REVERSE; AFFIRMED as MODIFIED and Opinion Filed March 30, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-01067-CV

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) ON BEHALF OF ITSELF AND ITS MEMBERS, Appellant
V.
THE BOEING COMPANY, Appellee

On Appeal from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-16290

MEMORANDUM OPINION

Before Justices Carlyle, Smith, and Garcia
Opinion by Justice Garcia

In this interlocutory appeal from a plea to the jurisdiction, Southwest Airlines Pilots Association ("SWAPA") challenges the trial court's final order dismissing with prejudice its common law tort claims against the Boeing Company ("Boeing"). SWAPA argues that it has standing to assert claims on its own behalf and associational standing to assert claims on behalf of its members, and even if it does not, the trial court should have allowed a pleading amendment and should not have

dismissed the suit with prejudice. SWAPA further argues that the Railway Labor Act ("RLA")[1] does not preempt its state law tort claims against Boeing.

As discussed below, we conclude that SWAPA has standing to assert claims on its own behalf, but at the time the suit was filed, lacked standing to assert claims on behalf of its members. Although SWAPA's subsequently acquired assignments of member interests do not cure the jurisdictional defects in the present case, the assignments might confer standing on SWAPA to file suit in the future. Thus, while the trial court properly dismissed the suit without providing SWAPA an opportunity to amend its pleadings, the dismissal should have been without prejudice. We further conclude that the RLA does not preempt SWAPA's state law claims.

Accordingly, we reverse the trial court's order granting Boeing's plea to the jurisdiction on the claims SWAPA asserted on its own behalf. We modify the trial court's order to reflect that the claims SWAPA asserted on behalf of its members are dismissed without prejudice. As modified, the remainder of the trial court's order is affirmed.

[1] 45 U.S.C. §§ 151 et. seq.

I. BACKGROUND

SWAPA is an unincorporated non-profit labor organization and employee association that represents over 9,000 Southwest Airlines Pilots. Acting in its representative capacity, SWAPA enters into collective bargaining agreements ("CBAs") with Southwest Airlines. The CBAs define employment terms, including pay, benefits, working conditions, and the approved aircraft that the pilots agree to fly. Southwest pilots pay SWAPA a percentage of their wages as dues.

In 2016, SWAPA entered a CBA in which SWAPA agreed that its members would operate Boeing's 737 MAX aircraft. In 2018 and 2019, the 737 MAX was involved in catastrophic crashes and as a result, the 737 MAX fleet was grounded worldwide.

SWAPA subsequently initiated this suit against Boeing on behalf of itself and its members. The petition alleges that SWAPA seeks damages on behalf of itself and its pilots "who have collectively lost, and are continuing to lose, millions of dollars in compensation as a result of Boeing's false representations concerning its 737 MAX aircraft, namely that the 737 MAX was safe, airworthy, and was essentially the same as the time-tested 737 aircraft that SWAPA pilots were already flying." To this end, SWAPA asserts Texas common law claims for fraudulent and negligent misrepresentation, tortious interference with contract and with an existing business relationship, negligence, and fraud by nondisclosure. SWAPA seeks compensation for pilots in connection with cancelled or reduced flights following the grounding of

the 737 MAX, in addition to its own lost dues and legal fees incurred in connection with government investigations.

Boeing removed the case to federal court, asserting that SWAPA's state law claims are completely preempted by the RLA and that the "mass action" provision of the Class Action Fairness Act creates original federal jurisdiction. SWAPA moved to remand.

While SWAPA's remand motion was pending, 8,794 SWAPA pilots executed assignments in which they assigned and transferred to SWAPA "all rights, title, and interest to any and all claims, demands, and/or causes of action . . . against Boeing arising out of the Max Crisis" (the "Assignments"). The Assignments acknowledge that SWAPA's agreement to pursue the assignor-member's damage claims is "[c]onsistent with SWAPA's Constitution and the ordinary business it conducts in representing the interests of Southwest pilots."

The federal court concluded that it lacked subject matter jurisdiction and remanded the case to state court. Boeing filed an answer and a plea to the jurisdiction. The plea asserted that SWAPA lacks associational standing, and its claims are preempted by the RLA.

SWAPA filed a notice of assignment requesting that the Assignments be recorded in accordance with the Texas Property Code, but it did not amend or seek to amend its petition.

Boeing amended its plea to the jurisdiction. The amended plea argues that SWAPA lacks associational standing to pursue claims on behalf of its members, the Assignments do not confer standing because they violate Texas public policy relating to standing and class actions, and the RLA preempts SWAPA's state law claims.

After full briefing and some limited discovery, the trial court conducted a hearing. After the hearing, the court signed an order granting Boeing's plea and dismissing SWAPA's claims with prejudice. SWAPA moved to modify the judgment and to amend its petition and the trial court denied the motion.[2] SWAPA now appeals the trial court's orders granting the plea to the jurisdiction and denying its motion to modify the judgment.

II. ANALYSIS

A. Standard of Review and Dilatory Pleas

A plea to the jurisdiction is a dilatory plea that challenges the trial court's subject matter jurisdiction without regard to whether the asserted claims have merit. *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *see also City of San Antonio v. Maspero*, ___ S.W.3d ___, 2022 WL 495190, at *4 (Tex. 2022) (proper function of a dilatory plea does not authorize an inquiry so far into the

[2] After the court denied SWAPA's motion to modify the judgment, SWAPA filed a new lawsuit in its capacity as assignee of the Assignments. That case is not at issue in this appeal, but rather is a separately filed appeal pending as *Southwest Airline Pilots Assoc. v. Boeing*, No. 05-21-00598-CV.

substance of the claims that plaintiffs are required to put on their case to establish jurisdiction).

