NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5273-12T4

PATRICK M. O'DONNELL AND
BRIAN FIDANZATO,

Plaintiffs-Appellants,

v.

NIGHTLIFE, d/b/a DUSK, RED STRIPE
PLANES GROUP, JAMES WANKMILLER,
GARY VELORIE, ERIC MILLSTEIN,
KEVIN FRIEL, CRAIG SLOTKIN,
JUSTIN LOTTER, KEVIN SCANLON,
CHELSEA FLEMING, BROOKE ASHCROFT,
ASHLEY COSTELLO, AMANDA GRILL,
KELLY SCHWEIR, SARRAH LOUIS DILENNO,
ASHLEY KNIGHT, AND LIANA WILLIAMS,

Defendants-Respondents.

Argued March 17, 2014 - Decided April 17, 2014

Before Judges Harris and Guadagno.

On appeal from the Superior Court of New
Jersey, Law Division, Somerset County,
Docket No. L-398-12.

Michael R. O'Donnell argued the cause for
appellants.

John E. MacDonald argued the cause for
respondents (Constangy, Brooks & Smith, LLP,
attorneys; Mr. MacDonald, of counsel and on
the brief; Phillip J. Lipari, on the brief).

PER CURIAM

Plaintiffs Patrick M. O'Donnell and Brian Fidanzato appeal from the March 15, 2013 order of the Law Division granting defendants' motion to dismiss counts one through four of plaintiffs' second amended complaint and the May 24, 2013 order granting defendants' motion to dismiss counts six through eight of that complaint without prejudice.[1]

I.

Defendant Dusk Nightclub (Dusk) in Atlantic City, New Jersey is owned and operated by defendant Red Stripe Plane Group (RSPG) and A.C. Nightlife, LLC. In June 2009, RSPG hired O'Donnell as a "tipped Euro"[2] and Fidanzato as a "busser" for Dusk. During 2010, plaintiff Fidanzato was promoted to a "tipped Euro" for Dusk. We affirm.

In August 2009, RSPG and Unite Here Local 54 entered into a collective bargaining agreement (CBA). Plaintiffs were both members of Local 54. The position of "Tipped Floor Euro" is included under the list of employee classifications in the CBA. The CBA provides that the union is "the sole and exclusive

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[1] Because the dismissal without prejudice did not finally resolve all issues as to all parties, the appeal is interlocutory. In the interest of justice and an abundance of caution, we grant leave to appeal those counts nunc pro tunc.

[2] At oral argument we were told that a tipped Euro serves alcoholic beverages, including wine.

bargaining representative of the classifications of employees within their respective jurisdiction . . . in all matters relating to wages, hours, and working conditions such as may properly be the subject of collective bargaining, adjustment of grievances, and labor relations generally." The CBA also provides that it

> supersede[s] any other contract in effect between the Employer and the Union and any prior or pre-existing contract . . . and shall supersede any contract between the Employer and individual member or members of the Union coming within classifications covered by this Agreement.
>
> . . . .
>
> Amendments, additions and/or deletions to this Agreement, with the exception of powers under Articles 18, will be null and void unless in writing and signed by the Parties hereto.

In addition, the CBA contains provisions regarding employment, discharge, hours of work, wages, gratuities, grievances, job classifications and duties, and pay rate.

Plaintiffs claim that in June 2009, Dusk and its employees entered into an oral agreement

> wherein it was agreed that "Tipped Euros", would receive 25 percent of the nightly tip pool which was to be comprised of 20 percent gratuity added to all bottle sales plus 25 percent of the nightly private side tips received by bottle servers and that the sum of said amounts would be split equally

> between all tipped euros who worked on the given night.

Plaintiffs further claim that defendants breached this agreement by intentionally failing to give plaintiffs their proper percentage of the nightly tip pools.

Plaintiffs informed Dusk management of their complaints and they claim management not only declined to rectify the situation but retaliated against them. On December 16, 2011, plaintiff O'Donnell was terminated. Plaintiffs claim that the termination was in retaliation for their complaints to management about: not receiving the proper amount of the nightly tip pools, being forced to perform cleaning duties specifically prohibited by the CBA, a lack of tip committee as required by the CBA, not receiving full minimum wages for non-tipped work in violation of wage and hour laws, an assault on plaintiff O'Donnell by defendant Craig Slotkin, and for failure to pay financial benefits such as holidays and other time off as a result of fraud and theft, among other reasons.

