

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 STEVEN MCARTHUR,

11 Plaintiff,

v.

12 BNSF RAILWAY COMPANY,

13 Defendant.

14 CASE NO. C17-1314-JCC

15 ORDER DISMISSING CASE

16 This matter comes before the Court on Defendant BNSF Railway Company's ("BNSF")  
17 motion to dismiss (Dkt. No. 6). Having thoroughly considered the parties' briefing and the  
relevant record, the Court hereby GRANTS the motion for the reasons explained herein.

18 **I. BACKGROUND**

19 Plaintiff Steven McArthur recently terminated his employment with BNSF. (Dkt. No. 1-2  
20 at 3.) His position involved travel to various BNSF work locations, with compensation based, in  
21 part, on the mileage he incurred. (Dkt. Nos. 6 at 1-3, 11 at 1-5.) In a separate case, BNSF  
22 brought suit seeking to recoup amounts it paid to McArthur and certain fellow employees,  
23 claiming they fraudulently inflated their mileage. *See BNSF Ry. Co. v. McArthur*, No. C15-0992,  
24 slip op. (W.D. Wash. Feb. 9, 2017). Judge Jones dismissed the case due to a lack of subject  
25 matter jurisdiction because BNSF's state law claims were preempted by the Railway Labor Act  
26 ("RLA"), which imposes mandatory arbitration provisions for such wage claims. *See Id.* at \*2

1 (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994)).

2       In the instant suit, originally brought in King County Superior Court, McArthur seeks  
3 \$43,119.55 in unpaid vacation and leave time. (Dkt. No. 1-2 at 4.) He asserts BNSF  
4 impermissibly failed to pay this amount following his termination and is liable under Revised  
5 Code of Washington §§ 49.48.010, 49.48.030, 49.52.070 for double damages and attorney fees.  
6 (*Id.* at 3.) BNSF removed to this Court based on diversity (Dkt. No. 1), and now moves to  
7 dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (Dkt. No. 6). BNSF  
8 asserts that it properly withheld payment pursuant to the collective bargaining agreements  
9 (“CBA”) between BNSF and McArthur’s collective bargaining unit, and adjudication of the  
10 matter outside of arbitration is preempted by the RLA. (*Id.* at 2.) BNSF also asserts judicial  
11 estoppel on the basis that McArthur, in the related proceeding before Judge Jones, previously  
12 argued that mandatory arbitration applies to all wage-related claims. (*Id.* at 22.)

13 **II. DISCUSSION**

14       BNSF’s 12(b)(1) motion makes the same argument McArthur successfully made to Judge  
15 Jones—that the pay dispute is subject to the mandatory arbitration provisions of the RLA, 45  
16 U.S.C. § 151a(5), thereby preempting this suit. (Dkt. No. 6 at 9–13); *see BNSF Ry. Co.*, No. C15-  
17 0992, slip op. at \*2. Therefore, this Court lacks subject matter jurisdiction to adjudicate  
18 McArthur’s claims.

19       Under Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed if the  
20 court lacks subject matter jurisdiction. Jurisdiction is a threshold separation of powers issue, and  
21 may not be deferred until trial. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95  
22 (1998). A motion to dismiss under Rule 12(b)(1) for lack of jurisdiction may be facial or factual.  
23 *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In reviewing a factual attack, the Court  
24 may consider materials beyond the complaint. *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir.  
25 1988).

1       As Judge Jones described when dismissing BNSF’s claims against McArthur, under the  
2 RLA, arbitration is required to the extent that interpretation of the CBA is necessary to resolve  
3 claims between McArthur and BNSF. *See BNSF Ry. Co.*, No. C15-0992, slip op. at \*2. Here,  
4 BNSF asserts such interpretation is required to (a) determine the amount of vacation pay it  
5 rightfully owes McArthur and (b) whether BNSF may offset termination payments against  
6 amounts it believes McArthur owes. (Dkt. No. 6 at 13.)