We review a trial court's ruling on a plea to the jurisdiction de novo. *See Hous. Belt & Terminal Ry. Co. v. City of Hous*., 487 S.W.3d 154, 160 (Tex. 2016). A jurisdictional plea may challenge the pleadings, the existence of jurisdictional facts, or both. *Tex. Dep't of Criminal Justice v. Rangel*, 595 S.W.3d 198, 205 (Tex. 2020) (quoting *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018)).

The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction. *Heckman v. Williamson Cnty*., 369 S.W.3d 137, 150 (Tex. 2012). In reviewing a plea to the jurisdiction, we begin with the plaintiff's live pleadings and determine if the plaintiff has alleged facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In making this assessment, we construe the plaintiff's pleadings liberally, taking all assertions as true, and look to the plaintiff's intent. *Id.* If a plea to the jurisdiction challenges the existence of jurisdictional facts, we may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id*. at 227. That is, we review the evidence in the light most favorable to the nonmovant to determine whether a genuine issue of material fact exists. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) (citing *Miranda*, 133 S.W.3d at 221, 227–28). "Our ultimate inquiry is whether the

plaintiff's pleaded and un-negated facts, taken as true and liberally construed with an eye to the pleader's intent, would affirmatively demonstrate a claim or claims within the trial court's jurisdiction." *Brantley v. Texas Youth Comm'n*, 365 S.W.3d 89, 94 (Tex. App.—Austin 2011, no pet.).

When a plaintiff fails to plead facts that establish jurisdiction, but the petition does not affirmatively demonstrate incurable defects, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *see also Miranda*, 133 S.W.3d at 226–27. If, however, the pleadings affirmatively negate the existence of jurisdiction, then the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to replead. *Cty. of Cameron*, 80 S.W.3d at 555.

The plea in this case was premised on the alleged absence of standing and federal preemption. "Standing is a constitutional prerequisite to suit." *Heckman*, 369 S.W.3d at 150 (citing *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 915 (Tex. 2010)). Standing "requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Id.* at 154 (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304, 307 (Tex. 2008)). "If a plaintiff lacks standing to assert a claim, then a court has no jurisdiction to hear it." *Heckman*, 369 S.W.3d at 150; *Inman*, 252 S.W.3d at 304).

Preemption can be jurisdictional or defensive. *See Gruber v. Fuqua*, 279 S.W.3d 608, 624 n.2 (Tex. 2009); *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d

542, 545–546 (Tex. 1991) (forum preemption implicates a court's subject matter jurisdiction). When it is the former, it is sometimes raised in a plea to the jurisdiction. *See De Los Santos v. Heldenfels Enters, Inc.*, 632 S.W.3d 584, 589 (Tex. App.—El Paso 2020) (considering preemption raised in plea to the jurisdiction). We begin with standing.

B. Does SWAPA have associational standing?

SWAPA argues that it has standing to assert its members' claims because it meets the requirements for associational standing and by virtue of the Assignments. Because the Assignments occurred after the suit was filed and because there was no pleading based on the Assignments at the time the court considered the plea, we divide our analysis to consider the effect of the Assignments before and after they were executed.

1. Before the Assignments

SWAPA insists that it has direct standing as the assignee of its members' claims and "common sense" suggests that we should not require a "meaningless dismissal and subsequent refiling." Guided by the long-standing principle that standing must exist at the inception of the suit, we disagree. As this court has explained:

> Standing must exist at the time a plaintiff files suit and must continue to exist between the parties at every stage of the legal proceedings, including the appeal; if the plaintiff lacks standing at the time suit is filed, the case must be dismissed, even if the plaintiff later acquires an interest sufficient to support standing.

Martin v. Clinical Pathology Labs., Inc., 343 S.W.3d 885, 888 (Tex. App.—Dallas 2011, pet. denied); *see also Kilpatrick v. Kilpatrick*, 205 S.W.3d 690, 703 (Tex. App.—Fort Worth 2006, pet. denied), *overruled on other grounds by Revell v. Morrison Supply Co., LLC*, 501 S.W.3d 255 (Tex. App.—Fort Worth 2016, no pet.). "A trial court determines its jurisdiction at the time a suit is filed. At that time, the court either has jurisdiction or it does not. Jurisdiction cannot subsequently be acquired while the suit is pending." *Bell v. Moores,* 832 S.W.2d 749, 754 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 446 n.9 (Tex. 1993) ("Our concern is with a party's right to initiate a lawsuit and the trial court's corresponding power to hear the case ab initio. Standing is determined at the time suit is filed in the trial court . . . ."); *McMillan v. Aycock*, No. 03-18-00278-CV, 2019 WL 1461427, at *2 (Tex. App.—Austin Apr. 3, 2019, no pet.) (mem. op.). Courts consistently hold that "a later-acquired interest does not retroactively confer standing." *La Tierra de Simmons Familia Ltd. v. Main Event Enter., LP.*, No. 03-10-00503-CV, 2012 WL 753184, at *5 (Tex. App.—Austin Mar. 9, 2012, pet. denied) (mem. op.) (*citing Martin*, 343 S.W.3d at 888; *Kilpatrick*, 205 S.W.3d at 703); *see also McMillan*, 2019 WL 1461427, at *3; *Doran v. Clubcorp USA, Inc*., No. 05-06-01511-CV, 2008 WL 451879, at *2 (Tex. App.—Dallas Feb. 21, 2008, no pet.) (mem. op.); *Bell*, 832 S.W.2d at 754. Accordingly, we cannot conclude that the Assignments retroactively conferred jurisdiction on SWAPA in this suit.

SWAPA argues that even without the Assignments, it meets the statutory requirements for associational standing. *See* TEX. BUS. ORGS. CODE ANN. § 252.007(b). Boeing disagrees and maintains that SWAPA cannot assert members' claims because the participation of each individual member is necessary to determine both liability and damages.

When, as here, the legislature has conferred standing through statute, judge-made criteria regarding standing do not apply and "the analysis is a straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing." *Texas Ass'n of Bus. v. City of Austin,* 565 S.W.3d 425, 433 (Tex. App.—Austin 2018, pet. denied). "Statutory construction presents a question of law that we determine de novo under well-established principles." *Paxton v. City of Dallas*, 509 S.W.3d 247, 256 (Tex. 2017) (citing *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016)).

We begin, as we must, with the language of the statute by which the legislature provides associational standing for nonprofit associations. *See Texas Ass'n of Bus*., 565 S.W.3d at 433. Section 252.007(b) of the Texas Business Organizations Code provides:

> (b) A nonprofit association may assert a claim in its name on behalf of members of the nonprofit association if:
>
> (1) one or more of the nonprofit association's members have standing to assert a claim in their own right;
>
> (2) the interests the nonprofit association seeks to protect are germane to its purposes; and

> (3) neither the claim asserted nor the relief requested requires the participation of a member.

TEX. BUS. ORGS. CODE ANN. § 252.007(b); *accord Tx Ass'n of Bus v. Texas Air Control Bd.*, 852 S.W.2d 440, 447, (Tex. 1993) (adopting three-part test as articulated in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)); *Wyly v. Pres. Dallas*, 165 S.W.3d 460, 463–464 (Tex. App.—Dallas 2005, no pet.).

The third prong of the associational standing test is at issue here. This prong focuses on administrative convenience, efficiency, and judicial economy concerns. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556–57 (1996). Texas courts have recognized that determining whether claims and relief would or would not advance these "prudential concerns" is "somewhat tricky." *See Big Rock Investors Ass'n v. Big Rock Petroleum, Inc.*, 409 S.W.3d 845, 849 (Tex. App.—Fort Worth 2013, pet. denied); *City of Fredericksburg v. E. 290 Owners' Coalition*, No. 04-20-00339-CV, 2021 WL 2445621, at *3 (Tex. App.—San Antonio Jun. 16, 2021, pet. denied) (mem. op.).

The Texas Supreme Court has held that whether an association has standing to invoke the court's remedial powers on behalf of its individual members depends substantially on the nature of the relief sought. *Tex. Ass'n of Bus.*, 852 S.W.2d at 448; *Tex. Mun. League*, 209 S.W.3d at 815; *see also Hunt*, 432 U.S. at 343. If the association seeks a declaration, injunction, or some other form of prospective relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured," and the third prong of this test

is satisfied. *Tex. Ass'n of Bus*., 852 S.W.2d at 448 (holding that association satisfied third prong because it sought only prospective relief, raised only issues of law, and did not need to prove the individual circumstances of its members to obtain that relief); *see also Hunt*, 432 U.S. at 344 (recognizing that commission's claims did not require individualized proof and were thus properly resolved in a group context); *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 931–32 (Tex. App.—Austin 2010, no pet.) (holding claims did not require participation of individual members because plaintiff sought only prospective declaratory and injunctive relief, raised only questions of law, and was not required to prove the individual circumstances of its members to obtain relief); *City of Bedford v. Apt. Ass'n of Tarrant Co*., No. 02-16-00356-CV, 2017 WL 3429143, at *3 (Tex. App.—Fort Worth Aug. 10, 2017, pet. denied) (mem. op.) (association pleaded declaratory and injunctive relief that benefitted members and did not seek monetary damages on members' behalf); *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc*., 177 S.W.3d 552, 561 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (holding homeowners' association not required to prove individual circumstances of its members because it sought declaratory relief to collectively and equally benefit injured members); *Concerned Owners of Thistle Hill Estates Phase I, LLC v. Ryan Road Mgmt., LLC*, 02-12-00483-CV, 2014 WL 1389541, at *6 (Tex. App.—Fort Worth Apr. 10, 2014, no pet.) (mem. op.) (association bringing declaratory judgment seeking recoupment of damages for itself satisfied third prong

of standing test because proof of individual members' entitlement to damages not required). Under such circumstances, prudential concerns are satisfied because the court can assume that the remedy sought, if granted, will inure to the benefit of those members of the association actually injured. *Tex. Ass'n of Bus*., 852 S.W.2d at 448; *see also Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("[I]n all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.").

Conversely, if an association seeks damages on behalf of its members or must otherwise prove the members' individual circumstances in order to obtain relief, participation of the individual members is required, and the third prong is not satisfied. *Tex. Ass'n of Bus*., 852 S.W.2d at 446–47 (organization should not be allowed to sue on behalf of its members when the members seek to recover money damages and the amount of damages varies with each member); *Burns*, 209 S.W.3d at 815; *Warth*, 422 U.S. at 515–16 (holding that association of construction firms lacked standing to sue for damages for lost profits of its members because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof").

Here, SWAPA seeks damages rather than declaratory or injunctive relief. We thus consider whether proof of such damages requires "the participation of a member" as that term has been interpreted by the courts. *See Big Rock*, 409 S.W.3d at 850.

SWAPA argues that §252.007(b)(3)'s use of the word "member" (singular) should be interpreted to mean "members" (plural) because the first reference in the statute is to "members." The "participation of a member" prong, however, does not turn on whether one or several members must participate, but rather whether the damages are individualized and vary across members. *See Texas Ass'n of Bus.*, 852 S.W.2d at 446–47. Thus, even if we read the statutory text as SWAPA suggests, our analysis does not change.

SWAPA's petition seeks damages on its own behalf for legal fees and lost member dues. The petition, as well as the declaration of Samuel Engel, submitted by SWAPA in response to the plea, states that SWAPA also seeks damages on behalf of its members for compensation the pilots were unable to earn because of the 737 MAX grounding. According to SWAPA, these damages can be proved through objective criteria using data in SWAPA records, including payroll records, operational flight schedules, and fleet plans. The Engel declaration details this analysis.

According to Engel, the total lost compensation consists of the difference between what the pilots earned and what they would have earned with the 737 MAX in operation. Calculating damages for each individual pilot is also formulaic, with each pilot to receive his or her share of total pilot compensation.

Engel states that once the total damages are established, he could use "the W-2 records of the entire Southwest Airlines pilot population before and during the

period of MAX grounding" to calculate the share of damages that could be apportioned to each member. Engel opines that exceptions for "a small number of identifiable categories . . . such as pilots on long term disability" could be treated separately with other formulaic calculations using SWAPA data. Engel does not require assistance from any SWAPA members to explain these formulas to the jury.

But even though a SWAPA member may not be required to testify, individualized proof will be required, and damages will vary across members. Not all of the aircraft in Southwest's fleet were grounded—only the 737 MAX. Thus, there may have been pilots who were able to continue flying or who were only marginally affected by schedule changes occasioned by the grounding. Damages for pilots who were scheduled to fly the 737 MAX would vary based on individual assignments, whether they were reassigned to other aircraft, seniority, experience, level of compensation, retirement, military reserve duty, and disability. "[T]he mere fact that the damages calculation formula may produce the same compensatory damages calculation for each of [an] association's members, is insufficient to satisfy section 257.007(b)'s third prong that 'neither the claim asserted nor the relief requested requires the participation of a member."' *RCCC Social Members Ass'n v. Barton Creek Resort, LLC*, No. 03-18-00708-CV, 2020 WL 2990577 at *5, (Tex. App.—Austin June 3, 2020 pet. denied) (mem. op.); *see also City of Fredericksburg*, 2021 WL 2445621 at *5 (third prong of standing test not met where proof of

members' individual circumstances would be required to determine damages accruing to each property).

Our sister court addressed a similar situation. *See Big Rock*, 409 S.W.3d at 851–852. In *Big Rock*, BRIA, a nonprofit association comprised of investors in oil and gas drilling projects sued Big Rock Petroleum on behalf of its investors alleging that Big Rock participated in a Ponzi scheme causing financial damage to its members. *Id*. at 847. Big Rock filed a plea to the jurisdiction alleging that BRIA could not pursue its members' claims because the claims and the relief requested required participation of individual members. *Id.*

BRIA argued that individual member participation would be very minimal because a receiver could testify about the financial losses suffered by the individual members. *Id*. at 852. The court rejected this argument, holding that "[t]his is not the type of minimal participation envisioned by the third prong of the associational standing test; the evidence is not duplicative, redundant, or elicited from representative injured members." *Id*. The court further held that:

> Substituting the testimony of one person (the receiver) concerning the individual profits and losses of each of BRIA's 226 individual members is no less fact-intensive than simply permitting each individual member to provide such testimony concerning his profits or losses. This type of fact-intensive analysis, even if performed through one witness, raises the type of real and substantial concerns found to thwart a determination of associational standing under the third prong of the associational standing test.

Id.

The damage analysis is even more fact intensive in the present case. SWAPA has over nine hundred members with unique circumstances. Applying formulaic criteria to address these individual circumstances through the testimony of one witness does not alleviate the problem. Thus, this is not a case where the requested relief does not require the "participation of a member." *See* TEX. BUS. ORGS. CODE ANN. § 252.007(b). The trial court did not err in concluding that SWAPA lacked associational standing based on the petition before the court at the time of the plea.[3]

Although it filed notice of the Assignments, SWAPA did not amend its pleading or seek a pleading amendment until after the court granted Boeing's plea. SWAPA insists that even if the record did not affirmatively demonstrate jurisdiction, the court should have allowed a pleading amendment.

Amendment of pleadings is permitted if the plaintiff's pleadings do not contain sufficient facts to affirmatively demonstrate jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction. *Miranda*, 133 S.W.3d at 226. Here, however, the issue is not one of pleading sufficiency. SWAPA did not have associational standing when the suit was filed, *see Bell*, 832 S.W.2d at 754, and pleading additional facts describing events occurring after suit was filed would not cure this jurisdictional defect. *See Harris Cnty. v. Sykes*, 136 S.W.3d 635, 639 (Tex.

[3] The parties also argue about whether the claims asserted require individualized proof of reliance and causation. But we need not address these additional arguments. *See* TEX. R. APP. P. 47.1.

2004). SWAPA was not entitled to replead based on its later-acquired interest. *See McMillan*, 2019 WL 1461427, at *3 (acquiring rights to claim after suit and plea filed would not cure jurisdictional defect in the pending case). Likewise, an amended pleading would not overcome the statutory barrier to establishing associational standing. *See Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 846 (Tex. 2007) (when amending pleadings would serve no legitimate purpose dismissal without affording opportunity to amend is proper). The trial court did not err in dismissing SWAPA's case without affording it the opportunity to replead.

2. After the Assignments

A plea to the jurisdiction does not challenge the merits of a claim, but simply challenges the trial court's subject matter jurisdiction without regard to the merits. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). Accordingly, a dismissal with prejudice is generally improper when the plaintiff is capable of remedying the jurisdictional defect. *Id*.[4]

Although there was no pleading based on the Assignments at the time of the plea, the parties argue here about the effect of the assignments, as they did in the court below. We consider these arguments in the context of whether the suit should have been dismissed with prejudice—that is, whether dismissal with prejudice was appropriate because SWAPA could never cure the current jurisdictional defects.

[4] The dismissal of a case with prejudice operates as an adjudication on the merits as if the case had been tried and decided. *Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam).

Boeing maintains that the Assignments are void as against public policy because they distort the litigation process and would allow SWAPA to create a *de facto* class action suit without satisfying the requirements of Rule 42. *See* TEX. R. CIV. P. 42. SWAPA argues that the Assignments in this case present no different policy considerations than any other contract case involving assignee rights. We agree with SWAPA.

Absent specific circumstances, causes of action in Texas are freely assignable. *See State Farm Fire & Cas. Co., v. Gandy*, 925 S.W.2d 696, 705–07 (Tex. 1996). When a cause of action is assigned or transferred, the assignee becomes the real party in interest with the authority to prosecute the suit to judgment. *See Tex. Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co*., 442 S.W.2d 315, 317 (Tex. 1969).

Nonetheless, in certain limited circumstances the Texas Supreme Court has invalidated otherwise contractually valid assignments on public policy grounds when the assignment (i) tends to increase or prolong litigation unnecessarily; (ii) tends to distort the litigation process; and (iii) is otherwise inconsistent with the purpose of a statutory cause of action. *See Sw. Bell Tel. Co.*, 308 S.W.3d at 916. Applying these guidelines, the high court has concluded that the following types of assignments are invalid because they violate public policy: (1) an assignment of a cause of action that works to collude against an insurance carrier; (2) an assignment of a legal malpractice claim; (3) an assignment that creates a Mary Carter agreement;

(4) an assignment of the plaintiff's cause of action to a joint tortfeasor of the defendant; (5) an assignment of interests in an estate that distorts the true positions of the beneficiaries; and (6) an assignment of a DTPA cause of action. *See PPG Indus. Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 87 n.31 (Tex. 2004). The Assignments at issue here are not among these categories.

Expanding the categories of assignments recognized by the supreme court as contrary to public policy is beyond the province of this court, particularly when the Assignments do not implicate the general concerns the court identified as the impetus for such exceptions. *See Sw. Bell*, 308 S.W.3d at 916 (assignments have been invalidated when they increase or prolong litigation, distort the litigation process or are inconsistent with the purpose of a statutory cause of action); *see also Robinson v. Homeowners Mgmt. Enters*., 590 S.W.3d 518, 528 n. 45 (Tex. 2019) (only the Supreme Court can abrogate or modify existing precedent).

SWAPA is not a "stranger/entrepreneur whose actions . . . distort the judicial process." *Id*. at 917–918. Indeed, as the sole collective bargaining unit for its members, SWAPA "had a preexisting relationship with the assignors that was directly related to the subject of the claims." *See id.* As the Texas Supreme Court has explained, distortion of the legal process occurs when an assignment skews the trial process, confuses or misleads the jury, promotes collusion among nominal adversaries, or misdirects damages from more culpable to less culpable defendants. *See PPG*, 146 S.W.3d at 90. No indicia of distortion is present here.

In addition, the Assignments are not inconsistent with the associational standing statute. *See* TEX. BUS. ORGS. CODE ANN. § 252.007(b). The statute addresses when an association may assert claims on behalf of its members; that is, an association's rights without an assignment. An assignment, however, involves first-party rights, not the assertion of rights on behalf of others. *See Sprint Commc'ns Co., L.P. v. APCC Servs,. Inc*., 554 U.S. 269, 290 (2008). The United States Supreme Court, considering the associational standing test codified in the Texas statute, has recognized this distinction. *See Warth,* 422 U.S. at 516. Specifically, the court held that where claims for damages *have not been assigned* to an association and when the alleged damages are not common to the entire membership nor shared to an equal degree, the association has no standing to assert members' claims. (Emphasis added). *Id.*

Moreover, TEX. BUS. ORGS. CODE ANN. § 252.004(b) provides that "a nonprofit association may be a beneficiary of a trust, contract, or will." This statutory confirmation of an association's right to receive the benefits of a contract forecloses the conclusion that an association may not be a party to an assignment. And nothing in the statute precludes suit by an association as an assignee of such assignments.

We are similarly unpersuaded by Boeing's argument that "allowing SWAPA's suit will mean that no court will assess the class actions requirements." As the supreme court has held, "nothing mandates that a plaintiff pursue a remedy through the procedures of Rule 42. It is the plaintiff who chooses to resolve a claim

through the class action mechanism." *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 450 (Tex. 2007). "Class actions are permissive, not mandatory," and "constitute but one of several methods for bringing about aggregation of claims." *Sprint*, 554 U.S. at 290 (rejecting argument that circumvention of class action rule could constitute a basis for denying assignee standing). We therefore find no basis to conclude that a plaintiff electing to proceed as the assignee of claims rather than through a class action renders the assigned claims void as against public policy.

We are further guided by the precept that, in examining an agreement to determine if it is contrary to public policy, courts look to whether the agreement has a tendency to injure the public good. *See Johnson v. Structured Asset Svs*., *LLC*, 148 S.W.3d 711, 726 (Tex. App.—Dallas 2004, no pet.). Court review of a claim that a contract is against public policy should be applied with caution and only in cases involving dominant public interests. *Id.* Boeing has identified no such interests here.

Under these circumstances, we cannot conclude that the Assignments are void as against public policy. Although the Assignments cannot cure the jurisdictional impediments in the present case, the Assignments might confer standing on SWAPA in the future. *See BCCC*, 2020 WL 2990577, at *6; *Mcmillan*, 2019 WL 1461427, at *3. Therefore, the court erred by dismissing the case with prejudice.

C. Does SWAPA have standing to pursue its own claims?

SWAPA also sued Boeing on its own behalf, seeking damages for lost member dues and legal fees. According to SWAPA's petition, Boeing

misrepresented the truth about the 737 MAX, and had SWAPA known the truth, it would have "demanded that Boeing rectify the aircraft's fatal flaws before agreeing to include the aircraft in the CBA and to provide its pilots . . . with the information and training needed to respond to the circumstances [encountered in the fatal crashes]." SWAPA contends that Boeing is liable for damages resulting from false representations concerning the 737 MAX, interference with SWAPA's contract and business relationship with Southwest Airlines, and negligence in certifying the aircraft. Boeing does not challenge SWAPA's standing to sue on its own behalf.[5]

A nonprofit is entitled to "institute, defend, intervene, or participate in a judicial . . . proceeding in its own name. *See* TEX. BUS. ORGS. CODE ANN. § 252.007(a). The standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties to be resolved by the court. *Hickman*, 369 S.W.3d at 154–55. These requirements are met, and SWAPA's petition alleges facts that affirmatively demonstrate the court's jurisdiction to hear SWAPA's claims. *See Texas Ass'n of Bus*., 852 S.W.2d at 446. Therefore, the trial court erred by granting the plea and dismissing the claims SWAPA asserted on its own behalf.

D. Does the RLA preempt SWAPA's state law tort claims?

Boeing argues that SWAPA's claims are preempted by the RLA because resolving SWAPA's claims will require interpretation of the current and former

[5] Instead, Boeing argues that SWAPA's claims are preempted.

CBAs between Southwest and its pilots.[6] SWAPA argues that its claims are not preempted because the plain terms of the RLA limit its mandatory arbitration provisions to disputes between carriers and their employees. SWAPA further argues that if the RLA applies, SWAPA's references to the CBAs do not require interpretation of the agreements, and the state law tort claims are not conducive to adjustment board resolution.

The origins of the statute shape our analysis. "[R]elations between railroads and their workers have often been stormy." *Burlington N. & Santa Fe Ry. Co. v. Bhd. of Maint. of Way Emps*., 143 F. Supp. 2d 672, 678 (N.D. Tex. 2001). As other courts have noted, "the origins of this matter (as well as many other disputes) can probably be traced back prior to 1894, when Eugene V. Debs led members of the American Railway Union in a turbulent strike against the Pullman Palace Car Company of Illinois." *Id*. (quoting *Alton & S. Ry. Co. v. Bhd. of Maint. of Way Emps*., 883 F. Supp. 755, 756 (D.D.C. 1995)).

Accordingly, the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes'" in order to "safeguard the vital interests of the country" in uninterrupted rail service. *Texas & N. O. R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930); *see also* 45 U.S.C. § 151a. The RLA

[6] This case involves defensive RLA preemption rather than "complete preemption." Complete preemption is a federal removal doctrine relating to whether a case may be removed from state to federal court because it is considered a federal claim arising under federal law from its inception. *Caterpillar v. Williams*, 482 U.S. 386, 393 (1987). The federal court's remand was premised on the conclusion that there is no complete preemption here.

was later extended to include the air transportation industry. *See Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc*., 372 U.S. 682, 685–89 (1963); 45 U.S.C. §§ 181–88.

The purpose of the RLA is "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *see also Brown v. Illinois Central R.R. Co*., 254 F.3d 654, 658 (7th Cir. 2001); *Russell v. Nat'l Mediation Bd*., 714 F.2d 1332, 1342 (5th Cir. 1983) (purpose is to make and maintain agreements between carriers and employees concerning working conditions, rules, and rates of pay to avoid disruption of commerce). Accordingly, at the "heart of the [RLA]," is the "duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . between the carrier and the employees thereof." *Atlanta & W. Point Ry. Co. v. United Transp. Union*, 439 F.2d 73, 77 (5th Cir. 1971); 45 U.S.C. § 152.

To that end, the RLA sets out a mandatory and "virtually endless" process of "negotiation, mediation, voluntary arbitration, and conciliation." *Burlington N. R.R. v. Bhd. of Maint. of Way Emps*., 481 U.S. 429, 444 (1987). Specifically, the RLA establishes mandatory processes for two separate classes of disputes: major disputes

and minor disputes. *Norris*, 512 U.S. at 252–253.[7] The statute grants federal courts jurisdiction to resolve major disputes, while minor disputes must be submitted to arbitration. *Am. Train Dispatchers Ass'n v. Nat'l Ry. Labor Conference*, 525 F.Supp.3d 107, 111 (D.D.C. 2021) (citing *Ass'n of Flight Attendants, AFL-CIO v. United Airlines, In*c., 71 F.3d 915, 917 (D.C. Cir. 1995); *Cons. Rail Corp. v. Railway Executives Ass'n*, 491 U.S. 299, 302–03 (1989)).

A major dispute concerns "rates of pay, rules or working conditions" involved in the formation or modification of collective bargaining agreements. *Id*.; *see also Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945) (stating that a major dispute arises where there either is no CBA or where changes to an existing CBA are sought; major disputes "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."). On the other hand, minor disputes grow out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions when there is an existing collective bargaining agreement. *Norris*, 512 U.S. at 252–253. "Major disputes seek to create contractual rights, minor disputes to enforce them." *Id*. at 253. "All minor disputes must be adjudicated under RLA mechanisms, which include an

[7] Although the terms "major dispute" and "minor dispute" are not found in the statute, RLA jurisprudence has adopted these phrases as terms of art. *Bhd. Of Locomotive Eng'rs & Trainmen v. Union Pacific R.R. Co.*, 879 F.3d 754, 757 (7th Cir. 2017).

employer's internal dispute-resolution procedures and an adjustment board established by the unions and the employer." *Brown*, 254 F.3d at 658.

Whether federal law preempts state law is a question of Congressional intent *Norris*, 512 U.S. at 252–253; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (Congressional intent is "ultimate touchstone" in preemption analysis). In determining Congressional intent, a court must "begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1982).; *see also Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1907 (2019) (plurality op.) (evidence of congressional intent in the text and structure of the statute).

A seminal preemption case, *Lucas v. Flour Co*., 369 U.S. 95, 103–104 (1962), explains the rationale for labor dispute preemption. In *Lucas*, the court held that federal labor law must be paramount under the supremacy clause in areas covered by federal statute to avoid inconsistent state law interpretations of collective bargaining agreements.[8] *Id*. Guided by the rationale for preemption and the purpose of the statute, we examine the language of the statute to assess its application in this case.

[8] *Lucas* was decided under the labor Management Relations Act, 29 U.S.C. §185 ("LRMA"). *See id. Norris* instructs that the RLA preemption standard is identical that applied in LMRA cases. *See Norris*, 512 U.S. at 260.

As relevant here, the authority of an adjustment board includes "disputes between carriers by air and its or their employees." 45 U.S.C. §§ 184, 185. The statute defines a "carrier" to include

> any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of Title 49 . . . .

45 U.S.C. §151 (First).

The statute further provides that:

> All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every *common carrier by air* engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. §181 (emphasis added).

The statute does not define the term "common carrier by air." *Thibodeaux v. Exec. Jet Int'l, Inc*., 328 F.3d 742, 749 (5th Circ. 2003). But federal courts that have considered the issue apply a test similar to a test employed by the National Mediation Board, the agency that administers the RLA. Under this test, "the crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or a definable segment of the public as being willing to transport for hire, indiscriminately." *Id*. at 750. The "test is an objective one, relying on what the carrier actually does rather than the label the carrier attaches to its activity or the purpose which motivates it." *Id*. (quoting *Woolsey v. Nat'l Transp. Safety Bd*., 993

F.2d 516, 523 (5th Cir. 1993)); *see also Riegelsberger v. Air Evac. EMS, Inc*., 369 F.Supp.3d 901, 906 (E.D. Mo. 2019).

The petition alleges that Boeing manufactures and sells 737 aircraft, and Boeing does not dispute these allegations. There is nothing in the record to suggest that Boeing holds itself out as being willing to transport for hire. Moreover, there is no indication that Boeing has been licensed as a common carrier. *See Med-Trans. Corp. v. Benton*, 581 F.Supp.2d 721, 733 (E.D.N.C. 2008) (that an entity is licensed by the government as a common carrier supports that it is a common law common carrier). Boeing makes and sells aircraft; it does not operate the aircraft commercially for hire. Under these circumstances, there is no basis to conclude that Boeing is a "common carrier by air."

Even when an employer is not a "common carrier by air," the RLA may still apply if the employer is sufficiently controlled by a carrier.[9] *See e.g., Frisby v. Sky Chefs, Inc*., No. 19C7989, 2020 WL 4437805, at *4 (N.D. Ill. Aug. 3, 2020) (mem. op.) (catering company owned by air carrier subject to RLA). Nothing in the record supports or even suggests that Boeing is controlled by an air carrier, so we do not consider this expanded application of the statute.

[9] The test applied to determine such control is referred to as the "function and control test," and asks (1) whether the nature of the work is that traditionally performed by employees of rail or air carriers," and (2) "whether the employer is actively or indirectly owned or controlled by or under common control with a carrier or carriers." *See Allied Aviation Serv. Co. of N.J. v. NLRB*, 854 F.3d 55, 61 (D.C. Cir. 2017).

In addition, SWAPA is not an employee as defined by the statute. The RLA applies to disputes between an air carrier and its employees. 45 U.S.C. §184; *In re Continental Airlines*, 484 F.3d 173, 183 (3rd Cir. 2007). An "employee" includes:

> [E]very person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official . . . .

45 U.S.C §151 (Fifth). We have concluded that Boeing is not a carrier. And it is undisputed that neither SWAPA nor its member pilots perform employment- related work for Boeing or are otherwise in its service. SWAPA is not an employee.

The parties vehemently disagree about whether this dispute requires interpretation and application of the CBAs. *See Norris*, 512 U.S. at 252 (discussing state law claim based on interpretation of a CBA); *Adames v. Executive Airlines, Inc*., 258 F.3d 7, 11 (1st Cir. 2001) (if state law claim plausibly depends on one or more provisions within the collective bargaining agreement, federal law preempts the claim); *Careflite v. Office and Prof'l Employees Int'l Union*, 612 F.3d 314, 320–22 (5th Cir. 2010) (the assertion of any right that is not created by a CBA is not subject to binding arbitration under the statute). But this aspect of the inquiry presupposes that the parties involved are those to whom the statute applies.

Significantly, most of the cited cases considering whether state law claims are preempted because interpretation of a CBA is required involve disputes between a carrier by air and its employees. *See, e.g*., *Gore v. Transworld Airlines*, 210 F.3d 944, 949 (8th Cir. 2000) (state claims preempted in suit between carrier and

employees); *Sullivan v. American Airlines*, 424 F.3d 267, 273 (2d Cir. 2005) (considering preemption in employee action against carrier); *Wilburn v. Missouri-Kansas-Texas R. Co.*, 268 S.W.2d 726, 730 (Tex. App.—Dallas 1954, no writ) (noting exclusive jurisdiction of adjustment board over CBA in wrongful discharge suit between employee and railroad); *Adames*, 258 F.3d at 11 (in suit by employees against airline, holding that federal law preempts state law claims that plausibly depend on one or more sections of a CBA).

Nonetheless, Boeing categorically states that RLA preemption means that "no court (state or federal) can address the merits of a case requiring the interpretation of a CBA." To the extent that some authority outside this jurisdiction can be read to suggest that RLA preemption is triggered anytime a CBA is referenced—even when the dispute does not involve a carrier and its employees—we are not persuaded. Simply considering whether a state law claim is dependent upon interpretation or application of a CBA in isolation fails to frame the inquiry in the appropriate statutory context. In other words, a conclusion that a claim is preempted must necessarily be predicated on a threshold determination that the RLA applies to the dispute. *See Norris*, 512 U.S. at 266 (noting that prior decision said nothing about the threshold question of whether the dispute was subject to the RLA in the first place.).

Moreover, even in those cases lacking discussion of the threshold determination that the RLA applies, use of the phrase "interpretation or application

of a CBA" is significant. This talismanic language has its origin in the RLA's mandatory arbitral mechanism for "minor disputes," which "grow out of grievances or out of the interpretation and application of agreements concerning pay rates, rules, or working conditions." *See* 45 U.S.C. §184. Therefore, it is reasonable to conclude that determination of whether a state law is preempted because the dispute turns on the interpretation or application of a CBA is only appropriately undertaken in the context of a "minor dispute" under the RLA. *See, e.g., Norris*, 512 U.S. at 246 (discussing preemption of state law claim in the context of minor disputes, which are those grounded in a CBA).

The RLA vests the adjustment board with exclusive jurisdiction over minor disputes. *Brown v. Am. Airlines, Inc.*, 593 F.2d 652, 654 (5th Cir. 1979). A determination that a worker's complaint is a minor dispute preempts a private cause of action. *Id.* The RLA is clear, however, that "minor disputes," (and the adjustment board's authority over such suits) are limited to disputes concerning a CBA that arise between a carrier by air and its employees.

Minor disputes are based on §152 Sixth and §153. Section 152 Sixth refers to:

> A dispute between a carrier or carriers and its or their employees arising *out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions* . . . .

45 U.S.C. §152 Sixth (Emphasis added). Section 153 includes identical verbiage. *See* 45 U.S.C. §153.

Section 184, requiring arbitration before the adjustment board, similarly refers to

> disputes between an employee or group of employees and a carrier or carriers by air *growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions* . . . .

45 U.S.C. § 184 (Emphasis added).

The statutory text makes clear that the RLA does not apply to this case. This case does not involve a dispute between a carrier by air and its employee(s). *See* 45 U.S.C. §181. Likewise, it is not a "minor dispute" to which the mandatory arbitral provisions of the RLA apply. *See* 45 U.S.C. §§ 152 Sixth, 153. Rather, it is a suit involving state law tort claims asserted by a labor organization against an aircraft manufacturer. Such a suit does not implicate the statutory purpose of facilitating stability in labor-management relations, nor does it have the potential to affect national commerce. Absent support from the statutory text or other controlling authority, we cannot conclude that the state law claims between the parties here are within the purview of the RLA. Accordingly, the claims are not preempted. To conclude otherwise would judicially legislate expansion of the RLA far beyond the purpose Congress sought to advance. This we decline to do.

III. CONCLUSION

We reverse the trial court's order granting Boeing's plea to the jurisdiction on the claims SWAPA asserted on its own behalf. We modify the trial court's order to

reflect that the claims SWAPA asserts on behalf of its members are dismissed without prejudice. As modified, the remainder of the trial court's order is affirmed.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

201067F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SOUTHWEST AIRLINES PILOTS ASSOCIATION (SWAPA) ON BEHALF OF ITSELF AND ITS MEMBERS, Appellant

No. 05-20-01067-CV V.

THE BOEING COMPANY, Appellee

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-16290.
Opinion delivered by Justice Garcia.
Justices Carlyle and Smith participating.

In accordance with this Court's opinion of this date, it is **ORDERED** that the trial court's order granting Boeing's plea to the jurisdiction on the claims SWAPA asserted on its own behalf is **REVERSED**. The trial court's order is **MODIFIED** to reflect that the claims SWAPA asserts on behalf of its members are dismissed without prejudice. As modified, the remainder of the trial court's order is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 30th day of March 2022.