Plaintiff Fidanzato claims that he was constructively terminated in 2012 when the position of tipped Euro was done away with and subsumed under the classification of busser. Plaintiffs claim that the elimination of the tipped Euro position was also retaliation for their complaints.

Plaintiffs' second amended complaint filed on July 17, 2012, alleges willful breach of contract, fraud, wage and hour violations, tip pool/wage and hour violations, assault, shaving of hours, and Conscientious Employee Protection Act (CEPA) violations.

On October 18, 2012, defendants filed a notice of removal to the United States District Court for the District of New Jersey, alleging that plaintiffs' claims are subject to the Labor Management Relations Act. Plaintiffs moved to remand the matter to the Superior Court claiming the federal court lacked subject matter jurisdiction and the notice of removal was not timely filed.

On January 7, 2013, the district court issued a memorandum and order finding that "[d]efendants' removal was proper based on the federal claim," but untimely as defendants' notice of removal was filed beyond the thirty-day filing requirement of 28 U.S.C.A. § 1446(b).

Defendants then moved to dismiss counts one through four of plaintiffs' second amended complaint. After oral argument, the court issued an order and written decision granting defendants' motion to dismiss. Defendants then moved to dismiss counts six, seven, and eight of plaintiffs' second amended complaint. After oral argument, the court issued an order and written decision

dismissing counts six, seven, and eight of plaintiffs' second amended complaint without prejudice and issued a separate order and decision denying a motion by plaintiffs for reconsideration of the earlier order. On June 3, 2013, plaintiffs and defendants filed a joint voluntary stipulation of dismissal of count five of plaintiffs' second amended complaint.

On appeal, plaintiffs raise two points:

POINT I

THE COURT'S DISMISSAL OF COUNTS SEVEN AND EIGHT OF THE SECOND AMENDED COMPLAINT PERTAINING TO CEPA WAS IMPROPER UNDER R. 4:6-2(E) AND SUBSTANTIVELY.

POINT II

THE COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS FOR WILLFUL BREACH OF CONTRACT, FRAUD AND SHAVING OF HOURS PURSUANT TO R. 4:6-2(E) AND SUBSTANTIVELY BASED UPON LMRA PREEMPTION.

II.

"In reviewing a complaint dismissed under Rule 4:6-2(e) our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). A reviewing court must search the complaint liberally to determine whether a cause of action exists. Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244,

252 (App. Div. 1957). The court must accept as true the facts alleged in the complaint, Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625 (1995), and the plaintiff is entitled to every reasonable inference of fact. Indep. Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956).

"If a complaint must be dismissed after it has been accorded the kind of meticulous and indulgent examination counselled in this opinion, then, barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint." Printing Mart-Morristown, supra, 116 N.J. at 772.

A.

Plaintiffs first argue the trial court's dismissal of counts seven and eight, the CEPA violations, was improper based on Rule 4:6-2(e). CEPA provides in pertinent part:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
>
> > (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any

shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

. . . .

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or

> misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3.]

Plaintiffs argue that "the complaint clearly establishes that plaintiffs made complaints and threats of complaints to management concerning conduct that was unlawful, illegal, fraudulent and contrary to public policy. . . . [which] falls within the categories expressed in N.J.S.A. 34:19-3(a)(1)(2)(3)." To maintain a cause of action under N.J.S.A. 34:19-3(a) or (c), a plaintiff must show:

> (1) that he or she reasonably believed that his or her employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law;
>
> (2) that he or she performed whistle-blowing activity described in N.J.S.A. 34:19-3a, c(1) or c(2);
>
> (3) an adverse employment action was taken against him or her; and
>
> (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

> [Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999) (citing Falco v. Cmty. Med. Ctr., 296 N.J. Super. 298, 315, 317 (App. Div. 1997), certif. denied, 153 N.J. 405 (1998)).]