7       Vacation pay for a BNSF engineer is derivative of the total amount of compensation  
8 received the prior year, which necessarily includes claimed mileage. (Dkt. Nos. 6 at 4–5, 14 at  
9 7.) Mileage is based on the distance an engineer travelled by rail or van, reported by the engineer  
10 using “tie-up tickets,” and reviewed and approved by BNSF’s payroll department. *BNSF Ry. Co.*  
11 *v. McArthur*, Case No. C15-0992-RAJ, Dkt. No. 47 at 4 (W.D. Wash. 2016). Judge Jones  
12 previously held that interpretation of the CBA is required to determine “whether [McArthur and  
13 his fellow employees] correctly calculated and reported their traveled miles . . . how that  
14 translates to wages, and how the employee and employer are to resolve disputes over same.”  
15 *BNSF Ry. Co.*, No. C15-0992, slip op. at 2. The Court will not disturb this holding as it now  
16 applies to McArthur’s claims.

17       McArthur counters that the disputed vacation pay here is different than the disputed  
18 wages before Judge Jones because vacation pay is “contractually vested” and, as such, does not  
19 require interpretation of the CBA to determine the amount owing. (Dkt. No. 11 at 2.) This is not  
20 a plausible assertion. BNSF is only obligated to pay the amount McArthur rightfully earned.  
21 (Dkt. No. 14 at 7.) This amount is yet to be determined. What McArthur refers to as  
22 “contractually vested” is the amount of vacation pay BNSF told McArthur he had earned, before  
23 it concluded that he inflated his compensation the prior year. (Dkt. Nos. 6 at 12–13, 14 at 7.) Of  
24 the \$43,119.55 McArthur claims owing as termination payments in this case, for which he seeks  
25 double damages, \$32,360.90 represents vacation pay. (Dkt. No. 1-2 at 4.) This is the amount  
26 subject to CBA interpretation and preemption. The remaining \$10,758.65 McArthur seeks is

1 leave pay, which is not impacted by mileage.<sup>1</sup> (Dkt. Nos. 6 at 5–6, 11 at 3.) This is the only  
2 amount not requiring interpretation of the CBA, and is insufficient to support subject matter  
3 jurisdiction. *See 28 U.S.C. § 1332(a).*

4 Further, interpretation of the CBA is required to determine whether BNSF may offset the  
5 termination payments it owes McArthur against the amount exceeding \$100,000 that it believes  
6 McArthur owes. (Dkt. No. 6 at 4.) While the CBA does not explicitly allow for such self-help,  
7 industry practice and custom do. “[P]ractice, usage and custom is of significance in interpreting”  
8 a CBA between railroad employees and their employer. *Consol. Rail Corp. v. Ry. Lab. Executives’ Ass’n*, 491 U.S. 299, 311 (1989). BNSF persuasively cites a series of Public Law  
9 Board (“PLB”) decisions supporting this practice. (Dkt. Nos. 6 at 15–16, 9-1 Ex. 1–5.)<sup>2</sup> Rather  
10 than cite countervailing PLB decisions, McArthur attempts to distinguish these decisions from  
11 the facts of this case. (Dkt. No. 11 at 13–15.) The Court does not find those distinctions  
12 meaningful.

14 Interpretation of the CBA is required to determine how much vacation pay BNSF owes  
15 McArthur and whether BNSF may offset termination payments against what it believes  
16 McArthur misappropriated. On this basis, McArthur’s claims before this Court are preempted.  
17 This is sufficient for dismissal under Federal Rule of Civil Procedure 12(b)(1), as the Court lacks  
18 subject matter jurisdiction. The Court need not reach BNSF’s 12(b)(6) or judicial estoppel  
19 arguments.

20 “Dismissal without leave to amend is improper unless it is clear upon *de novo* review that  
21 the complaint could not be saved by any amendment.” *Krainski v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010). Under these facts, no amendment  
22 would confer subject matter jurisdiction on the Court. It would not be appropriate to grant

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25 <sup>1</sup> Leave pay is based solely on an employee’s basic pay. (Dkt. No. 11 at 3.)

26 <sup>2</sup> The RLA created the PLB to hear disputes between railroad employees and their employers. *See United Transp. Union v. BNSF Ry. Co.*, 710 F.3d 915, 919 (9th Cir. 2013).

1 McArthur leave to amend his complaint.

2 **III. CONCLUSION**

3 For the foregoing reasons, BNSF's motion to dismiss (Dkt. No. 6) is GRANTED.

4 McArthur's complaint is DISMISSED with prejudice. The Clerk is DIRECTED to CLOSE this  
5 case.

6 DATED this 16th day of October 2017.

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John C. Coughenour  
UNITED STATES DISTRICT JUDGE