylor, 481 U.S. 58, 65–66 (1987). The Court also identified congressional intent through longstanding *judicial* interpretation of a statute. *Beneficial*, 539 U.S. at 10.

191. *Metro.*, 481 U.S. at 65.

termination: parallels with the LMRA, congressional intent as reflected in legislative history, and the central concern of the RLA.

A. A Federal Cause of Action

The existence of a federal cause of action to replace plaintiff's state law claim is a prerequisite to any finding of complete preemption.[192] The RLA, like ERISA, is not a monolithic mechanism for handling all carrier-employee disputes. As *Metropolitan* made clear, a statute need not operate with complete preemptive force in all its facets.[193]

The RLA sets forth a variety of affirmative duties, many of which do not have a corresponding statutory federal cause of action for enforcement.[194] There are also nonexclusive forums in which to resolve claims under the RLA, including optional arbitration and NMB mandatory mediation.[195] In contrast, the NRAB, system boards of adjustment, and public law boards are statutorily created arbitral bodies in which the Court has recognized exclusive jurisdiction over minor disputes.[196]

Therefore, if there is complete preemptive force in the RLA, it will be found only in the federal cause of action represented in the adjustment boards. Courts of appeal have disagreed as to whether the right to a proceeding before these adjustment boards is a sufficient federal cause of action to create complete preemption, with an adverse finding terminal to any complete preemption claim.[197] The best guidance as to sufficiency is a comparison with the causes of action available under LMRA section 301, ERISA section 502, and National Bank Act section 86.

1. Federal Causes of Action Invoking Complete Preemption

The three federal causes of action that the Supreme Court has found to support complete preemption are causes of action before courts, established explicitly in statute. ERISA section 502 confers exclusive jurisdiction of civil actions under the statute solely in the federal

192. *See supra* Part II.D.

193. *See Metro.*, 481 U.S. at 64 (distinguishing ERISA preemption alone in *Franchise* from ERISA preemption and section 502 cause of action in *Metropolitan*). LMRA complete preemption exists only under section 301, not under other sections of the LMRA. WRIGHT ET AL., *supra* note 6, § 3722.1.

194. *See, e.g.*, 45 U.S.C. § 152 Fourth (2000) (limiting role of the carrier in employee efforts to organize). A circuit may recognize an implied private right of action to enforce such a provision. *See* Price v. PSA, Inc., 829 F.2d 871, 876 (9th Cir. 1987).

195. 45 U.S.C. § 155 First (mediation); *id.* § 157 (arbitration). A party may decline arbitration, wait out the various status-quo timing provisions under the statute, and then resort to self-help to resolve this dispute. *See supra* Part II.B.2.

196. Consol. Rail Corp. v. Ry. Labor Executives Ass'n, 491 U.S. 299, 304 (1989).

197. *Compare* Ry. Labor Executives Ass'n v. Pittsburgh and Lake Erie R.R. Co., 858 F.2d 936, 942 (3d Cir. 1988) (finding no federal cause of action created under RLA to replace plaintiff's claim and no complete preemption), *with* Graf v. Elgin, Joliet & E. Ry. Co., 790 F.2d 1341, 1346 (7th Cir. 1986) (finding potential federal remedy and complete preemptive force).

district courts.[198] The preemptive effect of this remedy results from the statute's unique preemption provision, which declares that ERISA "shall supersede any and all state laws."[199] LMRA section 301's statutory language also creates an express cause of action, which the Court interpreted as creating federal common law.[200] Thus, "federal interpretation of federal law will govern, not state law,"[201] preempting state law. National Bank Act section 86 provides a civil cause of action to recover usurious interest.[202] Although preemption is not mentioned in the statute, the Court has, since shortly after the statute's passage, interpreted section 86 as the exclusive remedy for usury.[203]

While all three statutes explicitly created causes of action in the courts, they were interpreted to be exclusive causes of action for different reasons. Exclusivity was established once by statute and twice through judicial interpretation, so an explicit statutory claim of exclusivity is clearly not required. In none of these cases, though, did the Court find any ambiguity as to the exclusive nature of the remedy.[204]

2. Minor Disputes and the NRAB: An Exclusive Cause of Action?

The minor dispute process created for adjudicating grievances is of a very different character than section 301, section 502, and section 86. Like the other statutes, it creates a cause of action for a specific type of claim, for "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."[205] Unlike the other statutes, this cause of action does not confer jurisdiction on the courts. Instead, the RLA routes these claims to a statutorily created arbitral body independent of the judicial system.[206]

This arbitral body does not function in a way closely analogous to a trial court. It has members appointed by labor organizations and railway carriers, with no requirement that the members have legal training.[207] Parties before the court may, but need not, appear with counsel.[208] Parties are expected to submit briefs detailing the facts rather than present

198. 29 U.S.C. § 1132(e) (2000).

199. *Id*. § 1144 (a).

200. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456–57 (1957).

201. *Id*. at 457.

202. 12 U.S.C. § 86 (2000).

203. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10 (2003) (citing cases dating back to 1875 that hold § 86 to be exclusive).

204. *See, e.g.*, *Beneficial*, 539 U.S. at 10 ("longstanding and consistent construction . . . as providing an exclusive federal cause of action").

205. 45 U.S.C. § 153 First (i) (2000).

206. *Id.* § 153.

207. *Id*. § 153(a).

208. *Id.* § 153(j); *see* Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567, 578 (1937).

witnesses,[209] and an oral hearing before the NRAB is granted only if there is a written request.[210]

Appellate review of NRAB decisions, although available, is extremely limited by statute.[211] The courts are limited to a procedural review of NRAB decisions.[212] Even under the pre-1966 version of the RLA, which did not contain the statutory limits on the scope of appellate review, the Supreme Court itself limited the scope of appellate review.[213]

Some courts mistakenly equate section 301 of the LMRA with the adjustment provisions of the RLA. "[Chapter 3] of the RLA has essentially the same function as section 301 of the LMRA."[214] One court treated the RLA and LMRA remedies as analogous and the analysis of RLA and LMRA cases as virtually indistinguishable.[215]

This confusion may arise because section 301 claims are sometimes dismissed when the parties fail to pursue arbitration.[216] Such a result is only superficially comparable to the requirement of NRAB adjustment. Section 301 creates a federal cause of action, *in the courts*, to enforce contracts between labor organizations and employers.[217] This provision reflected a congressional concern that unions were failing to abide by the terms of negotiated CBAs.[218] To the extent a CBA included an arbitration provision, the courts would enforce that provision.[219] Section 301 does not create an arbitral body or command arbitration. Any requirement to arbitrate is derived fully from the CBA between the employer and the labor organization, not from section 301.[220]

ERISA section 502, LMRA section 301, and National Bank Act section 86 are not identical, and do not define a uniform template for a federal cause of action that preempts state law. Specificity of remedy and source of exclusivity differ among the three. Still, in *every* regard,

209. NAT'L R.R. ADJUSTMENT BD., CIRCULAR #1: ORGANIZATION AND CERTAIN RULES OF PROCEDURE 3 (1934), *available at* http://www.nmb.gov/arbitration/amenu.html.

210. NAT'L R.R. ADJUSTMENT BD., UNIFORM RULES OF PROCEDURE 2, R. 7 (2003), *available at* http://www.nmb.gov/arbitration/amenu.html.

211. *See supra* notes 109–12 and accompanying text.

212. 45 U.S.C. § 153(p)–(q).

213. Union Pac. R.R. Co. v. Price, 360 U.S. 601, 616 (1959).

214. Deford v. Soo Line. R.R. Co., 867 F.2d 1080, 1086 (1989) (relying on other courts' reasoning that RLA has same function as LMRA in concluding that the RLA has complete preemptive force).

215. Graf v. Elgin, Joliet and E. Ry. Co., 790 F.2d 1341, 1345–46 (1986).

216. The seminal case of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), which interpreted section 301 as authorizing federal common law, involved an employer's failure to abide by a contractual arbitration provision.

217. 29 U.S.C. § 185 (2000).

218. S. REP. NO. 80-105, at 16 (1947). It was, however, an employer's failure to honor a CBA agreement to arbitrate that first brought this provision before the Court.

219. *Textile*, 353 U.S. at 451.

220. "The federal rule would not of course preclude [an employee's] court suit if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy." Republic Steel Corp. v. Maddox, 379 U.S. 650, 657–58 (1965).

the RLA adjustment provisions are distinct.[221] The RLA established adjustment boards with extraordinarily limited appellate review,[222] while the other statutes all provide a judicial cause of action in the first instance. Most significantly, for a doctrine that, post-*Beneficial*, leans heavily upon the exclusivity of a federal law cause of action, there was no "longstanding and consistent construction" of the RLA adjustment provisions as exclusive.[223] The decades-long evolution of preemption and exclusivity is described below in Part IV.B.

B. Ordinary Preemption Under the RLA

Perhaps surprisingly, given the debate about *complete* preemption, the RLA arbitration board provisions in the largely definitive post-1934 amended form were not originally accorded preemptive powers.[224] Indeed, the Court initially found "nothing in that Act" creating exclusivity.[225] Only with the passage of time, as successive RLA cases reached the high court, did choice-of-forum preemption develop recognizing the exclusive jurisdiction of the RLA adjustment boards, preemption eventually reaching the broad scope recognized under current law.[226] This Section looks first at the development of this preemption, then at the current boundary of preemption in light of *Hawaiian Airlines, Inc. v. Norris*, before exploring parallels with Garmon preemption.

1. The Development of Ordinary Preemption

In the first case to reach the Supreme Court involving a plaintiff who declined to follow RLA adjustment procedures, *Moore v. Illinois Central Railroad Co.*, the Court found "nothing in the [Railway Labor] Act which purports to take away from the courts the jurisdiction to determine a controversy over wrongful discharge *or* to make an administrative finding a prerequisite to filing a suit in court."[227] Although this plain language unambiguously rejects preemption, *Moore's* holding was

221. Not surprisingly, lower courts have been troubled by the dissimilarity between the RLA remedy and those provided in the other statutes. Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936, 942 (3d Cir. 1988); Price v. PSA, Inc., 829 F.2d 871, 876 (9th Cir. 1987).

222. *See* Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 563 (1987).

223. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10 (2003) (describing construction of National Bank Act).

224. Moore v. Ill. Cent. R.R. Co., 312 U.S. 630, 635–36 (1941).

225. *Id.* at 634.

226. Compare the language of *Order of Railway Conductors of America v. Pitney*, 326 U.S. 561, 567 (1946) (holding court should exercise equitable discretion to give the NRAB first opportunity), with the robust language of *Walker v. Southern Railway Co.*, 385 U.S. 196, 198 (1966) ("Act compels parties to arbitrate").

227. *Moore*, 312 U.S. at 634 (emphasis added). The Court based its finding, in large part, on the use of "may" in 45 U.S.C. § 153 First (i), a provision added in the 1934 amendments. *Id.* at 635. While perhaps a plausible interpretation based only on the bare language, this finding is curious given the avowed purpose of the 1934 amendments to strengthen the original 1926 RLA adjustment provisions. *See infra* note 303 and accompanying text.

quickly limited. The plaintiff in *Moore* brought a common law action for wrongful discharge contrary to the terms of the CBA, seeking only monetary damages and not reinstatement.[228] Only nine years after *Moore*, the Court held that the NRAB jurisdiction to adjust non-*Moore* type disputes was "exclusive."[229] The Court reasoned that where the parties would have an ongoing employment relationship, unlike in *Moore*, the interpretation of a dispute would have prospective effects and thus should be handled by Congress's designated body, the NRAB.[230] Allowing concurrent access to the courts would invite "races of diligence" whenever one party preferred one forum to the other, depriving parties of their unilateral right to invoke NRAB adjustment.[231]

The already limited *Moore* holding gradually fell in danger of being overturned. The Court's language concerning the adjustment provisions' preemptive force grew stronger, and the Court reevaluated assumptions underpinning *Moore's* conclusions.[232] When a wrongful discharge dispute reached the Court after the enactment of the RLA 1966 amendment, in *Andrews v. Louisville & Nashville Railroad Co.*, the Court overruled *Moore*.[233]

"[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional . . . was never good history and is no longer good law."[234] As the Court explained, *Moore* held that an employee's action for breach of an employment contract was created and governed by state law, a position "undercut by later decisions."[235] Henceforth, NRAB jurisdiction would be unqualifiedly exclusive. Distinguishing between independent, state law claims, and preempted claims falling within the jurisdiction of the RLA's adjustment bodies would be the next issue before the Court; the Court resolved this issue in *Hawaiian Airlines, Inc. v. Norris*, where it defined the boundary of RLA preemption.[236]

228. Slocum v. Del., Lackawanna & W. R.R. Co., 339 U.S. 239, 244 (1950).

229. *Id*.

230. *Id.* at 242–43. The Court distinguished the significance of a court decision in a wrongful discharge case, noting it would have no binding effect on future interpretations by the NRAB. *Id.* at 244. *But cf.* Republic Steel Corp. v. Maddox, 379 U.S. 650, 656 (1965) (LMRA case, addressing this rationale in Moore). Given the substantive review of NRAB awards by district courts when *Slocum* was issued, prior to the 1966 amendments, *see supra* notes 284–86 and accompanying text, a federal court interpretation of a CBA might well have had a stronger precedential impact than an NRAB decision.

231. Order of Ry. Conductors v. S. Ry. Co., 339 U.S. 255, 256–57 (1950).

232. *See* Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co., 353 U.S. 30, 34–36 (1957) (rejecting argument that parties are free to use alternative remedies and noting congressional intent to strengthen RLA minor dispute procedures with 1934 amendments).

233. 406 U.S. 320, 326 (1972). The Court heard a case with similar facts six years earlier, but then declined to overrule *Moore*, noting the extreme delays the plaintiff would face in securing a hearing before the NRAB under the pre-1966 RLA. Walker v. S. Ry. Co., 385 U.S. 196, 198 (1966). Three justices were then ready to overturn *Moore*. *Id*. at 199 (Harlan, J., dissenting).

234. *Andrews*, 406 U.S. at 322.

235. *Id.* at 323.

236. 512 U.S. 246 (1994).

2. The Limit of Ordinary Preemption

Over a period of decades, the Supreme Court extended the bounds of the RLA's preemptive force as the "exclusive" option through which to adjudicate disputes falling within the jurisdiction of the NRAB and adjustment boards.[237] Where, though, was the line dividing RLA grievances from state law claims? How could one be distinguished from the other?

In its many RLA opinions, the Court used varied language to describe RLA minor disputes. Typical language included: "the dispute may be conclusively resolved by interpreting the existing agreement."[238] Left unclear was whether claims based on other laws, but sharing factual circumstance with a cognizable RLA claim, were preempted by the RLA.

In *Hawaiian Airlines*, the Court provided a test to determine if a claim was preempted by the RLA adjustment provisions, adopted from *Lingle v. Norge Division*, an LMRA section 301 case.[239] *Hawaiian Airlines* involved an aircraft mechanic plaintiff employed by Hawaiian Airlines whose terms of employment were governed by a CBA. The plaintiff contacted government authorities to report some improper maintenance ordered by a supervisor and was disciplined and ultimately discharged by Hawaiian Airlines for refusing to sign-off on that maintenance.[240] The plaintiff then filed suits against the airline and some employees, claiming wrongful discharge in violation of public policy and a Hawaiian whistleblower statute.[241] The trial courts dismissed the claims as preempted by the RLA adjustment provisions, the Supreme Court of Hawaii reversed, and the Supreme Court accepted certiorari.[242]

The Court agreed that the claims were not preempted.[243] The Court held that "substantive protections provided by state law, independent of whatever labor agreement might govern, are not preempted under the

237. *See Andrews*, 406 U.S. at 325.

238. Consol. Rail Corp. v. Ry. Labor Executives Ass'n, 491 U.S. 299, 305 (1989); *see also* Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711, 723 (1945) ("The dispute relates either to the meaning or proper application of a particular provision [of the CBA].").

239. The *Hawaiian Airlines* decision adopted the standard of preemption set forth in *Lingle v. Norge Division*, 486 U.S. 399 (1988), for preemption under the LMRA. *Hawaiian Airlines*, 512 U.S. at 263. The Eighth Circuit interpreted the *Hawaiian Airlines* opinion as aligning the RLA with LMRA *complete preemption* jurisprudence. Gore v. Trans World Airlines, 210 F.3d 944, 949 (8th Cir. 2000). *Hawaiian Airlines* does include expansive language on the similarities between the RLA and the LMRA. *See* 512 U.S. at 260 ("The pre-emption standard . . . is virtually identical to the pre-emption standard the Court employs in cases involving § 301."). However, *Hawaiian Airlines* involved a claim litigated in the Hawaiian state courts. The case came before the Court on certiorari; it concerned only preemption and not removal. Complete preemption was simply not an issue in the case. *See* Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1356 (11th Cir. 2003).

240. *Hawaiian Airlines*, 512 U.S. at 249–50.

241. *Id*. at 250–51.

242. *Id*.

243. *Id.* at 266.

RLA."[244] The fact that a CBA would be consulted in litigating the independent claim did not result in preemption.[245] The issue in the case was whether the plaintiff could establish the elements required under Hawaiian law, not whether the plaintiff's discharge was in violation of the CBA.[246]

The delineation of this boundary established a coherent philosophy underlying the evolution of preemption in favor of the RLA adjustment proceedings, from the restrictive doctrine of *Moore*, to the broad preemption of *Andrews*, then qualified by *Hawaiian*. *Moore* involved a state law claim for wrongful discharge where the wrong was a violation of the CBA.[247] The outcome of the court proceeding hinged upon the court's interpretation of the CBA. This was not a substantive state law protection, independent of the CBA; it was a contractual right, the sort of grievance that Congress intended for the NRAB.[248] *Andrews*, in overruling *Moore*, did not stand for the broad proposition that the RLA preempted all claims for wrongful termination of a railway employee, but instead for the narrower preemption of claims for violation of a CBA right.[249] Thus, claims of the sort in *Hawaiian* that assert rights independent of the CBA fall outside the exclusive jurisdiction of the RLA adjustment bodies.

3. The Garmon Preemption Analogy

One court concluded its analysis of complete preemption under the RLA by identifying the RLA's choice-of-forum preemption, and drawing a comparison with Garmon preemption.[250] Garmon preemption is choice-of-forum preemption that protects the jurisdiction of the National Labor Relations Board (NLRB).[251] Sections 7 and 8 of the National Labor Relations Act (NLRA) protect certain labor activities and govern unfair labor practices.[252] The NLRB was created to interpret and apply these rules.[253] The Supreme Court held that this statute created choice-of-forum preemption in favor of the NLRB: "[T]he States as well as the federal courts must defer to the exclusive competence of the [NLRB]."[254]

244. *Id.* at 257 (finding Hawaii Whistleblower Protection Act to be independent); *cf. Lingle*, 486 U.S. at 407 (finding Illinois statutory retaliatory discharge claim not precluded by LMRA). The same analysis applies to federal law claims. *Hawaiian Airlines*, 512 U.S. at 259 n.6.

245. *Hawaiian Airlines*, 512 U.S. at 261 n.8.

246. The plaintiff had also filed claims for discharge in violation of the CBA, but those claims were dismissed by the trial court and the plaintiff did not appeal the dismissal. *Id*. at 266.

247. Moore v. Ill. Cent. R.R. Co., 312 U.S. 630, 632 (1941).

248. *See* Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320, 322 (1972).

249. *See Hawaiian Airlines*, 512 U.S. at 257.

250. Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 276–77 (2d Cir. 2005). The phrase Garmon preemption is derived from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

251. *See* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 391 (1986).

252. 29 U.S.C. §§ 157, 158 (2000).

253. *See id*. § 160; *Garmon*, 359 U.S. at 242.

254. *Garmon*, 359 U.S. at 245.

Section 301 of the LMRA was enacted as an amendment to the NLRA and invokes complete preemption. Due to this close relation, federal courts have considered whether claims falling within sections 7 and 8 of the NLRA are also subject to complete preemption. Lower federal courts have consistently held that claims subject to Garmon preemption are not removable to federal court under the doctrine of complete preemption.[255] As one court noted, "[i]t is both illogical and contrary to elemental principles of federalism to allow removal of this case to federal court solely for the purpose of deciding whether the state court has jurisdiction."[256] Another court questioned whether a claim subject to Garmon preemption would fall within the original jurisdiction, and thus the removal jurisdiction, of the federal district courts.[257]

There is little to distinguish the applicable interests behind Garmon preemption and the RLA's adjustment provisions. Both create nonjudicial bodies with the exclusive jurisdiction to adjudicate claims falling within their statutory mandate. That RLA preemption analysis and section 301 preemption analysis share the common *Lingle* standard, which is not applicable to sections 7 and 8 of the NLRA, is a modest factor in favor of fully aligning the preemptive force of the RLA and section 301. A more significant reason for federal courts' disparate treatment of RLA and Garmon preemption, divided as to whether the RLA operates with complete preemption but in agreement that Garmon preemption does not lead to complete preemption, may be that Garmon preemption predated *Avco*, and thus was an established doctrine prior to the first recognition of complete preemption by the Supreme Court.

Although Garmon preemption parallels may be persuasive in the RLA complete preemption debate, they are not controlling. "Illogical" may be a fair word to describe a doctrine that allows the removal of a claim over which the federal court lacks jurisdiction to reach the merits.[258] However, the argument that complete preemption removal of RLA claims would fall outside the original and thus removal jurisdiction of the federal courts is unsound.[259] That argument looks at the lower federal courts' jurisdiction to hear the merits of the claim, which is a separate and subsequent issue to the choice-of-law preemption determination.

The constitutional and statutory limit of federal court jurisdiction extends to any case where "the vindication of a right under state law

255. Ethridge v. Harbor House Rest., 861 F.2d 1389, 1400 (9th Cir. 1988); TKO Fleet Enters., Inc. v. Int'l Ass'n of Machinists, 72 F. Supp. 2d 83, 87 (E.D.N.Y. 1999) (listing cases).

256. *TKO Fleet Enters.*, 72 F. Supp. 2d at 87.

257. *Ethridge*, 861 F.2d at 1397. See also the extended analysis in *Ethridge* of Supreme Court precedent supporting the holding that claims subject to Garmon preemption are not removable to federal district court. *Id.* at 1399–400.

258. *TKO Fleet Enters.*, 72 F. Supp. 2d at 87.

259. *But see* Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 276 (2d Cir. 2005) (rejecting RLA complete preemption because RLA claim not within original jurisdiction of federal court, and therefore not within removal jurisdiction of federal court).

necessarily turn[s] on some construction of federal law."[260] Therefore, as a matter of constitutional law and statute, the determination whether federal law preempts state law is a federal question within the original jurisdiction of the federal courts. It is simply not a federal question as recognized under the judge-made well-pleaded complaint rule. Because the very existence of complete preemption requires the setting aside of the well-pleaded complaint rule, it cannot be a terminal objection to complete preemption removal that such removal is dependent upon a federal question that exists outside the boundaries of the well-pleaded complaint rule.

C. Parallels with the Labor Management Relations Act? Exploring a Metropolitan *Rationale*

When the Supreme Court in *Metropolitan* identified complete preemptive force in ERISA section 502, the conclusive factors in the Court's analysis were the statutory similarity between the jurisdictional provisions of section 502 and LMRA section 301, and legislative history indicating Congress's intent that section 502 be treated for jurisdictional purposes as arising under federal law in the same manner as section 301.[261] The Court implied that a third commonality influenced the complete preemption determination: both ERISA and section 301 create federal common law.[262] While such parallels with section 301 are not necessary, post-*Beneficial*,[263] they are still potent justifications for finding complete preemptive force.[264] This Section examines the RLA to determine if it shares these three common features with section 301 and ERISA.

1. A Jurisdictional Provision?

Under section 301, suits may be brought "without respect to the amount in controversy or without regard to the citizenship of the parties."[265] ERISA section 502 confers jurisdiction "without respect to the amount in controversy or the citizenship of the parties."[266] The close linguistic parallel of the ERISA provision, enacted years after and informed

260. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983). The constitutional boundary of jurisdiction may be more expansive yet; arising-under jurisdiction "extend[s] to any case of which federal law potentially forms an ingredient." *Id*. at 8 n.8.

261. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987); *see also* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 15 (2003) (Scalia, J., dissenting).

262. *See Metro.*, 481 U.S. at 66 (quoting remarks of Sen. Javits on federal substantive law); *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).

263. *See supra* Part II.C (discussing Court's reasons for finding complete preemptive force in the National Bank Act).

264. *See* Aetna Health Inc. v. Davilla, 542 U.S. 200, 209 (2004) (identifying, post-*Beneficial*, similarity of language to LMRA section 301 and congressional intent that statute be treated like section 301 as Court's rationale in finding complete preemptive force in ERISA section 502).

265. 29 U.S.C. § 185(a) (2000).

266. *Id.* § 1132(f).

by the language of section 301, helped persuade the Court to find complete preemptive power in section 502.[267]

This unusual language suggests Congress intended to grant the federal courts jurisdiction extending beyond the conventional boundaries of federal question and diversity jurisdiction. If these statutes had the jurisdictional reach Congress intended solely through traditional federal question jurisdiction, there would be no need to include such a jurisdiction-extending provision.[268] Complete preemption removal, while nominally a form of federal question "arising under" jurisdiction,[269] falls neatly within these jurisdictional provisions.

Although the RLA has jurisdictional provisions, they are distinct in form and function. Where the LMRA, and later ERISA, possess expansive provisions augmenting the jurisdiction of the federal courts, the RLA goes in the opposite direction.[270] Jurisdiction, in the first instance, is conferred upon one of the four divisions of the NRAB[271] or the NMB.[272] District courts have jurisdiction on appeal from NRAB verdicts[273] with a very narrow scope of review.[274]

RLA jurisdictional language is tailored to confer specific, limited jurisdiction upon the federal courts.[275] Unlike in the LMRA, this specificity dictates a statutory construction with multiple jurisdictional provisions placed throughout the statute, rather than a single broad provision.[276] Although LMRA-derived statutory language is not essential to find complete preemption, it is difficult to reconcile a broadening of federal court jurisdiction with the narrow jurisdictional terms of the RLA.

267. *Metro*., 481 U.S. at 65.

268. Such a provision could raise constitutional issues, conferring federal jurisdiction without diversity of citizenship or substantive federal law. Both ERISA and section 301 create substantive federal common law, so this constitutional issue was not reached. *But see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting).

269. *See supra* notes 125–27 and accompanying text.

270. *Compare* 29 U.S.C. § 185(a) (LMRA jurisdiction), *with* 45 U.S.C. § 153(q) (2000) (district court jurisdiction).

271. 45 U.S.C. § 153(h).

272. *Id.* § 155 First.

273. *Id.* § 153(p)–(q). The NMB does not issue judgments, so there is nothing to appeal.

274. *See supra* notes 109–12 and accompanying text. By statute, district courts also have jurisdiction to review arbitration awards. 45 U.S.C. § 159 Third.

275. And this has narrowed, not broadened, since the RLA's enactment. *See infra* notes 304–07 and accompanying text.

276. *Compare* 45 U.S.C § 153 (p) (grounds to set aside NRAB award, failure of a carrier to comply), *with id.* § 159 Third (grounds for impeaching awards, arbitration). While the grounds listed are similar, the NRAB is limited in its jurisdiction by statute, while arbitration is limited to the questions agreed upon by the parties. Thus, the concerns are not identical, and the jurisdictional provisions must remain distinct in the statute.

2. Cross-Referenced: The LMRA and RLA in Legislative History

The house conference report on ERISA states that "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in a similar fashion to section 301 of the Labor-Management Relations Act of 1947."[277] This statement carried great weight with the Supreme Court in finding complete preemptive force under ERISA. "No more specific reference to the *Avco* rule can be expected . . . ."[278] While the RLA predates the LMRA, the RLA has been amended several times since the LMRA's enactment. The LMRA contains a statutory exception for employees governed by the RLA, so the drafters of the LMRA were well aware of the RLA's existence.[279] Congress, then, has had several opportunities to consider and address the relationship between the RLA and the LMRA in legislative history.

Surprisingly, given the overlap in area of regulation, there are few cross-references in the legislative history between the RLA and the LMRA. None of the committee reports on the significant 1966 RLA amendment make reference to the LMRA.[280] Legislative materials concerning the LMRA contain only a few references to the RLA, most commenting on the RLA savings clause, and none comparing or contrasting the two acts in any substantive way.[281] This strongly suggests that Congress did not see a parallel between the RLA and LMRA like that between ERISA and the LMRA.

3. Federal Common Law

The LMRA and ERISA both conferred federal common law power on the federal courts.[282] The existence of federal common law was an important part of the *Avco* opinion.[283] If such common law power also existed under the RLA, it would strengthen a complete preemption argument.

Prior to the 1966 amendment to the RLA, an NRAB monetary award constituted only prima facie evidence on appeal to a district court.[284] In reviewing these cases, courts would create a body of law in-

277. H.R. REP. NO. 93-1280, at 327 (1974) (Conf. Rep.).

278. Metro. Life Ins. Co v. Taylor, 481 U.S. 58, 66 (1987).

279. 29 U.S.C. §§ 152 (2)–(3), 182 (2000).

280. S. REP. NO. 89-1201 (1966); H. R. REP. NO. 89-1114 (1965).

281. *See, e.g.*, H. R. REP. NO. 80-510, at 65 (1947) (Conf. Rep.). Much LMRA legislative history is contained in the well-indexed, two volume NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1959).

282. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957) (LMRA); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (ERISA).

283. Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559 (1968).

284. Act of June 21, 1934, Pub. L. No. 73-442, § 3 First (p), 48 Stat. 1185, 1192.

terpreting RLA contracts.[285] The Supreme Court saw federal courts as applying this "federal substantive law" to the determination of the validity of an NRAB award.[286]

Whether or not this earlier, substantive review of NRAB awards reflected congressional intent,[287] the 1966 RLA amendment eliminated any judicial power to create substantive law interpreting NRAB awards.[288] Henceforth, courts were limited to review of procedure and not the merits. To the extent uniformity of interpretation would develop, it would flow from NRAB divisions electing to follow division precedent and not from uniform federal law. Unlike with LMRA section 301 or ERISA section 502, the RLA cannot support a federal common law need for national uniformity-type preemption rationale.[289]

D. Legislative History: Identifying Congressional Intent

In *Metropolitan*, the Supreme Court found evidence of congressional intent to make actions within the scope of section 502 removable, illustrated with excerpts from ERISA legislative history.[290] In *Beneficial*, the Court expanded the scope of this intent inquiry, identifying the crucial congressional intent as an intent that the cause of action be exclusive.[291] Lower courts exploring RLA legislative history did not find evi-

285. This was a second chance at the merits of the case. *See* Union Pac. R.R. Co. v. Price, 360 U.S. 601, 621 (1959) (Douglas, J., dissenting) (noting unfairness of practice that allows second chance when money award is granted, no second chance when money award is denied).

286. Int'l Ass'n of Machinists v. Cent. Airlines, Inc., 372 U.S. 682, 694 n.18 (1963). The case involved a claim filed in federal court, invoking 45 U.S.C. § 184 (1958), to enforce an air carrier adjustment board award when the airline refused to comply with the award. The issue before the court was whether this suit fell within federal question jurisdiction. *Cent. Airlines*, 372 U.S. at 684. The Court held that federal substantive law determined whether a contract complied with federal law, specifically § 204, thus conferring federal question jurisdiction on the courts. *Id.* at 693 n.17, 694. In the rail context, district courts are explicitly given jurisdiction to enforce NRAB awards, so this issue does not arise.

287. The Court grew uncomfortable with the lack of deference lower courts accorded NRAB money awards. By the time of the 1966 amendment, the Court had limited the scope of district court review to the dollar amount of the money award, not the merits of the grievance. Gunther v. S.D. & Ariz. E. Ry. Co., 382 U.S. 257, 264 (1965).

288. *See supra* notes 110–12 and accompanying text.

289. While *Hawaiian Airlines* refers to a shared common law of labor preemption with section 301, a more reasonable interpretation is that "common" means common to section 301 and the RLA rather than substantive "common law". Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 263 n.9 (1994). The preemption determination also turns upon the interpretation of state law, for which state courts are better suited, not on the interpretation of the labor contract or any federal law. If a common law of preemption justified removal, then all cases involving a claim of preemption could be removed, and preemption would be exactly the same as complete preemption. *See* Caterpiller Inc. v. Williams, 482 U.S. 386, 392–93 (1987) (distinguishing preemption, which is not a basis for removal, from complete preemption, which is a basis for removal).

290. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987).

291. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9–10 n.5 (2003). The lower court in that case held that complete preemption did not apply to the National Bank Act because it could find no congressional intent to permit removal, *Anderson v. H&R Block, Inc.*, 287 F.3d 1038, 1048 (2002), so the proper measure of intent was the issue squarely before the Court.

dence of congressional intent to permit RLA removal, and held that the RLA did not support complete preemption.[292]

The intent of Congress, as expressed in the legislative history, is thus clearly relevant to a finding of complete preemptive force. The nature of the RLA, conferring jurisdiction in the first instance on an adjustment board, raises unique questions regarding Congress's intended role for the courts.[293] An investigation into legislative history must therefore look closely at this balance of power between the adjustment boards and the courts, in addition to exclusivity and removal.[294]

Congress recognized a choice between two options when originally drafting the RLA: a choice between a compulsory system with means of enforcement or a system of amicable resolution.[295] These options were viewed as distinct. "It is manifestly unwise to commingle the two. One plan or the other should be adopted."[296]

A clear and comprehensive choice was made. The Act was drafted "from start to finish" on the theory of "conciliation, arbitration, and agreement."[297] There was a recognition of the intimate knowledge railway workers, as opposed to outsiders, could bring to the process of resolving grievances.[298] Such force as the Act contemplated, to enforce ad-

292. *See* Ry. Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936, 936 (3d Cir. 1988) ("We find no evidence in the RLA or its legislative history of a Congressional intent to permit recharacterization and removal of what purports to be a state claim."). One circuit took a broader approach to identifying congressional intent, looking to the history and purpose of the RLA rather than a specific reference in the legislative history to an intent to remove. *See* Deford v. Soo Line R.R. Co., 867 F.2d 1080, 1086 (8th Cir. 1989) (specifically rejecting the Third Circuit's approach of looking at legislative history as "unnecessarily narrow").

293. *Cf.* WRIGHT ET AL., *supra* note 6, § 3722.1 (Supp. 2005) (identifying a common goal in courts' analysis of complete preemption to identify congressional intent to provide removal of the action to "*a federal court*" (emphasis added)).

294. Looking for this more specific intent regarding exclusivity is not inconsistent with *Beneficial*. That case, like *Avco* and *Metropolitan*, involved statutes creating causes of action with jurisdiction in the courts. The *Beneficial* Court had no reason to indicate that it meant intent to create an exclusive remedy within the jurisdiction of the courts because a remedy within the jurisdiction of the courts was the only one at issue in the case. While it is possible that exclusivity regardless of forum is the test, it is unlikely that a federal statute conferring, for example, exclusive jurisdiction in state court would provide the requisite intent for removal the Court is seeking.

295. S. REP. NO. 69-606, at 4 (1926); s*ee also* 67 CONG. REC. 5, 4675 (1926) (statement of Rep. Parker, House sponsor of the RLA) ("There are two schools of thought. There is the school that believes in force, which has been tried and tried unsuccessfully in many countries, and never successfully anywhere."). This strong aversion to resolving labor disputes by force was common to members of Congress on both sides of the debate, *see* 67 CONG. REC. 8, 8817 (1926) (exchange between Sen. Watson and Sen. Bruce, opponent of the Act), and reflected Sen. Watson's understanding of the difficulties with prior legislation in this area. *Id*. (no cases submitted for arbitration during ten-year existence of 1888 labor act "for the reason that it had in it provision for compulsory arbitration").

296. S. REP. NO. 69-606, at 4 (1926).

297. 67 CONG. REC. 5, 4675 (1926) (statement of Rep. Parker). "The theory of the bill is . . . that all these difficulties can be adjusted by good-faith agreements, by adjustments, either by collective bargaining or through the medium of a board of adjustment, or by mediation, or by arbitration and conciliation, and that no force whatever is required to bring about this happy solution of these difficulties." 67 CONG. REC. 8, 8811 (1926) (statement of Sen. Watson).

298. *See* Consol. Rail Corp. v. Ry. Labor Executives Ass'n, 491 U.S. 299, 310 (1989); 67 CONG. REC. 8, 8808 (1926) (statement of Sen. Watson) ("These problems are all of a technical nature, and therefore railroad men are required to decide them").

justment board or arbitration awards, extended from the cooperation of the parties and "[was] not put in by the force of Congress"[299] or through a role for the courts.[300] The parties were to resolve these cases through amicable adjustment, not under force from the government.[301]

With the 1934 amendment, enacted in response to the failure of labor and carriers to set up adjustment boards, Congress abandoned its earlier commitment to avoid compulsion.[302] In addressing these problems, Congress did not turn to the courts. Instead, Congress established the NRAB, consisting of labor and carrier representatives, as compulsory for the resolution of grievances.[303]

With the 1966 amendment, Congress expanded access to court review of NRAB awards but limited the scope of that review.[304] Prior to the amendment, court review had been limited to monetary judgments against a carrier, with the award constituting only prima facie evidence.[305] A railroad worker suffering an adverse judgment had no recourse. "This the [House Committee on Interstate and Foreign Commerce] did not feel was fair."[306] Judicial review of NRAB awards would henceforth be available to all, but limited in scope to the "questions traditionally involved in arbitration legislation—whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of the tribunal."[307] The Senate Committee on Labor considered a proposal to expand review of an award to include "arbitrariness and capriciousness,"[308] but rejected it for inviting the courts "to treat any award with which the court disagreed as being arbitrary or capricious."[309]

299. 67 CONG. REC. 5, 4675 (1926) (statement of Rep. Parker).

300. The adjustment boards would issue "a decree of a court that these people decide on themselves." *Id.*

301. S. REP. NO. 69-606, at 4. President Harding shared this understanding of the RLA. *See* H.R. REP. NO. 69-328, at 2 (1926) (President's message, Dec. 5, 1925).

302. H.R. REP. 73-1944, at 3 (1934). There was no provision under the 1926 Act for a neutral referee in the event an adjustment board deadlocked, as those boards often did. *Id*. Some carriers and unions in employment relationships also failed to establish the voluntary boards. LECHT, *supra* note 16, at 73.

303. S. REP. NO 73-1065, pt. 1, at 1–2 (1934). The Senate Committee on Interstate Commerce, at least, reconciled this modest shift toward a mixed voluntary/compulsion model of labor regulation by suggesting the creation of this compulsory board might "greatly increase" the settlement of disputes by voluntary boards. *Id*. Regardless, the NRAB was staffed with labor and carrier representatives, and the application of compulsion by government actors was limited to the enforcement of monetary awards. *See* Act of June 21, 1934, Pub. L. No. 73-442, § 3 (First) (p), 48 Stat. 1185, 1192 (court review of NRAB monetary award).

304. Act of June 20, 1966, Pub. L. No. 89-456, 80 Stat. 208 (1966).

305. Act of June 21, 1934, § 3 First (p).

306. 112 CONG. REC. 2, 2749 (1966) (statement of Rep. Younger); *see* S. REP. NO. 89-1201, at 3 (1966) ("The committee believes that . . . an equal opportunity for judicial review should be provided . . . ."). Because NRAB awards were only prima facie evidence in a court prior to the 1966 amendment, the disparity in treatment between an NRAB award in favor of a carrier and a money award in favor of an employee was particularly great.

307. H.R. REP. NO. 89-1114, at 3 (1965).

308. S. REP. NO. 89-1201, at 3 (1966).

309. *Id.*

There are thus two clear themes that emerge from this legislative history. First, Congress intended that the adjustment boards be the exclusive remedy.[310] Second, the settlement of disputes through the boards of adjustment was to be final, with judicial review limited accordingly.[311] *Beneficial* held that intent that the remedy be exclusive is the relevant inquiry,[312] while *Metropolitan* suggests a showing of congressional intent might not be necessary.[313] Findings in legislative history, therefore, cannot conclude the complete preemption inquiry. Still, this congressional intent to create an exclusive remedy in an adjustment board, combined with an intent to limit judicial review that has been reaffirmed over passing decades, aligns poorly with a doctrine conferring extraordinary access to the federal courts.

E. Central Concern

In each instance where the Supreme Court has recognized complete preemptive force, the preempted right of action was not merely legislation in an area occupied by federal law, but was instead a right of "central concern" that threatened the purpose of the federal statute.[314] A state law cause of action implicating contract interpretation directly conflicted with the goal of uniformity of interpretation underlying section 301.[315] Congress's policy choices in creating the ERISA remedial scheme would be "completely undermined" if other remedies could be obtained under state law.[316] Uniform rules limiting the liability of banks are "an integral part" of the regulation of the banking system under the National Bank Act,[317] a uniformity in direct conflict with state usury laws.

The RLA's central concern is declared in the text itself: "To avoid any interruption to commerce or to the operation of any carrier engaged

310. The House Committee on Interstate and Foreign Commerce explicitly referred to and affirmed the Court's holding of NRAB exclusivity in *Brotherhood of Railroad Trainmen v. Chicago & Indiana Railroad Company*, 353 U.S. 30 (1957), concluding that the NRAB was the "exclusive means by which employees may obtain decisions on minor grievances." H.R. REP. NO. 89-1114, at 15 (1965).

311. 112 CONG. REC. 2, 2749 (1966) (statement of Rep. Younger) ("If the employee is given an award by the Board, it should be carried out. This bill provides for just that.").

312. *See supra* notes 172–73 and accompanying text.

313. *See supra* note 162. Read narrowly, this may have meant only that intent *to remove* is not a necessary showing, which *Beneficial* confirmed. *Id.*; *see supra* note 173.

314. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 25–26 (1983).

315. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987) (contract rights in *Avco* of "central concern"); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 559 (1968) ("federal interpretation of the federal law will govern, not state law") (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 456–57 (1957)).

316. *Metro.*, 481 U.S. at 64–65 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)). This is the crucial difference between *Metropolitan* and *Franchise*. ERISA section 502 contains specific rights of relief for specific parties. The plaintiff in *Franchise* was a state government; ERISA section 502 does not provide a cause of action for state governments and expressly preserves some state laws. *Franchise*, 463 U.S. at 25. While the possibility of preemption was left open, the Court reasoned that this state government action was not of central concern to the federal statute. *Id*. at 25–26.

317. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10–11 (2003).

therein."[318] Congress's concern was to protect the public from an economically devastating rail strike.[319] The Court has recognized the threat of strikes and the interruption of rail traffic as the motivating factors behind the 1934 amendments.[320] A state law right of action does not implicate this central concern of the RLA in the way a state right of action threatened LMRA section 301, ERISA section 502, and the National Bank Act.

Where a state law cause of action survives, the dispute by definition cannot involve interpretation of the CBA.[321] If, while the state law action is pending, labor intends to strike, the carrier can bring the issue to the attention of an adjustment board or,[322] if it is a major dispute, require a section 6 notice.[323] Federal courts can then enjoin any strike pending an adjustment board hearing or in accordance with major dispute status quo requirements.[324] Thus, the survival of a state law right of action has no effect on the RLA mechanisms, because the adverse party is still free to invoke the RLA's substantive protections.[325]

While ideally courts will correctly determine the limits of RLA preemption, the correctness of this determination does not threaten the RLA's purpose of "avoid[ing] any interruption to commerce or to the operation of any carrier engaged therein."[326] The protections of the RLA ensure that a strike will be averted, regardless of the state law preemption determination. The survival of a state law claim may have real effects on the parties, in terms of costs and recovery. It is not, however, of "central concern" to the RLA.[327]

318. 45 U.S.C. § 151(a)(1) (2000). While there are five purposes listed, the goal of avoiding interruptions to commerce comes first, literally and figuratively. This purpose is similarly stated as the first of the general duties of carriers and employees. *Id.* § 152 First. The other four purposes and duties are best viewed as facilitating this goal. *See, e.g.*, Consol. Rail Corp. v. Ry. Labor Executives Ass'n, 491 U.S. 299, 310 (1989) (describing purpose of arbitration as facilitating the general duties in § 152 First).

319. *See* H.R. REP. NO. 69-328, at 1 (1926). Without using the word strike, the House report considered "failures . . . to settle peaceably their controversies." *Id.* When the RLA was drafted, in the 1920s, there were, of course, neither interstate highways nor meaningful air transport. If the railroads were to go on strike, interstate commerce would have been severely restricted.

320. *See* Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711, 726 (1945) (citing strike ballots and threats to interrupt rail traffic as motivating factor behind 1934 amendment). The Supreme Court has characterized the purpose of the Act's administrative methods in similar terms. *See* Slocum v. Del., Lackawanna & W. R.R. Co., 339 U.S. 239, 242 (1950).

321. *See supra* Part IV.B.2.

322. Either party may request an NRAB adjustment. 45 U.S.C. § 153 First (i).

323. *See supra* note 83.

324. *See supra* Part II.B.5.

325. Because adjustment board jurisdiction is exclusive, see *supra* Part IV.B.1, there is no legal bar to a state court and the NRAB adjudicating disputes involving the same facts. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 262 (1994) ("State-law analysis might well involve attention to the same factual considerations.").

326. 45 U.S.C. § 151(a).

327. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), makes an excellent comparison. *Id.* at 25–26. The state government action did not interfere with the remedies central to ERISA in section 502, though it might conflict with portions of the ERISA statute. An er-

V. RESOLUTION

The question of whether the RLA operates with complete preemptive force is not a simple one; the fluid state of the complete preemption doctrine has seen to that.[328] After *Beneficial*, the only certainties are the threshold requirements of preemption and an available federal cause of action. Still, after a thorough examination of the doctrine of complete preemption and the RLA, the answer is clear. The RLA does not have complete preemptive force.

There is no dispute that the RLA preempts other laws, but even in satisfying this first of the threshold requirements—preemption—the case for complete preemption is called into question. The exclusive jurisdiction currently recognized in the RLA adjustment boards does not reflect the Supreme Court's earlier, decades-long interpretation of the statute.[329] Only in the fifth decade of adjudicating RLA cases did the Court identify broad preemptive force in the RLA adjustment provisions. It is difficult to reconcile a statute whose ordinary preemptive force took decades to identify with a statute operating with "extraordinary pre-emptive power."[330]

The case for RLA complete preemption is weakened further in the search for a federal cause of action.[331] In the most literal sense, the RLA satisfies this requirement. The adjustment boards are federal bodies, and they have exclusive jurisdiction over the relevant labor grievances. They are not, however, a federal court. They are arbitral bodies made up of labor and carrier representatives, not lawyers or judges. The role of the federal courts in the RLA is extremely limited by statute, and never involves deciding the merits of any claim under the RLA. It is difficult to imagine a federal cause of action bearing less resemblance to those in LMRA section 301, ERISA section 502, and the National Bank Act section 86, which the Court has identified as having complete preemptive force.

Most damaging to the case for RLA complete preemption is a review of legislative history. Congress's original goal in enacting comprehensive labor regulation was to remove responsibility in this area from the courts.[332] In constructing the RLA, Congress viewed its past attempts at legislating labor relations as a collection of promising mediation and arbitration procedures, along with failed attempts at compulsion.[333] In enacting the RLA, Congress rejected compulsion, and rejected any sub-

roneous RLA preemption determination could result in a court proceeding in conflict with RLA provisions, but it will not interfere with the central, strike-averting purpose of the RLA.

328. *See supra* Part III.

329. *See supra* Part IV.B.1.

330. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987).

331. *See supra* Part IV.A.

332. *See supra* notes 295–97.

333. *Id.*

stantive role for the courts.[334] Where decision-making power existed, it resided in labor and carrier representatives, chosen by labor and the carriers.

In the two significant amendments to RLA procedures, Congress again rejected a substantive role for the courts.[335] Faced with the failure of labor and carriers to establish adjustment boards, Congress chose to establish national boards, staffed by labor and carrier representatives, rather than revert to the courts. The power to bind remained with labor and carrier representatives, exclusively.

When the backlog of claims before the adjustment boards grew too large, Congress amended the RLA while further restricting the role of the courts.[336] The amendment made it possible to establish local adjustment boards, staffed with labor and carrier representatives, and further limited the scope of judicial review. So strong was Congress's intent to restrict court review of NRAB awards that it rejected review even for "arbitrariness or capriciousness."[337] The only role Congress saw for courts was ensuring that RLA procedures were followed.

Complete preemption rests poorly with this clear congressional intent to greatly restrict court involvement under the RLA. The Supreme Court has told us that the "touchstone of . . . removal jurisdiction is . . . the intent of Congress."[338] Although *Beneficial* holds the relevant intent is exclusivity of remedy, that case did not confront legislative history so hostile to court involvement. If intent is dispositive, the RLA does not have complete preemptive force.

The argument for complete preemption cannot rely on parallels with the LMRA. The statutes share no common jurisdictional language.[339] There is no showing of congressional intent that the one share the jurisdictional reach of the other.[340] The RLA and the LMRA are procedurally distinct; the RLA with its limited role for the courts will not lead to federal common law.[341]

Finally, there is the issue of central concern.[342] The RLA was enacted to prevent strikes and avoid interruption to commerce. The survival of state law claims, which should properly be preempted by the RLA, is simply not of central concern to the statute. RLA mechanisms were not designed to vindicate individual rights, or prevent carriers from bearing the costs of frivolous lawsuits. They were enacted to avoid strikes. Either party may invoke the jurisdiction of the appropriate RLA

334. *Id.*
335. *See supra* notes 302–09 and accompanying text.
336. *See supra* notes 65–67 and accompanying text.
337. S. REP. NO. 89-1201, at 3 (1966).
338. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987).
339. *See supra* Part IV.C.1.
340. *See supra* Part IV.C.2.
341. *See supra* Part IV.C.3.
342. *See supra* Part IV.E.

mechanism even if there is a state law proceeding under way concerning the same dispute. They are entirely separate proceedings. The RLA will still function, as intended, to prevent strikes.

In sum, every factor points against complete preemption under the RLA. The historical foundation of RLA preemption is weak. The RLA provides a federal cause of action in the most superficial terms. Legislative history shows that Congress intended the courts to stay out of RLA adjustment, not apply extraordinary doctrine to pull RLA disputes into federal court. The claims in state court are simply not of central concern to the RLA. This comprehensive analysis makes it clear that the RLA does not have complete preemptive force.

VI. CONCLUSION

The question whether the RLA has complete preemptive force has divided lower courts. However, identifying the essential elements and relevant factors the Supreme Court has relied upon in developing the doctrine of complete preemption, and considering those factors in the context of the RLA, yields a clear answer. The essential elements the Court has identified can be found in only the most qualified way under RLA jurisprudence. Those factors the Court has identified as influential, but not essential, are not present at all. Thus, the RLA does not operate with complete preemptive force.