The trial court framed the issue as "whether a plaintiff has identified a clear mandate of public policy which focuses on the underlying employer activity or practice that triggers the employee's objection[,]" citing Cosgrove v. Cranford Bd. of Educ., 356 N.J. Super. 518, 525 (App. Div. 2003). The court found that "[c]ount seven alleges that these complaints included violations of the CBA as to cleaning duties, receiving full financial benefits including vacation/holiday pay as well as contractual overtime. These allegations of retaliation relate to rights afforded by the CBA and thus such are not actionable under CEPA." As to count eight,

> [t]he allegations directly relate to the CBA which include the allocation of tip pools, performance of duties prohibited under the CBA and failure to provide a higher minimum wage for non-tipped work as outlined in the CBA. . . . Thus, Count Eight does not involve a clear matter of public policy and further is grounded in the CBA.

On appeal, plaintiffs argue that the trial court's reliance on Cosgrove is misplaced, as the CEPA complaint in that case alleged unfair distribution of premium overtime, which was not a violation of law or public policy, but was only guaranteed by the CBA. Here, plaintiffs argue,

> [t]he acts complained of . . . constitute violations of public policy under applicable case law. . . . More importantly, the trial court failed to recognize that the conduct in question also fits squarely within sections a, paragraphs (1) and (2) of CEPA, which do not pertain to violations of public policy but instead are concerned with acts which are unlawful, criminal or fraudulent.

The trial court focused on whether public policy was violated as required by N.J.S.A. 34:19-3(c), but appeared to ignore plaintiffs' allegation under subsection (a), which does not require a violation of public policy, but instead a "violation of a law, or a rule or regulation[.]" See N.J.S.A. 34:19-3(a).

The Court in Mehlman v. Mobil Oil Corp., 153 N.J. 163, 188 (1998), stated, "the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee." However, the Court in Mehlman was analyzing "whether the plaintiff adequately has established the existence of a clear mandate of public policy" under N.J.S.A. 34:19-3(c). Mehlman, supra, 153 N.J. at 187.

Counts seven and eight of plaintiffs' complaint allege that their termination and constructive termination were in retaliation to their complaints on a variety of issues. Most of those complaints alleged violations of the CBA, including being forced to perform cleaning duties, not establishing a tip

committee, and failure to pay for holidays and vacations. These are not violations of law, only violations of the CBA, and therefore not actionable under CEPA. See N.J.S.A. 34:19-3(a). However, plaintiffs claim that there are allegations contained in counts seven and eight that are not violations of the CBA:

> not receiving the proper amount of the nightly tip pools which plaintiff reasonably believed to have been the result of fraud;
>
> not receiving full minimum wages for non-tipped work which plaintiff reasonably believed to have been in violation of wage and hour laws;
>
> the assault against [O'Donnell] by defendant Craig Slotkin of October 31, 2011 which plaintiff reasonably believed to be in violation of New Jersey's simple assault statute and for threatening to file a complaint against Craig Slotkin for simple assault in Atlantic City Municipal Court;
>
> Dusk had not made any required contributions to the union's severance fund on behalf of plaintiff or any other past or current union employee which plaintiff reasonably believed was contrary to civil and criminal statutes pertaining to ERISA.

Article 13 and Schedule A of the CBA address wage rates according to positions and would govern how plaintiffs should have been paid for non-tipped work. Article 14 provides for gratuities and the method of tip pooling, providing that "[a]n employee committee will be set up to discuss the implementation and procedures for and any issues arising from the pooling

arrangement, but this committee has no authority to alter the fact that tips will be pooled." Thus, any arrangement of tipping percentages would fall under the CBA. Finally, Article 15 of the CBA requires Dusk to contribute to the severance fund and therefore would govern a failure to do so.

"[O]ne cannot avoid federal preemption of alleged state law claims by artfully phrasing the language in the complaint." Johnson v. United Food & Commercial Workers, Int'l Union Local No. 23, 828 F.2d 961, 967 (3d Cir. 1987).

The only allegation contained in O'Donnell's CEPA complaint that is not a purported violation of the CBA is the alleged assault against O'Donnell by defendant Slotkin. Count five describes the assault as Slotkin "intentionally pushing [O'Donnell] in the back." No bodily injury is alleged. On June 3, 2013, plaintiffs and defendants filed a joint voluntary stipulation of dismissal of count five of plaintiffs' amended complaint, the alleged assault.

