

CHAPTER SEVENTEEN
LABOR RELATIONS

LABOR RELATIONS	1
Federal Legislation	1
California Legislation	2
Action Against Unions	3
..... <u>Air Line Pilots Assn. v. O'Neill</u>	3
..... <u>DeTomaso v. Pan American World Airways, Inc.</u>	3
Safety	14
..... <u>United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.</u>	14
Public Sector	24

Federal Legislation

Employment and labor disputes are extensively regulated by the National Labor Relations Act (NLRA; 29 USC §151 et seq.), the Labor Management Relations Act (LMRA: 29 USC §§141 et seq.), and as to airline industry, the Railway Labor Act (RLA; 45 USC §§151 et seq.). To the extent there is conflict, state regulation is preempted. In the interests of national uniformity, federal law governs disputes arising out of or involving the interpretation of collective bargaining agreements. Not every state law claim involving a collective bargaining agreement is preempted; however, if resolution of the claim is substantially dependent on analysis of the terms of the labor agreement, federal law prevails.

Under Section 7 of the National Labor Relations Act, employees have the right to self_ organization, to form, join or assist labor organizations, to bargain collectively through their representatives, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection. Under section 8 of the NLRA, it is an unfair labor practice for either an employer or a labor organization to interfere with the right of employees to engage in such concerted activities. The National Labor Relations Board (NLRB) has exclusive jurisdiction of claims arising out of activities subject to Section 7 or 8, and both state and federal actions generally are preempted.

Under Section 14 of the NLRA, the NLRB may decline to assert jurisdiction over a labor dispute involving a class or category of employers if, in the opinion of the NLRB, the effect of the labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. When the NLRB declines to assert jurisdiction, a state court or agency may assume jurisdiction of the labor dispute.

The NLRB does not have jurisdiction of a labor dispute if the employers are not engaged in interstate commerce. In such a case, an action can be filed in state court and

must be decided under state law. Whether employers are engaged in interstate commerce can be determined by volume_of_business guidelines set by the NLRB for exercise of its jurisdiction.

California Legislation

California policy in favor of collective bargaining is declared very broadly in Labor Code §923 and gives individual workers full freedom of association, self_organization, and the right to designate representatives of their own choosing free from interference, restraint or coercion by employers. This policy prohibits employers from requiring employees, as a condition of employment, to promise not to join a labor organization. Where an employer discharges an employee for union activity or otherwise interferes with the rights of an employee, a civil action for damages, injunctive relief, or both, is appropriate.

The duty of fair representation arises from a union's status as exclusive bargaining agent for employees in a unit. When a union has the exclusive right to represent collectively the interests of all employees in a unit, individuals in that unit are deprived of the ability to bargain individually or through a minority union. A union has a duty of fair representation of its members, and breach of this duty may render the union liable to the member for resulting damages. The duty applies to all activities, including contract negotiation, administration and enforcement, conducted by the union on behalf of members. (ALPA v O'Neill (1991) 499 US 65) A union's duty of fair representation extends to members who are employed by an employer with whom the union has an exclusive bargaining agreement, regardless of whether the union became the exclusive bargaining agent under statute or by contract. A union's inadequate representation of a member in discharge proceedings by the employer, resulting in the member's loss of unemployment and workers' compensation benefits, is actionable. A union is not required to prosecute every grievance claimed by an employee. A union, acting in good faith after a realistic appraisal of the situation, may determine that it is in the employee's interest not to file or pursue a grievance. Absent a showing of fraud, misrepresentation, bad faith, dishonesty of purpose, or unlawful discrimination, an employee has no cause of action for breach of the union's duty of fair representation.

A collective bargaining agreement (CBA) is an attempt to erect a whole system of industrial self_government. It constitutes a generalized code to govern the workplace and covers the whole employment relationship. A collective bargaining agreement will consist of a compilation of diverse provisions, some providing objective criteria that are almost automatically applicable, some providing more or less specific standards that require reason and judgment in their application, and some doing little more than leaving problems to future consideration. Although a collective bargaining agreement does not create or guarantee the creation of an employer_employee relationship, a collective bargaining agreement governs the terms and conditions of an employer_employee relationship whenever and with whomever such a relationship may be established. After a collective bargaining agreement has been made, the individuals who will benefit by it

are identified by individual hiring. When hired, an employee becomes entitled to all the benefits of the collective bargaining agreement. The individual employment contract is subsidiary to the collective bargaining agreement and may not waive any of the provisions of the collective bargaining agreement. In effect, the terms of the collective bargaining agreement are incorporated into the separate employment contracts with each of the various employees. Where one accepts employment under a collective bargaining agreement, he or she thereby ratifies and accepts its terms and is bound to it to the same extent as if he or she had entered into it individually.

Most collective bargaining agreements contain grievance and arbitration provisions. The grievance machinery under a CBA is at the very heart of that system. An arbitration provision typically is included as a means of providing for unforeseeable situations by molding a system of private law for all problems that may arise under the agreement and providing for their solution in a way that will generally accord with the varying needs and desires of the parties. Enforceable arbitration agreements include agreements between employees and their employers or between their respective representatives.

Contractual arbitration is a favored method of resolving disputes, and every intentment will be indulged to give effect to such proceedings. Arbitration seeks peaceful resolution of disputes in lieu of economic warfare, and the courts therefore give dynamic sweep to such provisions.

When a collective bargaining agreement involves an industry that affects interstate commerce, a California court must apply federal substantive law pursuant to Section 301 of the Labor Management Relations Act. Hence, the issue as to whether a particular dispute is arbitrable must be decided under federal law, which strongly favors arbitration. The federal standard limits a court to a determination of whether the party seeking arbitration is making a claim that on its face is governed by the contract. The court must order arbitration unless, after resolving all doubts in favor of that procedure, it can determine with positive assurance that the dispute is not covered by the arbitration clause.

Action Against Unions

Air Line Pilots Assn. v. O'Neill (1991) 499 U.S. 65, that union breaches its duty of fair representation if its actions are either arbitrary, discriminatory or in bad faith, applies to all union activity, including not only contract administration and enforcement, but also contract negotiation.

DeTomaso v. Pan American World Airways, Inc.

(1987) 43 Cal.3d 517

In this action for breach of warranty of title, defamation, and intentional infliction of emotional distress, Pan American World Airways, Inc. (Pan Am) seeks review of the Court of Appeal's decision (1) setting aside an order conditionally granting Pan Am's motion for new trial on the issue of damages, (2) affirming and reinstating the judgment

on the verdict, and (3) holding that employee John DeTomaso's tort claims were not preempted by the Railway Labor Act (RLA or Act).

We granted review in order to resolve a conflict among the Courts of Appeal as to when state tort claims are preempted by the RLA. As explained hereafter, we conclude that on the facts presented in this case the intentional infliction of emotional distress and defamation claims are preempted.² In this case, we intended by our order to limit oral argument and briefing to the issue specified — preemption.

Facts

DeTomaso worked in Pan Am's Los Angeles cargo department. On September 15, 1978, he purchased a bin of abandoned cargo from Pan Am for \$100.³ He made the purchase through Don Roark, a supervisor in the cargo department. Four days later, he paid \$200 for two more bins of what he and Roark believed to be abandoned cargo.

Before DeTomaso's purchases, William Lasso, a cargo department employee, had prepared an inventory of shipments that had been in the warehouse for an unusually long time. Lasso placed the inventoried shipments in bins on the upper level of a cargo rack near the salvage bins, with a sign stating, "All transfers. Do not touch." Transfers were items to be transferred to other carriers who would transport them to cities not served by Pan Am.

One of the inventory items found in DeTomaso's bins was a shipment of 13,000 Sylva Cell batteries. Shortly after his purchase, in an effort to sell these batteries, DeTomaso contacted a Texas Instruments representative in Lubbock, Texas. The representative informed him that similar batteries had been noted as a delinquent shipment. DeTomaso told the representative that he had purchased the batteries in salvage and that he would be willing to sell them to Texas Instruments if the company was interested in purchasing them. DeTomaso testified that before the phone call he was unaware that the batteries were originally to be shipped to Texas Instruments. The batteries were, however, on record as having been transferred by Pan Am to Continental Airlines (Continental).

¹ The RLA preemption issue was first raised in Pan Am's trial brief. DeTomaso claims that, since the issue was not specifically pleaded as an affirmative defense, it was waived. Whether or not tort claims are preempted by the RLA is a question of subject matter jurisdiction, which cannot be waived.

² Although other issues were raised in the parties' briefs, we ordered that "pursuant to rule 29.2(b) of the California Rules of Court, oral argument ... will be limited to the issue of whether an employee's claims for intentional infliction of emotional distress and defamation are preempted by the Railway Labor Act (45 U.S.C. § 151 et seq.) when those claims arose out of the employer's investigation into conduct by the employee that might be grounds for discharge." The parties have questioned whether our reference to "oral argument" meant that they were still free to submit briefs on the other issues. The answer is given in the text of rule 29.2(b) which, after referring to the court's ability to specify "the issues to be argued," states: "Unless otherwise ordered, briefs on the merits and oral argument shall be confined to the specified issues and issues fairly included in them."

³ The parties stipulated at trial that there was no restriction on employee purchases of abandoned cargo.

Continental had received a claim of loss for the batteries from Texas Instruments.

DeTomaso did not hear from the Texas Instruments representative again. Instead, on October 16, 1978, he received a call from Continental. The caller asked DeTomaso where and how he had obtained the batteries. DeTomaso replied that he had purchased them from salvage and would have the seller contact Continental. DeTomaso did not, however, testify he told anyone at Pan Am about this call.

Continental contacted the Federal Bureau of Investigation (F.B.I.) at the Los Angeles International Airport. The F.B.I., in turn, contacted Pan Am's director of security, Jim Startzell. Startzell and F.B.I. Agent Tim O'Neill interviewed DeTomaso on October 17, 1978. During the interview, DeTomaso told Startzell and O'Neill that all the cargo he had purchased was stored in his garage. He offered to show it to them.

Once inside the garage, Startzell conducted an inventory of the cartons that had identifiable air waybill numbers.⁴ Some, including seven cartons containing the batteries, appeared to be part of recent shipments. O'Neill confiscated the batteries and delivered them to Continental.

DeTomaso's 10_year_old son, Sean, was present in the garage during the investigation. Startzell said something to DeTomaso that Sean interpreted as an accusation of theft.⁵ Both Sean and DeTomaso's wife, Carla, testified that after the investigation the family relationship deteriorated.

In November 1978, DeTomaso began experiencing physical pain. He ultimately was hospitalized for the removal of his appendix and of a growth on his intestine. At trial a psychiatrist whom DeTomaso had consulted in 1980, some two years after the operation, opined that DeTomaso's physical pain and appendicitis were caused by Pan Am's conduct, as was his continued depression and physical discomfort.

All employees of the cargo department in Los Angeles are represented by the Teamster's Union, Local 2707. As required by the RLA, the union and airline were parties to a collective bargaining agreement (the "agreement"). The agreement provided that no employee could be disciplined or discharged without "investigation by a recognized official of the [airline]." In the event an employee was to be disciplined or discharged, specified procedures were to be followed. Further, an employee who

⁴ Air waybill numbers are small adhesive labels placed on cargo cartons for identification. "Bill of lading" means the document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and which, by its terms, evidences the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers. Designation of a document by the issuer as a "bill of lading" is conclusive evidence of such intention. "Bill of lading" includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill

⁵ It is unclear exactly what statements Sean interpreted as an accusation. Startzell testified that DeTomaso asked if he was in trouble. Startzell replied, "I don't know if you're in trouble, but somebody's in trouble because this Texas Instruments shipment should not have been here." DeTomaso testified that Startzell stated that it appeared that he had stolen the batteries and that, since there were air waybill numbers on the cartons, he had probably taken them. Sean testified simply that Startzell had "accused his father of stealing."

believed "that he [had] been unjustly dealt with" or that any provision of the agreement "[had] not been properly applied or interpreted" could present a grievance.

Pan Am suspected that DeTomaso had obtained by questionable means, not only the battery shipment, but possibly other items which were found in his garage. As a result, as required by the agreement, Pan Am investigated further into the October salvage purchases in order to determine whether to discharge or otherwise discipline DeTomaso. Twice during the investigation Pan Am officials contacted the local union representative, Saroop Chandiramani, to inform him that the company was considering discharging DeTomaso for theft.

Although the terms of the agreement did not expressly require such calls when an investigation of an employee represented by the union was underway, an informal agreement did. According to Chandiramani, such calls — known as "courtesy calls" — were a customary part of the pretermination procedures established between the airline and union. If such calls were not made, the union "would have a legitimate disagreement" with Pan Am.

Sometime early in January 1979, a meeting was held at which DeTomaso, Chandiramani, Startzell and other Pan Am officials were present. The meeting, like the calls, was an informal but customary part of established pretermination procedures.

In the course of the meeting, Startzell stated that DeTomaso was being discharged because of his involvement in the theft of the batteries. Chandiramani noted the harsh implications of that statement. Startzell explained that he did not necessarily mean that DeTomaso was a thief, but that the circumstances pointed to a theft somewhere in the chain of events that led to the presence of the batteries in DeTomaso's garage.

By letter of January 11, 1979, DeTomaso was notified that he had been discharged, as of that day, for "fraud, dishonesty and abuse of company policy." The same day, DeTomaso filed a grievance claiming his termination by Pan Am violated the agreement. The grievance form also designated his union local to act on his behalf "in the disposition and settling of this grievance." The grievance form was signed by DeTomaso and Chandiramani as the union business agent. Following a grievance hearing, the grievance was denied on the ground that DeTomaso's actions were in violation of Pan Am's employee rules of conduct.

Pursuant to the provisions of the agreement, DeTomaso appealed to the Western Regional Field Board of Adjustment on March 9, 1979. At that hearing a settlement was reached. In exchange for withdrawal of the grievance, DeTomaso would be reinstated and made whole. Accordingly, Pan Am removed the termination letter from DeTomaso's file, retroactively restored his seniority and benefits, and reinstated him to the payroll with backpay.

On December 22, 1978, prior to his discharge, DeTomaso had filed a civil complaint seeking damages for Pan Am's alleged breach of warranty of title to the battery shipment. On February 15, 1979, after his discharge but before settlement of the grievance, he filed a first amended complaint, which added causes of action for defamation and for negligent and intentional infliction of emotional distress. On June 8, 1979, DeTomaso filed a second amended complaint deleting the causes of action for negligent infliction of emotional distress and for damages related to lost wages and employment benefits resulting from his discharge. Even so, the allegation giving rise to

the intentional infliction of emotional distress cause of action was that "defendants wrongfully fired plaintiff from his job and falsely accused plaintiff of fraud, dishonesty and abuse of company policy as the basis for his discharge." The causes of action in the second amended complaint were tried before a jury in September 1983.

By the close of the evidence at trial, the court determined that the defamation cause of action could not stand as pleaded. However, plaintiff was allowed to amend his pleading to charge that Startzell's statements in the garage, overheard by DeTomaso's son, constituted defamation. Those statements were not alleged to constitute intentional infliction of emotional distress.

A divided jury awarded DeTomaso a lump sum of \$265,000 general damages and \$300,000 punitive damages. Since a general verdict was returned, no allocation of damages was made to either the tort or warranty causes of action, nor did the verdict indicate which cause of action formed the basis of liability.

Pan Am moved for judgment notwithstanding the verdict or, in the alternative, for new trial or remittitur. At the hearing on the motions, the court stated that it was "amazed at the amount of damages ... awarded in this trial ... [and could] only conclude that this verdict by this jury was given under passion and prejudice. It's a very excessive verdict under the evidence." The court, without a statement of reasons, granted the motion for new trial on the limited issue of damages, subject to the condition that if DeTomaso would agree to accept a remittitur by a reduction of \$358,393 the motion would be denied.

DeTomaso refused to accept the remittitur. Instead, he appealed on the ground that the order failed to comply with section 657 of the Code of Civil Procedure.⁶

Pan Am conceded the deficiency of the order, but cross_appealed, arguing, inter alia, that the RLA preempted DeTomaso's tort claims. The Court of Appeal rejected Pan Am's argument and reinstated the judgment due to the trial court's failure to comply with Code of Civil Procedure section 657. We now review the propriety of the Court of Appeal's conclusion that DeTomaso's tort claims were not preempted.

Discussion

I. History and Background.

The RLA was passed in 1926, in the wake of the Railway Shopmen's Strike. "The Railway Labor Act was not [so much] an expression of social concern or an attempt to assist disfavored combatant in the industrial relations struggle [as] a legislative attempt to stabilize industrial relations patterns and extend periods during which the parties themselves could work out a peaceful solution to their disputes." (18H Kheel, Labor Law (1986) § 50.02, p. 50_4.)

A primary purpose of the Act is "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Such disputes are known as "minor disputes."⁷

⁶ Section 657 provides, in pertinent part: "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reasons for granting the new trial upon each ground stated."

⁷ "Major disputes" involve the negotiation of collective bargaining agreements.

Initially, the Act merely encouraged carriers and their employees to enter into arbitration agreements for resolution of minor disputes. "Because of its completely voluntary nature, however, this scheme resulted in difficulties and labor unrest." (18E Kheel, *supra*, § 26.02[2], at p. 26_24.) Consequently, in 1934 the Act was amended to establish the National Railroad Adjustment Board and to require carriers to participate in the administrative procedures established by the Act for the resolution of minor disputes. In 1936 the Act was extended to encompass the airline industry. Although no permanent national board of adjustment has been established for the airline industry, individual carriers and their employees are under a statutory duty to establish "system, group or regional boards of adjustment" for resolution of minor disputes. The Regional Field Board of Adjustment is such an entity.

The RLA directs that minor disputes be settled "on the property in the usual manner, but failing adjustment either party [can] take the matter to the adjustment board [created] to hear and decide it."

Under the RLA the role of courts in the area of minor disputes is extremely limited. Generally, courts will intervene only to determine the validity of an underlying contract (see e.g., *Machinists v. Central Airlines*, *supra*, 372 U.S. 682), to enforce a board of adjustment award, or to provide the limited review permitted by the Act.⁸

Congress considered it essential to keep so-called minor disputes within the boards of adjustment and out of the courts because finality of administrative determinations is essential to the boards in fulfilling their task of promoting stability in the air and rail carrier industries. When the RLA mandates that a claim be resolved by resort to arbitration and grievance procedures, those procedures are the exclusive remedy available to the claimant.

Thus, the question we must answer here is whether the acts alleged in DeTomaso's tort causes of action are inextricably intertwined with the provisions of the collective bargaining agreement, so as to be governed by the grievance and arbitration procedures set forth therein. For the reasons hereinafter stated, we conclude they are.

II. Characterization of Claims.

"[The] line between a tort actionable in court and an employment dispute actionable only in a grievance arbitration proceeding is ... not sharp, except in extreme cases."

The starting point of preemption analysis is the United States Supreme Court's decision in Andrews v. Louisville & Nashville R. Co.. There, plaintiff brought an action for wrongful discharge against his employer when the employer refused to allow him to return to work after he recovered from an injury. The court held that the only source of plaintiff's right not to be discharged was the collective bargaining agreement. Accordingly, the existence and extent of any obligation to restore the employee to his regular duties after recovery from the injuries would depend on an interpretation of that agreement. As such, the claim was subject to the Act's arbitration requirement. "The fact

⁸ Under the RLA, a court reviewing the decision of a board of adjustment may set aside the decision only for "failure of the [board] to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction, or for fraud or corruption by a member of the [board] making the order."

that [the plaintiff] [characterized] his claim as one for 'wrongful discharge'" made no difference. This was true even though the plaintiff sought damages rather than reinstatement.

Andrews teaches that one must look to the substance of the claim, not its characterization, to determine whether an action is preempted. This is so even where the alleged tort is for other than wrongful discharge. A leading case on point is Magnuson v. Burlington Northern, Inc.. In that case the employee, a train dispatcher, was on duty when a fatal accident occurred. The employer conducted an investigation and hearing, as required by the collective bargaining agreement. The employee was found responsible for the accident and was discharged. He then filed an action seeking damages for intentional infliction of emotional distress based on the railroad's alleged conspiracy to cover up the negligence of its supervisory employees by making him the scapegoat.

The Magnuson court held that, in determining whether or not a purported tort claim is in substance a minor dispute, courts should look to whether or not the conduct complained of is "'arguably' governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract. In either case, such a complaint involves a minor dispute which must be arbitrated under the RLA.

Applying the foregoing tests, the Magnuson court determined that Magnuson's action for emotional distress was barred. All of Magnuson's claimed damages flowed from his wrongful dismissal from employment. The employer's allegedly tortious acts involved abuse of the investigatory process and presentation of false evidence at the hearing that led to Magnuson's discharge. Both the investigation and hearing were required by the collective bargaining agreement as a prerequisite to discipline. Thus, Magnuson's action was based on a "matrix of facts" which was "inextricably intertwined" with the grievance machinery of the collective bargaining agreement and the RLA.⁹

The Magnuson rule — that an action is preempted if the conduct underlying it is "arguably governed by" or has a "not obviously insubstantial relationship to" the collective bargaining agreement — has been followed in numerous federal and state courts in a variety of contexts. [civil rights of the handicapped]; [Federal Employer's Liability Act]; [intentional infliction of emotional distress]; [wrongful termination]; [intentional interference with contractual relations]; [negligent misrepresentation]; [conspiracy to interfere with employment rights]; [defamation, false imprisonment]; [defamation]; [entitlement to death benefits]; [emotional distress, wrongful discharge]; [wrongful discharge].)

The Magnuson rule is consistent with the United States Supreme Court's recent decision in Allis Chalmers Corp. v. Lueck (1985) concerning the effect of section 301 of the Labor Management Relations Act. The court there stated, "If the policies that animate

⁹ At least one court in this state has adopted the Magnuson test. In Miller v. United Airlines, Inc. (1985), an airline stewardess filed an action against the airline for, inter alia, intentional infliction of emotional distress, defamation, and invasion of privacy. The conduct complained of — allegedly falsified work critiques and verbal harassment — took place during an investigation conducted by the airline pursuant to the collective bargaining agreement. The court correctly held that the causes of action were inextricably tied to the agreement, and thus were minor disputes properly resolved by arbitration, and were preempted by the RLA from judicial adjudication.

§ 301 are to be given their proper range ... the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." It must also extend to state claims, the evaluation of which is inextricably intertwined with a consideration of the terms of the collective bargaining agreement.

Like the United States Supreme Court, we believe that, if the policies underlying the RLA are to be given their proper force, the preemptive effect of the Act cannot be limited to suits alleging contract violations.⁰ If an employee can institute a civil action, in essence litigating the questions at issue in an arbitration, the value of arbitration as a dispute resolution tool will be undermined. Further, if the courts can be used as forums to resolve arbitrable disputes, employees can make an end run thereby avoiding the carefully crafted congressional procedures set forth in the RLA. These results cannot be squared with federal policy.

We conclude, therefore, that the Magnuson approach is the correct one. RLA preemption must, as the Magnuson court stated, extend to any claim premised on facts inextricably intertwined with matters subject to the grievance procedures of the collective bargaining agreement. To adjudicate such issues would necessarily involve interpretation of the agreement, which a court is without jurisdiction to do. Mere theoretical legal independence is not enough to save a purported tort cause of action from preemption under the RLA. Instead, it must appear from the plaintiff's complaint that the facts on which the cause of action is premised either: (1) are unrelated to matters expressly or impliedly governed by the collective bargaining agreement; or (2) so far exceed the scope of reasonable conduct in the context of such matters that reference to the collective bargaining agreement is unnecessary to resolve the claim.¹

Here, in rejecting Pan Am's preemption contention the Court of Appeal relied heavily on Raybourn v. Burlington Northern Ry. Co. (1985). In Raybourn, when an employee sleeping on duty was awakened, he showed marked signs of drunkenness and admitted having consumed a half pint of liquor late the previous night. Pursuant to company policy, the employer's agents took him to a hospital for a blood alcohol test. When he refused to be tested, the agents called the police and requested that they escort the employee home. A heated argument broke out between the employee and the agents, whereupon the police arrested the employee for disorderly conduct. The employee was subsequently discharged. After unsuccessfully seeking reinstatement via the grievance procedures established in the collective bargaining agreement, the employee filed suit

⁰ Indeed, arguably the case for insisting on resort to arbitration and grievance procedures is stronger in cases arising under the RLA than it is in cases arising under section 301 of the LMRA.

¹ For example, some courts have concluded that Federal Employers' Liability Act claims premised on physical injury are not preempted. At least one case has held that state tort causes of action premised on an employer's attempt to prevent his employee from retaining counsel to process a FELA claim were sufficiently independent from the collective bargaining agreement so as not to be preempted by the RLA, as nothing in the agreement remotely related to whether or not one could retain counsel to pursue FELA claims. Similarly, another case has held that state court jurisdiction over claims by former employees for alleged intentional infliction of emotional distress was not preempted by either the RLA or the FELA, when the distress was based on a continual and egregious pattern of harassment by the employer.

against his employer, alleging false arrest and imprisonment and wrongful institution of arrest.

The Raybourn court rejected the employer's RLA preemption argument on grounds the claim was "legally independent of any contractual claims or grievances he may have ..." In so doing, the court failed to follow the dictates of Andrews, and Magnuson, and did not analyze the substance of the claim, rather than its terminology, to determine whether it was in fact premised on the collective bargaining agreement or inextricably intertwined with its grievance machinery. Instead, the court simply stated, in a conclusory fashion, that since the employee's claim was a "typical tort claim," it was not preempted. The weight of authority follows Magnuson and is contrary to Raybourn. We believe the Magnuson rule is more persuasive and should be followed.

The facts in the case at bench fall squarely within the ambit of Magnuson. Here, as previously noted, the collective bargaining agreement required that an investigation and hearing take place before an employee could be discharged or disciplined. When Pan Am learned of what appeared to be a theft in which DeTomaso may have been implicated, it conducted the required investigation and held a hearing before determining whether to discharge or discipline him. DeTomaso complains of the statements made during both the investigation at his garage and the subsequent courtesy calls to Chandiramani, and of Startzell's statement at the January 1979 meeting. However, all these acts were inextricably intertwined with the investigation and discharge procedures mandated by the agreement. Indeed, all of the alleged wrongful conduct took place during the ordinary course of these proceedings.

In our view, the investigator's statements in the garage cannot form the basis for liability. The conduct complained of took place during the course of, and as part of, an investigation mandated by the collective bargaining agreement. The parties to such an agreement must be allowed to perform their duties without judicial interference in all but the most outrageous of cases. We do not find that the acts complained of establish such an outrageous case. Additionally, the conduct of the investigation was itself subject to the collective bargaining agreement's grievance adjustment procedure, since it was, in the language of the contract, a provision of that agreement which DeTomaso evidently believed had "not been properly applied." Thus, the abuses alleged by DeTomaso were remediable, if at all, only through the grievance and arbitration provisions of the collective bargaining agreement. For the jury or a court to second guess whether the required investigation was "reasonable" under the circumstances here would undermine the exclusiveness of those procedures. This we cannot do.²

Similarly, statements made to the union representative or during formal or informal disciplinary hearings cannot support a cause of action. There can be no doubt that the statements made by Pan Am to the union representative in the context of a

² DeTomaso argues that since the genesis of the controversy was the purchase and sale of the salvage bins, his tort claims stem not from the employment relationship, but from the vendor_vendee relationship. Such a characterization is entirely implausible in light of the fact that none of the alleged misconduct occurred in the course of the sale or was related to it in more than an extremely tangential sense. Instead, the conduct complained of occurred in the course of a legitimate investigation of what reasonably appeared to Pan Am to have been a cargo theft in which DeTomaso might have taken part.

disciplinary investigation are privileged and cannot form the basis for liability at law, whether or not they were made during an actual grievance proceeding. Moreover, as previously discussed, the reasonableness of the investigation and hearings was a question subject to the agreement's grievance and arbitration provisions. DeTomaso's remedy was in the forum provided for in the agreement.

We are not persuaded that the allegation of defamation, whether it concerns Startzell's statement in the garage or statements made during the formal or informal disciplinary procedures, brings Pan Am's conduct into the realm of actions that so far exceed the scope of reasonable conduct that reference to the agreement is unnecessary.³ Under the agreement, Pan Am could not impose discipline without cause. It was therefore necessary for the employer to prove some act by DeTomaso establishing that cause; specifically, Pan Am had to prove that DeTomaso wrongfully obtained the batteries. Yet that allegation was the substance of the comments DeTomaso alleges to be defamatory. As truth is a defense to defamation, the question of whether DeTomaso stole the property in question would be at issue in the tort case as well as in the arbitration. In the context of the employer's investigation, the very allegations that form the basis of the inquiry, which may lead to disciplinary action, cannot be the predicate for the outrageous conduct on which the state tort action is based. The situation would, of course, be different if Pan Am's agents had physically assaulted DeTomaso or accused him of murder rather than theft.

DeTomaso unsuccessfully attempts to escape the effect of Andrews, supra, and Magnuson, by relying on Farmer v. Carpenters, decided under the National Labor Act (NLRA). In Farmer, union officials subjected plaintiff, a member of the union, to a campaign of personal harassment including frequent public ridicule and incessant public abuse and intentionally engaged in outrageous conduct, threats, and intimidation. The United States Supreme Court held that Farmer's court action was not preempted by the NLRA, even though the union's conduct could arguably be characterized as an unfair labor practice. The court determined that there was little danger that judicially imposed liability for the alleged union misconduct would interfere with federal labor policy. Indeed, the acts complained of were only of "peripheral concern" to any federal labor interest. In contrast, the state was found to have a great interest in proscribing the alleged conduct. The court also noted that plaintiff's claim did not involve an arbitrable grievance under a collective bargaining agreement, and so preemption under section 301 of the LMRA was not at issue.

Because the case at bench does concern a collective bargaining agreement, Farmer does not control here. Where an employee through a collective bargaining agreement has

³ In addition, even if DeTomaso could allege an action for defamation, it is likely that he would have to prove "actual malice" as defined in New York Times v. Sullivan (1964) The New York Times standard applies to assure that the robust speech often occurring in the labor context does not become the basis for judicially imposed liability. The jury in the instant case was not so instructed. We note in passing that the facts alleged here cannot possibly meet that standard. For example, having just discovered the missing batteries in DeTomaso's garage, it is inconceivable that Startzell's accusation was made with knowledge of its falsity or reckless disregard as to whether it was true or false.

an alternative to litigation, an additional important federal policy is implicated, specifically that of enforcing labor arbitration agreements under the LMRA or the RLA. If such an avenue is available, it will usually constitute the only avenue of redress. DeTomaso had such an avenue available and in fact used it to regain his employment from Pan Am. Pan Am's investigation was mandated, and so governed, by the collective bargaining agreement. Thus, he could have and should have sought relief through the grievance procedure.

Even aside from the strong federal interest in enforcing arbitration provisions in employment contracts, Farmer does not apply to the case at bench. Farmer held that state court actions could be adjudicated only where resolution of the case could be had without resolving the "merits" of the underlying labor dispute. Here, the question of how in fact DeTomaso came into possession of the property, i.e., whether a theft occurred, is the principal issue that was to be adjudicated by the adjustment board. If there was no wrongful conduct, there could be no basis for termination under the agreement.

In addition, the factual setting in Farmer is readily distinguishable from the case at bench. Certainly California has an interest in punishing defamatory statements and intentional inflictions of emotional distress, as it has in proscribing all tortious conduct. However, the acts alleged by DeTomaso do not rise to the level of those alleged in Farmer. In stark contrast to the extreme misconduct by the union officials alleged there, Pan Am's agent is alleged to have accused DeTomaso of theft during a mandated investigation concerning theft. As we have already noted, statements made to the union representatives or during disciplinary hearings are protected as a matter of strong federal policy. The remaining alleged conduct is hardly so "outrageous that 'no reasonable man in a civilized society should be expected to endure it.'"

In sum, because the investigation giving rise to and forming the basis of the allegedly offensive conduct was required by the collective bargaining agreement, the risk of judicially imposed liability for it cannot be said to be merely "peripheral" to federal labor policy. DeTomaso's exclusive remedy was in the grievance adjustment procedures designated by the collective bargaining agreement for resolution of disputes stemming from an employee's belief "that he has been unjustly dealt with or that any provision of [the] Agreement has not been properly applied or interpreted." The Court of Appeal erred in concluding otherwise.

As we have noted earlier, the jury's verdict does not reveal whether the tort or warranty theory formed the basis for its imposition of liability on Pan Am, nor how damages were allocated, if at all, between the two theories. Generally, "[where] there are several counts or causes of action, a general verdict will stand if the evidence supports it on any one sufficient count." The evidence in this case, however, clearly cannot support the damage award based solely on the breach of warranty cause of action. It is, therefore, necessary to remand the case for retrial on the breach of warranty cause of action. Accordingly, the Court of Appeal's judgment — setting aside the trial court's order granting Pan Am a new trial and affirming and reinstating the trial court's judgment — is reversed. The Court of Appeal is directed to enter a new judgment consistent with the views expressed herein, to determine the right to costs on appeal, and to remand this case to the trial court for a new trial on the breach of warranty cause of action.

Safety

United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.

(1982) 32 Cal.3d 762, 654 P.2d 157; 187 Cal. Rptr. 387

In 1976, an engineer from the California Division of Occupational Safety and Health (the division) inspected the United Airlines ground maintenance facility at San Francisco International Airport. As a result of his observations, the division cited and fined United for failing to provide a guardrail on an unenclosed elevated work platform that was being used by an employee working on a plane.(1)

United appealed the citation to the Occupational Safety and Health Appeals Board. (appeals board) and filed a motion to dismiss, arguing, inter alia, that under Labor Code section 6303, subdivision (a) — which defines the places of employment over which the division has jurisdiction — the Federal Aviation Administration (FAA) and not the division has exclusive occupational safety jurisdiction over the maintenance facility. The current provisions of section 6303, subdivision (a) — which all parties agree should be applied in this case — exempt a "place of employment" from the division's jurisdiction if "the health and safety jurisdiction" over that place of employment is "vested by law in, and actively exercised by" any other state or federal agency.(2)

At a hearing before an administrative law judge (ALJ), United introduced a copy of its "maintenance manual" developed under FAA regulations. The FAA requires carriers to prepare and keep current such manuals "... for the use and guidance of flight and ground operations personnel ..." in conducting operations. (14 C.F.R. § 121.133(a).) The manuals must contain, inter alia, instructions necessary to allow workers to perform their responsibilities with a "high degree of safety." (Id., at § 121.135(a)(1).) United's manual included a provision requiring employees to wear safety harnesses when working on elevated platforms.(3)

A United Airlines engineer testified that the manuals are submitted to the FAA and considered "approved" unless the carrier is notified otherwise. He also testified that the FAA conducts inspections and has cited United for violations of manual procedures affecting inflight safety. He was not aware, however, of any instance in which the FAA had cited the airline for a violation of any provision relating solely to the safety of ground maintenance employees.(4)

The ALJ found that although the FAA exercised safety jurisdiction as to the passengers, aircraft and cargo, the evidence failed to show any exercise of safety jurisdiction over ground employees. Accordingly, the citation was upheld.

The appeals board affirmed, noting that although the FAA could disapprove of a manual, the FAA offered no specific guidance to the airlines on employee safety provisions or their enforcement.

United then petitioned the trial court for a writ of mandate to have the board's decision set aside. United argued that the FAA had actively exercised jurisdiction over ground maintenance workers by promulgating regulations requiring the development of maintenance manuals.

The division responded that United's arguments were effectively rebutted by the position of the administrator of the FAA. In a 1977 response to a letter of inquiry, the

administrator expressed doubt that the manual procedures were of a regulatory nature, and stated that failure to follow the procedures would not serve as a basis for FAA enforcement action unless a Federal Aviation Regulation had also been violated.(5) The trial court judicially noticed the administrator's statement and denied United's petition. This appeal followed.

II

California has long looked to a specialized administrative agency to play an important role in protecting the health and safety of working men and women in this state. "In 1913 ... the Legislature enacted a ... bill creating the Industrial Accident Commission, and vested that body, inter alia, with broad authority to adopt regulations relating to the safety and welfare of employees. [Citation.] ... Subsequently, in 1945, the Industrial Accident Commission's broad authority to regulate safety in places of employment was transferred to a new body, the Industrial Safety Board." In 1973, as part of a comprehensive revision of California's occupational health and safety statutes in response to the Federal Occupational Safety and Health Act of 1970, the Industrial Safety Board was reconstituted as the Occupational Safety and Health Standards Board, and the division of Occupational Safety and Health was designated as the administering entity.(6) It is this latter agency whose jurisdiction is challenged in this case.

The 1973 statute, in language which largely parallels its statutory predecessors, grants the division exceedingly broad authority to enforce regulations to protect the health and safety of employees throughout the state. Section 6307 provides: "The division has the power, jurisdiction and supervision over every employment and place of employment in this state, which is necessary to adequately enforce ... all laws and lawful standards and orders ... requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment."

As already noted, section 6303, subdivision (a) creates a limited exemption from the division's broad jurisdiction, excepting from the statutory definition of "place of employment" "a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division." The issue is the scope of this exemption.

Under the terms of section 6303, subdivision (a), the division is divested of jurisdiction over a place of employment only if two prerequisites are satisfied: (1) the place of employment is one over which the health and safety jurisdiction is vested by law in another agency and (2) that jurisdiction is being "actively exercised" by the other agency. In this case, United contends (1) that the safety jurisdiction over its ground maintenance facility is vested in the FAA by virtue of that agency's statutory authority to enact safety regulations with respect to airline operations and personnel, and (2) that the FAA has actively exercised this jurisdiction by promulgating a regulation requiring the airlines to develop manuals which include the subject of employee safety. The division, in response, asserts that the FAA's mission under the federal act is the protection of the inflight safety of passengers, crew and aircraft, not the health and safety of ground maintenance employees, and that the agency's incidental authority to promulgate regulations affecting employee safety is not sufficient to find that it is vested with "the health and safety jurisdiction over the place of employment" so as to divest the division of

jurisdiction under section 6303, subdivision (a). Furthermore, the division argues that the limited regulatory action which the FAA has taken with respect to employee safety — directing employers to devise their own safety standards for inclusion in manuals submitted to the agency — does not constitute the kind of "active exercise" of occupational health and safety jurisdiction that is sufficient to displace the division's regulatory jurisdiction. In our view, both the legislative history of the statute and the past authorities construing the provision support the division's interpretation.

A.

We begin with the requirement that "the health and safety jurisdiction" over the place of employment be vested in another agency. This portion of the statutory exemption first appeared in California law in 1917. In defining "place of employment" for purpose of the jurisdiction of the Industrial Accident Commission, the 1917 act included an exception for "any place of employment, concerning the safety of which jurisdiction may have been vested by law heretofore or hereafter in any other commission or public authority." In 1937, when the definition of "place of employment" was codified as section 6302 of the Labor Code, the provision was modified to narrow the exemption to "a place the safety jurisdiction over which is vested by law in any State or Federal agency other than the commission. With just a minor change in wording — reflecting the transformation of the administering agency from "commission" to "division" — the Legislature adopted this very definition of "place of employment" when it enacted section 6303, subdivision (a) in 1973. Thus, this portion of the statutory exemption has been a part of California law for more than 60 years.

Viewed in isolation, the "safety jurisdiction ... vested by law ... in any ... other agency" language could conceivably be read to apply whenever another agency simply has the power or authority to enact safety regulations applicable to a particular place of employment, and not only when the other agency has been specifically mandated to protect worker safety. From the outset, however, it was quite clear that the Legislature never intended a broad exemption from the division's jurisdiction. A separate provision of the 1917 act, while recognizing that cities and counties retained broad authority under their police power to enact safety regulations for the benefit of workers, at the same time specified that the existence or exercise of such authority would not divest the Industrial Accident Commission of jurisdiction over employment conditions in those municipalities. Instead, the commission's safety regulations would provide a minimum standard that a city or county could exceed.

The authorities which interpreted the statute confirmed the narrow scope of the exemption. In Lehmann v. L. A. City Board of Education (1957), the defendant district contended that because school districts had the authority to enact safety regulations with respect to employment on school district property, the statutory exception applied and rendered the Industrial Safety Board's regulations ineffective. The Court of Appeal rejected that contention, holding that "[s]afety jurisdiction has not been vested in school districts so as to make adoption of regulations mandatory, and the possession of discretionary powers in that field, which may or may not be exercised by school districts, does not relieve them of the duty to conform to the uniform regulations of the division." For example, California Highway Patrol's jurisdiction over safety on public highways does not displace safety board's regulations with respect to employment condition on

highways.

Even more closely in point is a 1959 opinion of the California Attorney General, discussing the applicability of the Industrial Safety Board's regulations to a place of employment under the jurisdiction of the San Francisco Port Authority. At the time, section 1735 of the Harbor and Navigation Code provided that "[t]he [Port A]uthority shall adopt such rules and regulations as may be necessary to the safe, convenient and efficient operation of the port facilities under its jurisdiction" (italics added), and the question was raised whether this statutory authority divested the Division of Industrial Safety of jurisdiction. The Attorney General's opinion concluded that "[w]hile section 1735 provides that the Port Authority is to adopt rules and regulations with regard to the safe operation of port facilities, we do not feel the section is sufficient to vest the safety jurisdiction over places of employment in the harbor of San Francisco in another state agency, the Port Authority, within the meaning of the exception clause in section 6302 of the Labor Code. Section 1735 is too narrowly drawn to accomplish this purpose and, in our opinion, is merely a provision empowering the Port Authority to adopt such rules and regulations as are necessary to comply with the general requirements imposed by sections 6400 and 6401 requiring the Port Authority and all other state agencies to maintain a safe place of employment."

In our view, the FAA's jurisdiction over United's ground maintenance facility is directly analogous to that of the San Francisco Port Authority over the San Francisco harbor. The Federal Aviation Act empowers the FAA to "... promote safety of flight of civil aircraft in air commerce. ..." Among other things, the administrator is authorized to prescribe rules, regulations and minimum standards governing "in the interest of safety the inspection, servicing and overhaul of aircraft, the maximum hours or periods of service of employees, and other practices, methods and procedures which the administrator may find necessary to provide adequately for safety in air commerce. It is under these sections that the FAA promulgates rules requiring the development of the maintenance manuals.

Although, as United claims, the Federal Aviation Act contemplates some regulation of ground employee practices, the division rightly contends that all provisions developed by the FAA under subdivision (a) — including the requirement of maintenance manual development — are primarily directed at inflight safety. A common sense reading of the section, with attention to the subclassification system, shows that subsections (3), (5) and (6) must be interpreted as means of accomplishing the sole directive in subdivision (a): the promotion of "safety of flight." This construction is consistent with subdivision (b) which directs the administrator to "... exercise and perform his powers and duties under [the] chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of accidents in air transportation. ..." It also comports with the purpose of the act as stated by the federal courts: to assure the safety of passengers, crew members and those on the ground who might be endangered by accidents from unsafe flying conditions.

This is not to say that the FAA lacks the authority to issue any regulations relating to the health and safety of ground maintenance personnel. As the Lehmann and Port Authority opinions indicate, however, the exemption of section 6303, subdivision (a) does not come into play simply because there is another agency that has the power or

discretion to enact some regulations affecting employee health or safety. Instead, the exemption applies only in much narrower circumstances, when the other agency in the picture — like the division itself — has been specifically mandated to regulate the working environment within its aegis for the protection of the employees' health and safety. As the Lehmann decision explained, the exception in section 6303, subdivision (a) was not adopted because the Legislature believed that employees who work at places of employment that fall within the exception should be subjected to unsafe or unregulated working conditions. Instead, the statutory exception simply reflects a legislative assumption that the division's jurisdiction is not necessary when the exemption applies because the safety of the place of employment will be adequately protected by another agency. That assumption may well be reasonable when the statutory mission of the other agency is, at least in part, to protect occupational health and safety. Such an assumption is not invariably warranted, however, when the other agency has been established for an entirely different purpose and may not have the expertise or the inclination to take measures necessary to safeguard employees in all aspects of their work.

We have held in the past that the Labor Code is to be liberally interpreted to achieve a safe work environment and that the allocation of health and safety jurisdiction between different agencies should be construed in a manner that minimizes any potential gap in coverage. To allow the mere mention of safety in another agency's enabling legislation to displace the division would be totally out of step with this approach. On the other hand, the narrow interpretation of the exemption adopted by the past authorities furthers the broad remedial purposes of the legislation.

Thus, we conclude that because the FAA — like the school district in Lehmann and the San Francisco Port Authority — is not statutorily mandated to protect the health and safety of workers, it is not "vested by law" with the "health and safety jurisdiction" over a place of employment within the meaning of section 6303, subdivision (a), so as to oust the division of jurisdiction.

In arguing against this interpretation of section 6303, subdivision (a), United relies heavily on a decision of the Federal Occupational Safety and Health Commission construing a statutory exemption contained in the Federal Occupational Safety and Health Act of 1970. In Secretary of Labor v. Northwest Airlines, Inc., the federal review commission held that under section 653(b)(1) of title 29, United States Code,(8) the Federal Occupational Safety and Health Administration (Fed/OSHA) was exempted from regulating a working condition of a maintenance employee servicing an airplane when a safety provision relating to that working condition was included in an airline maintenance manual. United asserts that the Northwest decision is controlling in this case on two separate grounds, but neither contention withstands analysis.

United initially argues that since the state agency draws authority from the Federal Occupational Safety and Health Act, the division cannot exceed the jurisdictional limits placed on Fed/OSHA by 29 United States Code section 653(b)(1) as interpreted by such decisions as Northwest. This contention, however, misperceives the nature of the federal/state relationship established by the federal act.(9)

Congress adopted the federal act in 1970 to address the problem of uneven and inadequate state protection of employee health and safety. In order to establish a nationwide "floor" of minimally necessary safeguards, the 1970 act authorized the

Secretary of Labor to promulgate and enforce national occupational safety and health standards and established Fed/OSHA to administer the act.

Despite a broad authorization to Fed/OSHA to "... assure ... every working man and woman ... safe and healthful working conditions ...", the act did not foreclose other federal agencies or states from exercising such jurisdiction. As already noted, section 653(b)(1) — the provision at issue in Northwest — provides that: "[n]othing in this chapter shall apply to working conditions ... with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." In addition, 29 United States Code section 667 provides that a state may continue enforcement of its own standards if no pertinent federal standard is in effect, or if the state has submitted an acceptable plan for the development and enforcement of standards. (*Id.*, at § 667(a)(e).) It was in response to section 667 that the California Legislature enacted the California Occupational Safety and Health Act of 1973.

Under the section 667 scheme, California is preempted from regulating matters covered by Fed/OSHA standards unless the state has adopted a federally approved plan. The section does not, however, confer federal power on a state — like California — that has adopted such a plan; it merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health. There is no indication in the language of the act that a state with an approved plan may not establish more stringent standards than those developed by Fed/OSHA or grant to its own occupational safety and health agency more extensive jurisdiction than that enjoyed by Fed/OSHA. A state is required only to provide a program "at least as effective" as Fed/OSHA's. Thus, contrary to United's claim, the federal act does not limit the division's jurisdiction to that exercised by Fed/OSHA.(10)

United alternatively claims that even if this court is not compelled to follow Northwest's limitation on Fed/OSHA's jurisdiction, that decision should nonetheless be found persuasive as an authoritative interpretation of a federal statute on which the state exemption was modeled. As we have seen, however, section 6303, subdivision (a)'s exception clause was not modeled on section 653(b)(1) of the federal act, but instead derives from a long line of California statutes dating back to 1917. Furthermore, the differences between the federal and state exceptions are significant: the federal exemption applies only to a "working condition" over which another agency has exercised jurisdiction, while the state exemption extends to an entire "place of employment." Under the federal scheme, there may be relatively little risk to employees in applying the exemption to an agency which is not specifically mandated to protect occupational health and safety, since the exemption only attaches to those "working conditions" as to which the agency has actually prescribed or enforced regulations affecting occupational safety or health and does not prevent Fed/OSHA from protecting employees with respect to other nonregulated working conditions. On the other hand, since the state exemption removes an entire "place of employment" from the division's jurisdiction, a narrower interpretation is warranted in order to ensure that employees are not left without effective health and safety protection.

Finally, United asserts that an interpretation of section 6303, subdivision (a) which allows both the division and the FAA to regulate its ground maintenance facility will

subject it to chronic uncertainty over whose regulations command compliance for a particular procedure or hazard. It appears, however, that United greatly exaggerates the potential for conflict. Although United contends that the FAA desires to regulate all aspects of ground maintenance safety, the materials before us suggest that the FAA is by no means fighting for the broad jurisdiction which United would thrust upon it. In an amicus brief filed in the Northwest case, the FAA stated " ... it is not necessary to decide whether FAA has exclusive authority by statute to regulate all aspects of the occupational safety of airline maintenance personnel FAA does not assert such broad authority." And in a letter written in February 1982 to an amicus in this case, the deputy chief counsel of the FAA expanded on the agency's position, noting that the FAA has only "limited safety and health jurisdiction ... in the [United] maintenance facility" and explaining that "[t]he FAA's authority in this regard is limited by its statutory grant and may not be expanded by the FAA or an airline. Thus, the FAA cannot require an airline to include a provision in its manual concerning the potability of drinking water in its maintenance facility; nor, if an airline included such a provision in its manual, could the FAA require that it be followed." (11) Consequently, in the many areas of employee safety and health that do not implicate inflight safety, no conflict between the two agencies is apparent.

Furthermore, when inflight safety is directly involved, the division acknowledges that, under traditional supremacy clause principles, any safety regulation promulgated by the FAA would necessarily take precedence over a conflicting division regulation. In this regard the division stresses that it has no desire to endanger the safety of passengers, crew members or airplanes. Indeed, as already noted, the division's investigating engineer testified in the administrative hearing in this case that had the employee observed during the inspection been wearing a safety harness, as required in United's manual, United would not have been cited.¹² Thus, if any conflicts do arise in the future, they may well be resolvable by mutual accommodation of the affected agencies.

In sum, United's position boils down to a claim that the mere potential for conflict between the FAA and the division in some aspects of occupational safety and health regulation is sufficient to oust the division of jurisdiction. As we have seen, however, prior decisions interpreting the statutory exception have uniformly rejected such a construction. Accordingly, we conclude that the FAA is not vested with such authority over occupational safety and health at United's ground maintenance facility so as to divest the division of jurisdiction over that facility.

B.

Furthermore, even if the FAA were vested with the requisite jurisdiction to satisfy the initial requirement of section 6303, subdivision (a)'s exemption, the judgment would still stand because we conclude that the FAA's limited actions with respect to employee health and safety do not constitute the "active exercise" of jurisdiction which the statute also demands.

The "active exercise" clause was added to the statute in 1978. The 1978 amendment, originally Assembly Bill No. 3282, was introduced on behalf of the Department of Industrial Relations, Division of Occupational Safety and Health. An analysis of the bill prepared by staff counsel of the Department of Industrial Relations, at the request of a consultant to the Assembly Labor Relations Subcommittee on Industrial Safety, reveals

that it was introduced to address the occupational health and safety of railroad employees. The analysis provides the following specifics.

Before the 1978 amendment, jurisdiction over railroad employees was partially vested in both the Federal Railroad Administration and the California Public Utilities Commission. However, neither agency had mandated specific requirements on railroad worker safety or had assessed fines for violation of existing safety rules. In short, neither agency had developed a comprehensive body of safety regulations for railroad employees, though the PUC did require the railroads to file present rules and regulations of their operating department with the commission. Like United's maintenance manual, the rules and regulations included provisions affecting employee safety.

The seriousness of an absence of comprehensive safety regulations was compounded by the division's lack of jurisdiction over the workers. By statute, the division's jurisdiction over workers employed by long_line railroads was limited to "shop" employees, resulting in a denial of health and safety legislation benefits to many workers.

The 1978 amendment was introduced in response to this jurisdictional void and was designed (1) to broaden the division's jurisdiction beyond shop employees, and (2) to insure that, as a general matter, the division would not be displaced by the mere existence of unused authority in another agency. Thus, the amendment to section 6303, subdivision (a) was intended to create a jurisdictional test which focused on both the authority to regulate and the exercise of that authority.

In light of this legislative history, we think that the FAA's actions fail to constitute an "active exercise" of jurisdiction over the ground maintenance facility for several reasons.

First, the FAA regulation requiring the airlines to develop maintenance manuals lacks any comprehensive or specific health and safety guidelines or standards, and the manuals themselves address few procedures and hazards not directly affecting the structure of the aircraft and are essentially devoid of references to employee health hazards.(13) We do not believe that the Legislature intended such a tangential treatment of ground employee safety and health to trigger an exemption under section 6303, subdivision (a). As shown, the statutory history proves that an "active exercise" of jurisdiction by the FAA requires, at the very least, the promulgation of a body of rules directly addressing the health and safety of ground maintenance workers.

United contends, however, that since its manual contained a provision regarding safety on unenclosed elevated platforms — the requirement for a safety harness — the FAA did actively exercise jurisdiction with respect to the particular violation cited by the division. The argument is unpersuasive. Since the FAA approves the manuals by a failure to object and offers no positive guidelines, the manual regulations are essentially internal safety regulations. An exemption for all areas covered by the maintenance manual would simply allow self_regulation by the airlines. The report by the House Committee on Government Operations, dealing with the relationship between Fed/OSHA and the FAA, explains the problem: "[The exemption] from OSHA's authority simply encourages airlines to insert general provisions in the manuals governing all aspects of occupational safety and health. Once they do so, they will be exempt from OSHA's requirements, and instead will be subject only to the provisions in the maintenance

manuals. The carriers will then be in the enviable position of having to comply only with those occupational safety and health regulations which they have decided to include in their own manuals. We do not believe that the California Legislature intended to divest the division of the authority to protect workers under these circumstances.

Moreover, the FAA has not only failed to promulgate a comprehensive body of rules directly addressing the health and safety of ground maintenance workers, but — at least so far as the present record suggests — it has also failed to undertake any systematic enforcement of those safety measures which are included in the manual. United, relying on several authorities interpreting the federal exemption, argues that no particular level of enforcement is necessary to trigger an exemption. The federal statute does contain language which can be read to indicate that an exemption from Fed/OSHA's jurisdiction requires only the promulgation, and not necessarily the enforcement, of rules by another agency.¹⁴ Section 6303, subdivision (a)'s "exercise" requirement, however, contains no such limiting language. In addition, while the analysis of the 1978 amendment proposed by the division's staff counsel does indicate that the 1978 amendment was drafted with the federal "exercise" requirement in mind, the language adopted by the California Legislature is quite clearly more demanding than the federal exemption, divesting the division of jurisdiction only when another agency "actively exercises" its jurisdiction, as compared to the federal statute which simply requires an "exercise" of jurisdiction.⁽¹⁵⁾

In light of the history of the amendment discussed above, and the Legislature's evident concern that the division not be displaced unless another agency is effectively protecting workers by "actively exercising" its jurisdiction, we conclude that the Legislature intended to require at least some degree of enforcement by another agency before divesting the division of jurisdiction. To eliminate the division's jurisdiction before another agency has taken any measures to ensure that safety regulations are in fact being implemented would contravene the primary purpose of California's remedial legislation in this field: the attainment of a safe working environment.

We recognize, of course, that requiring some degree of enforcement by another agency in order to divest the division of jurisdiction may raise potentially troublesome problems, particularly if — as United argues — the effectiveness of other agencies' efforts must be assessed on a continuous basis. These problems, however, cannot properly be evaluated in the abstract, but must be judged in the factual context of a particular case. In the matter before us, the record suggests that the FAA has not undertaken to enforce the occupational safety provisions contained in United's manual; indeed, the deputy general counsel's most recent comments (see p. 773, ante) indicate that the agency disclaims any authority over the great bulk of occupational safety and health hazards faced by ground maintenance personnel which do not affect inflight safety. Under these circumstances, the mere existence of a variety of airline-drafted safety rules "on the books" does not divest the division of jurisdiction. The judgment is affirmed.

FOOTNOTE 1. The citation alleged a violation of title 8, California Administrative Code, section 3642, subdivision (a)(1) which provides: "The platform deck shall be equipped with: (1) A guardrail or other structure around its upper periphery that shall be no less than 38 inches or more than 45 inches high, with a midrail. (Chains or the equivalent may be substituted across a ladder or stair opening where they give equivalent protection.) Where the guardrail is less than 42 inches high employees shall wear a safety belt securely fastened to the platform by a lanyard so secured that the employee cannot free fall more than 4 feet."

FOOTNOTE 2. Section 6303, subdivision (a) currently provides in full: "Place of employment" means any place, and the

premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division." Unless otherwise indicated, all statutory references are to the Labor Code.

At the time the citation in question in this case was issued, the exemption in section 6303, subdivision (a) varied from the current language in two respects: (1) it did not expressly include a requirement that the other agency "actively exercise" its jurisdiction in order to divest the division of jurisdiction, and (2) it curtailed the division's jurisdiction if a place of employment's "safety jurisdiction" — rather than "health and safety jurisdiction" — was vested in another agency. The "actively exercise" and "health and safety" modifications were enacted in 1978. (Stats. 1978, ch. 1248, § 1, p. 4060.) Since 1975, however, the appeals board has been applying an "active exercise" test of its own (see *Southern Pacific Transportation*, Cal/OSHA Docket Nos.

74_R2D3_193, 194, 195 and 74_R3D1_393, dec. after reconsideration, Oct. 28, 1975), and, at oral argument in this case, United specifically conceded that the division's jurisdiction in this matter should be decided under the current provisions of section 6303, subdivision (a). In any event, it will become clear that in view of our interpretation of the statute the result in this case would be the same under the version of the statute in effect in 1976.

FOOTNOTE 3. The employee observed during the division's inspection was not wearing a safety harness and the inspecting engineer testified that if the employee had been wearing a harness he would not have cited United for a violation of the division's safety regulation.

FOOTNOTE 4. The Committee on Government Operations of the United States House of Representatives provides the following further information on the manuals: "[The] manuals are written by aircraft manufacturers and the airline carriers. They become effective after they are submitted by the carriers to the FAA. If the FAA does not disapprove the manual provisions, they are deemed approved and binding on the carriers and may be only [sic] safety protection afforded workers. Some of these manual provisions explicitly address occupational safety and health matters, while many others address other matters in a way which substantially affects the health and safety of airline maintenance and ground support personnel." (H.R.Rep. No. 97_393, 97th Cong., 1st Sess., p. 3 (1981).)

FOOTNOTE 5. The administrator's statement is contained in Appendix 3 of Hearings on the Subject of Airline Deregulation and Aviation Safety Before a Subcommittee of the House Committee on Government Operations, 95th Congress, First Session, pages 262_263 (1977).

FOOTNOTE 6. Under the 1973 statute, the division retained its former designation as the Division of Industrial Safety. (Stats. 1973, ch. 993, § 13, p. 1920.) It was renamed the Division of Occupational Safety and Health in 1979. (Stats. 1979, ch. 72, §§ 14, 25, pp. 177, 181.)

FOOTNOTE 7. The provision read in relevant part: "Nothing contained in this act shall be construed to deprive ... any county, or city ... or any other public corporation or board or department, of any power or jurisdiction over or relative to any place of employment; provided, that whenever the [Industrial Accident Commission] shall, by order, fix a standard of safety for employments or places of employment, such order shall ... establish a minimum requirement concerning the matters covered by such order and shall be construed in connection with any local order relative to the same matter and to amend or modify any requirement in such local order not up to the standard of the order of the commission."

FOOTNOTE 8. Section 653(b)(1) provides in full: "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42 [the Atomic Energy Act], exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

FOOTNOTE 9. Our discussion of the federal/state relationship is partially drawn from a memorandum by the Solicitor General in response to the United States Supreme Court's invitation to express the views of the United States in a then pending petition by United.

Before decision by the trial court in this case, United had filed a federal injunction action to enjoin the division's enforcement of California occupational safety and health laws. The Ninth Circuit reversed the district court's preliminary injunction for lack of jurisdiction on grounds that the controversy was based on state law. (*United Air Lines v. Division of Indus. Safety, etc.* (9th Cir. 1980) 633 F.2d 814, cert. den. (1981) 454 U.S. 944 [70 L.Ed.2d 255, 102 S.Ct. 485].)

FOOTNOTE 10. Fed/OSHA reached the same conclusion in a 1978 Program Directive: "... [653(b)(1)] limitations are strictly binding only on the Federal program. Therefore, a state may choose to exercise greater jurisdiction under its own law than is allowed to Federal OSHA. Any maximum limitation on State jurisdiction would be determined under that State law and other Federal law and applicable court decisions." (Program Directive No. 77_5 (Oct. 30, 1978).)

FOOTNOTE 11. The specific question of the FAA's position as to its jurisdiction over guardrails on elevated platforms was raised at a congressional hearing in August 1980. At that hearing, Jonathan Howe, deputy director of the Northwest Region of the FAA, stated that while the FAA was concerned about some safety requirements of Fed/OSHA which involved "cutting holes in airplanes" and "using types of solvents," "where it is a matter ... concerning protective railings around platforms[,] [t]hat is not an area that the FAA has any expertise or interest in." (Hearing Before a Subcommittee of the House Comm. on Gov. Operations, 96th Cong., 2d Sess., p. 180 (Aug. 16, 1980).) When asked about this particular litigation, Howe stated: "I think if we were asked what our position would be, it would be ... that this is a matter between the State of California and United Airlines. ... We do not have jurisdiction." (*Id.*, at p. 182.)

FOOTNOTE 12. At a number of points during this proceeding, United has suggested that a guardrail requirement may endanger inflight safety because of the possibility that a guardrail may scratch or even puncture the aluminum skin of an airplane. United's own ground safety engineer testified, however, that the airline "use[s] guardrails on numerous vehicles in the servicing of the aircraft," and that a safety harness and lanyard are generally used only when there is the possibility of damaging the airplane because of the positioning of the maintenance lift truck. The engineer also testified that with respect to the specific maintenance operation that led to the administrative citation in this case, a guardrail could have been installed with no danger to the airplane.

FOOTNOTE 13. The House Committee on Government Operations lists the following health hazards, none of which are FAA regulated except incidentally through the regulation of inflight dangers: exposure to radiation, microwaves, carbon monoxide,

polynuclear aromatics, chemicals in jet fuel, jet exhaust, cleaning solvents and paints. (H.R.Rep. No. 97_393, 97th Cong., 1st Sess., p. 5 (1981).)

FOOTNOTE 14. 29 United States Code section 653(b)(1) provides for exemption of a working condition "with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." (Italics added.)

FOOTNOTE 15. The exemption provided by the 1978 amendment is narrower than the federal exemption in another respect as well, authorizing an exemption only when another agency has both "health and safety jurisdiction" over a place of employment, whereas the federal statute provides for an exemption when another agency has exercised authority with respect to either "occupational safety or health."

Public Sector Unions

Public employees have the right to organize and engage in collective bargaining. However, public employee strikes are illegal. This does not necessarily mean that such employees can't strike, or take other action which for all practical purposes, is a strike (such as "blue flu"). Usually, employees whose jobs are not directly related to public safety (fire, police) can strike and then negotiate for amnesty as part of the terms of the new CBA.

Enacted in 1968, the Meyers_Milias_Brown Act (MMBA) furnishes only a "sketchy and frequently vague framework of employer_employee relations for California's local governmental agencies." A product of political compromise, the provisions of the act are confusing, and, at times, contradictory. Unlike the Educational Employment Relations Act, enacted in 1975, the MMBA does not establish an administrative agency such as the Public Employee Relations Board to regulate local labor relations. Rather, the act leaves to local government agencies the power to establish and enforce rules governing relations with their own employees.

The California Supreme Court has held that the Meyers_Milias_Brown Act's protection of public employees' rights to participate in organizations of their own choosing, and the purpose of that Act, to foster employee_employer communication and improve management_personnel relations, barred local governments from revoking recognition of unions for encouraging or condoning strikes. The court held that the non-civil service employees who engage in a strike, and are dismissed for such activity, are entitled to notice and hearing before dismissal, where the personnel rules provide that discharge must be "for a stated cause," and since the local government had discretion to impose sanctions less severe than dismissal.

Federal Strikes

In August 1981, the Professional Air Traffic Controllers Organization (PATCO) launched a nationwide strike against the federal government. President Ronald Reagan ordered the discharge of 11,000 striking controllers who had not returned to work within a two_day grace period. The Administration rejected all suggestions for a general amnesty, its position being that the strikers, by violating the federal government's prohibition on strikes and their own "no_strike" oath, have forfeited their jobs with the Federal Aviation Administration forever. Revocation of recognition of the union (PATCO) was explicitly provided as a sanction for strike activity under the Federal

Labor_Management Relations Act. (5 U.S.C. § 7120(f); 5 U.S.C. § 7103(a)(4).)
Moreover, the action against PATCO was the first time in the history of the federal statute that the authority's power permanently to revoke the recognition of a union had been exercised. .Federal courts upheld the government's position in PATCO v. Federal Labor Relations Authority (D.C. Cir. 1982) 685 F.2d 547. For a more detailed analysis of the strike, see Meltzer & Sunstein, Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers (1983) 50 U.Chi.L.Rev. 731.