B.

Plaintiffs next argue that the trial court erred in dismissing count seven and eight because it was preempted by the National Labor Relations Act. The court found

> even if Counts Seven and Eight were cognizable under CEPA, they are preempted under the NLRA.

. . . .

In this case, the activity alleged in Counts Seven and Eight of the Compliant is arguably subject to the NLRA as the allegations set forth the claim that Plaintiffs were retaliated against for filing complaints and exercising their rights under the CBA.

Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> [29 U.S.C.A. § 157.]

Section 8 provides that it

> shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];
>
> . . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
>
> [29 U.S.C.A. § 158(a).]

"When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775, 783 (1959). "[S]tate regulations and causes of action are presumptively pre-empted if they concern conduct that is actually or arguably either prohibited or protected by the [NLRA]." Belknap, Inc. v. Hale, 463 U.S. 491, 498, 103 S. Ct. 3172, 3177, 77 L. Ed. 2d 798, 807 (1983).

On appeal, plaintiffs first argue that their "complaint does not establish that either plaintiff acted in concert; therefore dismissal of counts seven and eight pursuant to R. 4:6-2(e) and premised upon NLRA preemption was not proper." In response, defendants rely on NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830, 104 S. Ct. 1505, 1510, 79 L. Ed. 2d 839, 848 (1984):

> a single employee's invocation of such rights affects all the employees that are covered by the collective-bargaining agreement. This type of generalized effect, as our cases have demonstrated, is sufficient to bring the actions of an individual employee within the "mutual aid or protection" standard, regardless of whether the employee has his own interests most immediately in mind.

Plaintiffs contend that this case falls under the exceptions to NLRA preemption as articulated in Garmon,

> where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.
>
> [359 U.S. at 243-44, 79 S. Ct. at 779, 3 L. Ed. 2d at 782].

Plaintiffs argue that CEPA claims are deeply rooted in local feeling and responsibility and are peripheral concerns of the NLRB. Ultimately, state causes of action are "presumptively pre-empted if they concern conduct that is actually or arguably either prohibited or protected by the [NLRA]." Belknap, supra, 463 U.S. at 498, 103 S. Ct. at 3177, 77 L. Ed. 2d at 807. Here, plaintiff's allegations fall under that umbrella and the state cause of action is presumptively preempted. We find no error in the decision of the trial court to dismiss counts seven and eight as preempted.

C.

Plaintiffs next argue that their claims for willful breach of contract, fraud and shaving of hours, are not subject to complete preemption under section 301 of the LMRA. Section 301(a) of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> [29 U.S.C.A. § 185(a).]

"Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" Caterpillar Inc. v. Williams, 482 U.S. 386, 394, 107 S. Ct. 2425, 2431, 96 L. Ed. 2d 318, 328 (1987) (quoting Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 859 n.3, 107 S. Ct. 2161, 2167, 95 L. Ed. 2d 791, 801 (1987)).

"[W]hen 'the heart of the [state-law] complaint [is] a clause in the collective bargaining agreement,' that complaint arises under federal law[.]" Id. at 394, 107 S. Ct. at 2430, 96 L. Ed. 2d at 328 (quoting Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 558, 560, 88 S. Ct. 1235, 1236, 1237, 20 L. Ed. 2d 126, 128, 130 (1968)).

> [T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the

> fact that state law would provide a cause of action in the absence of § 301.
>
> [Ibid. (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23, 103 S. Ct. 2841, 2853-54, 77 L. Ed. 2d 420, 439-40 (1983)).]

"Our analysis must focus, then, on whether . . . evaluation of the [common law] claim is inextricably intertwined with consideration of the terms of the labor contract." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213, 105 S. Ct. 1904, 1912, 85 L. Ed. 2d 206, 216 (1985).

Here, the trial court found that "Counts One, Two, Three and Four require at least some consideration of the CBA and thus they are preempted by Section 301 of the LMRA." The court reasoned that the "CBA . . . governs virtually all aspects of Plaintiff's employment. . . . includ[ing] wages, hours, gratuities, job descriptions, and the like." As to count six, the court concluded that "any analysis of count six is inextricably intertwined with an analysis of the CBA, and thus Count 6 is preempted by LMRA."

Plaintiffs allege that a separate oral contract was formed between them and defendants, guaranteeing them twenty-five percent of the tip pool, and was not provided for in the CBA. As to count one, willful breach of contract, plaintiffs pled that defendants "breached said agreement by intentionally

failing to give plaintiffs nightly their proper percentage of the nightly tip pools." As to count two, fraud, plaintiffs alleged that "defendants intentionally and willfully denied plaintiffs their proper share of the nightly tip pools and fraudulently conspired to do so for their own pecuniary gain."

The trial court found that count one is preempted because:

> it is unclear whether the CBA actually supersedes any agreement regarding gratuities between the parties, oral or otherwise. The CBA provides that it "supersede[s] any contract between the Employer and individual members of the Union coming within classifications covered by the Agreement." While there has been little discussion on the issue thus far, it is conceivable that "classifications" covered by the CBA would include gratuities since there is an entire section devoted to it. If indeed gratuities could be considered a classification covered by the CBA, then it appears that any contracts between the parties, oral or written, would have been superseded when the CBA was signed. This would include the June 2009 oral agreement between Plaintiffs and Defendants because it was allegedly made two months before the CBA was signed in August 2009. While the disposition of this issue is not precisely clear at this time, it is at least clear that more analysis under the CBA is required and that as a result any claims dealing with gratuities and the June 2009 oral agreement require interpretation of the CBA.
>
> Plaintiffs contend that the CBA does not deal with tip distribution. They assert that it merely provides that tips will be pooled. However, despite the fact that the CBA does not expressly deal with how the tip pools will be distributed, it does appear to

> provide a route for the parties to come to such an agreement. In Article 14.1, the CBA provides that "[a]n employee committee will be set up to discuss the implementation and procedures for and any issues arising from the pooling arrangement, but this committee has no authority to alter the fact that tips will be pooled." Thus, if the alleged oral agreement between Plaintiffs and Defendants were superseded, then this procedure would presumably have to be followed for setting up pooling procedures and, conceivable, tip distribution.

As to count two, the court found that the analysis is similar: "Plaintiffs allege that Defendants failed to live up to their obligations with regard to tip distribution for their own pecuniary gain. In order to determine what obligations Defendants had in the first place, it must be determined whether the alleged June 2009 oral agreement was superseded." We agree.

Although plaintiffs allege a separate oral contract, whether that agreement is even enforceable is an issue that can only be determined after an analysis of the CBA and thus is preempted by the LMRA.

D.

Count six of plaintiffs' complaint alleges, "defendants have routinely shaved and/or caused to be shaved hours from the time records of plaintiffs resulting in the paychecks received by plaintiffs not properly reflecting the actual amount of hours

worked. . . . in violation of New Jersey wage and hours laws as well as New Jersey Common law."

The trial court concluded that

> To discern the amount of compensation due to Plaintiffs requires an interpretation of the CBA, particularly the sections that pertain to the particular job classifications, duties, and wage designations. . . . [A]s stated by the US Supreme Court in Allis-Chalmers, . . . preemption depends on whether the claim is "inextricably intertwined" with consideration of the terms of the labor contract. . . . In order to adjudicate this claim of shaving hours from paychecks, it will be necessary to consider the language set forth in the CBA.
>
> It is clear that multiple provisions within the CBA deal specifically with employee wages and hours. Notably, Article 12, provides broad guidelines for scheduling and payment of wages, as well as specific powers and responsibilities of management. A threshold inquiry into the employee classification of Plaintiffs, the hours which they actually worked, and thus the wages to which they were actually entitled would be required to determine what damage, if any, was caused by Defendants' alleged hour-shaving. In addition, Schedule A breaks out the job classifications and pay steps according to each role and time length. The case law is clear that Section 301 of the LMRA governs claims founded directly on rights created by CBA's but also claims that are substantially dependent on an analysis of a CBA.

Again, we agree. Article 12 provides for scheduling, hours of work, and payment of wages. To determine whether plaintiffs'

hours were "shaved" an analysis of the CBA would have to occur and thus the claim is preempted by LMRA.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION