UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 1:11-cv-22919-MARTINEZ-MCALILEY

AMERIJET INTERNATIONAL, INC.,	)
	)
Plaintiff,	)
	)
vs.	)
	)
NATIONAL LABOR RELATIONS BOARD, ROCHELLE KENTOV, individually and as Regional Director of NLRB Region 12, and MARK GASTON PEARCE[1], individually and as Chairman, National Labor Relations Board,	)
	)
Defendants.	)
	)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants National Labor Relations Board, et al. (NLRB or Agency) hereby request that the Court deny the Motion for Summary Judgment filed by Amerijet International, Inc. (Amerijet). Initially, the Court should be advised that there is no longer pending before the NLRB any unfair labor practice charge against Amerijet. On November 15, 2011, the National Mediation Board (NMB) responded to the NLRB inquiry and reported its conclusion that Amerijet and its cargo handlers fall within the Railway Labor Act (RLA). ECF No. 27 Ex. A, p. 6. Thereafter, on November 21, 2011 the NLRB General Counsel approved the Charging Party International Brotherhood of Electrical Workers' (IBEW) withdrawal of the amended unfair labor practice charge

[1] Mark Gaston Pearce should be substituted for his predecessor, Wilma B. Liebman, as Chairman, National Labor Relations Board, pursuant to Federal Rule of Civil Procedure 25(d).

against Amerijet. NLRB Exhibit A. There is therefore "nothing left of [Plaintiff's] claim." *See Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 772-73 (1947).

In any event, as shown below, Amerijet incorrectly describes the standards governing whether the NLRB has jurisdiction over a carrier and, significantly, fails to address this Court's lack of subject-matter jurisdiction over the NLRB General Counsel's pre-complaint discretion to investigate an unfair labor practice charge filed against Amerijet.

1. Amerijet is not "unambiguously" subject to the RLA regardless of the particular operations and employees in a given case, and there is simply no statutory mandate that the NLRB General Counsel immediately dismiss an unfair labor practice charge where employees of a charged employer who are not relevant to the pending case fall under RLA jurisdiction.

It is true that the NLRA excludes a "person" subject to the RLA from the definition of employer, and also excludes "individual[s] employed by an employer *subject to the [RLA]*" from the definition of employee. 29 U.S.C. §§ 152(2), (3) (emphasis added). However, as the federal courts, NLRB, and NMB have recognized, what *constitutes* an "employer" under the RLA, given the particular operations at issue, is not always free from doubt.

Contrary to Amerijet's assertions, the federal courts have *not* carved out from the NLRA coverage all employees or operations of companies that may be RLA "employers" for certain aspects of their business. *See Slavens v. Scenic Aviation*, 2000 WL 985933, at *2 (10th Cir. 2000) ("The RLA was not intended to apply to all types of work, regardless of the connection to transportation, just because the company conducting the work performed some carrier activities within its company function.") (unpublished). "For the Supreme Court has long held that merely because a company is a carrier for some purposes, it is not necessarily a carrier for all its activities. *Kansas City Southern Ry. Co. v. United States*, 282 U.S. 760, 51 S.Ct. 304, 75 L.Ed. 684." *Jackson v. Northwest Airlines*,

Inc., 70 F.Supp. 501, 507 (D.Minn. 1947) *aff'd*, 185 F.2d 74 (8th Cir. 1950), *cert. denied*, 342 U.S. 812 (1951).

The cases cited by Amerijet are not to the contrary. In *B'hood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 375, 377 (1969), the Supreme Court distinguished the case "where railway unions are engaged in a dispute on behalf of their nonrail employees" from the "railway labor dispute, pure and simple" actually at issue before the Court. In determining whether the union picketing there should be enjoined, the Court explained that the fact that the unions' national membership included "a small percentage of employees who are not subject to the Railway Labor Act" was not sufficient to bring the dispute within the NLRA. *Id.* at 375-77 (railway unions are "pro tanto exempt" from the NLRA where they "act on behalf of *employees subject to the Railway Labor Act*") (emphasis added). In another case involving union picketing, *Local Union No. 25 v. New York, New Haven and Hartford R.R. Co.*, 350 U.S. 155, 231 (1956), the Court decided that although "railroads' employer-employee relationships" are governed by the RLA, Congress did not intend to strip the NLRB of jurisdiction over railroads seeking NLRA protection. However, disputes involving "nonrail employees," were explicitly *not* addressed or resolved by the Court in either case. *Cf. Jacksonville Terminal*, 394 U.S. at 377.

Yet, this Circuit and others have acknowledged that when RLA coverage is in dispute as to a particular group of employees, application of that statute depends on the nature of the employees' services in relation to the employer's RLA activities. *See e.g., Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283, 1287 (11th Cir. 2002) ("Appellants do not dispute that their positions as loadmasters are integral to the transportation of cargo; therefore, these positions are included in the air carrier exemption to the FLSA.") (citing *Northwest Airlines, Inc. v. Jackson*, 185 F.2d 74, 75 (8th Cir. 1950)); *Thibodeaux v. Exec. Jet Int'l, Inc.*, 328 F.3d 742, 754 (5th Cir. 2003) (analyzing "both the

nature of the employee's duties and the nature of the employer's business"); *Slavens v. Scenic Aviation*, 2000 WL 985933, at *2-3 (10th Cir. 2000) (employee's "job duties [] were not remote, tenuous, or negligible with respect to [the employer's] transportation activities").[2]

Amerijet's assertion that the type of the work performed by a group of employees is "irrelevant" to NLRA-RLA jurisdictional analysis is plainly at odds with the above caselaw. The courts have concluded that Amerijet's categorical view of RLA coverage for any "carrier" would lead to absurd results, such as extending RLA coverage over employees of a carrier engaged in shoe-making or hotel operations. The District Court for the Middle District of Florida in *Marshall v. Pan Am.*, 1977 WL 1772, at *5-6 (M.D. Fla. 1977) explained that the "proper test" was applied to certain Pan Am World Airway employees employed at Cape Canaveral:

> The test applicable to a determination of whether an employee of a particular employer as to the activities and functions performed by the employee are subject to the [NMB and RLA] is whether the activities and functions bear more than a tenuous, remote or negligible relationship to the regular transportation activities of the carrier-employer. *Northwest Airlines, Inc. v. Jackson*, 185 F. 2d 74 (8th Cir. 1950) . . . [U]nder circumstances such as those envisioned [in] *Pan American World Airways, Inc. v. United Brotherhood of Carpenters*, [48 LC P 18,568] 324 F. 2d 217 (9th Cir. 1963), wherein that Court examined a hypothetical example involving the operation of a shoe factory by a carrier, the employees of the carrier so engaged would have only a tenuous remote or negligible relationship to the carrier's transportation activities, and therefore the jurisdiction of the NMB could not be exerted over such remote activities. Likewise, the same result would be reached for the employees of a carrier engaged in the operation of a similarly unrelated activity, such as a hotel . . . .

[2] *See also, Biswanger v. Boyd*, 40 LRRM 2267 (D.D.C. 1957) (RLA jurisdiction over employees working at employer's terminals and under employer's control); *Roland v. United States*, 75 F.Supp. 25, 30 (N.D. Ill. 1947). *Brittan v. Hudson & Manhattan R. Co.*, 50 F.Supp. 37 (S.D.N.Y. 1943), cited by Amerijet, is a rare exception to the generally-accepted functionality test. In *Brittan*, the court decided that the nature of the employee's employment is not "an important factor" in deciding RLA coverage. *Id.* at 38. As discussed, the vast majority of Board, NMB, and court decisions reject this wooden approach. *See e.g.*, *Jackson*, 70 F.Supp. at 506 (*Brittan* "is not sound and should not be followed."); *Northwest Airlines, Inc.*, 51 NLRB 1012, 1014 (1943).

Due to the difficulty of easily line-drawing between NLRA and RLA coverage in a given case, the NLRB has substantial discretion to make the "policy choice" of whether and when to refer a question of RLA jurisdiction to the NMB for an opinion. *See United Parcel Serv., Inc. v. NLRB*, 92 F.3d 1221, 1225 (D.C. Cir. 1996); *see also Chicago Truck Drivers v. NMB*, 670 F.2d 665, 670 (7th Cir. 1981) (NLRB and NMB have "wide latitude" to determine coverage issues). And, although the NLRB and NMB may apply different standards to determine whether a carrier's operations fall under the RLA, *Trans World Airlines*, 211 NLRB 733, 733, n.3 (1974), *Federal Express Corp.*, 23 NMB 32, 72 (1995), neither agency, nor the courts, follow Amerijet's wooden, all-or-nothing rule.[3]

If the plain language of the NLRA was as clear as Amerijet suggests, there would have been no need for the NLRB, NMB, and federal courts, over the decades, to have resolved statutory coverage disputes by analyzing employers' particular operations. By initially investigating and then referring this matter to the NMB, the NLRB can hardly be accused of violating a clear and specific NLRA provision.[4]

2. Perhaps more significant than Amerijet's refusal to acknowledge the settled law just discussed, is its failure to properly demonstrate this Court's subject-matter jurisdiction. "Ultimately,

[3] The NLRB has sometimes, in its discretion, taken into account not only the function of the employees at issue, but also whether the NMB has previously assumed jurisdiction over the particular operations at issue. *See United Parcel Service, Inc.*, 318 NLRB 778, 780 (1995) *enf'd*, 92 F.3d 1221 (D.C. Cir. 1996); *Northwest Airlines*, 51 NLRB at 1015. Here, while the NMB had previously certified Amerijet Pilots and Flight Engineers, it had not opined on whether Amerijet Cargo Handlers fell within the RLA. *See* ECF No. 1, Ex. A.

[4] The General Counsel's referral to the NMB in this case, as discussed previously (ECF No. 25, p. 18), is also consistent with Section 11711.2 of the Casehandling Manual, which states that the "Board's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion." Amerijet has conveniently omitted mention of Section 11711.2, instead citing only Section 11711.1, which concerns cases where "*it is clear* that the employer falls under the jurisdiction of the RLA" (emphasis added). The General Counsel, in its preliminary investigation of the unfair labor practice charge filed against Amerijet, reasonably found no such clarity. In any event, the NLRB Manual provides non-binding agency policies that do not create a legal duty on the agency. *See Schweiker v. Hansen*, 450 U.S. 785, 790 (1980); *United States v. Harvey*, 659 F.d 62, 63-65 (5th Cir. 1981); ECF No. 25, p. 17, n.15.

the plaintiff bears the burden of establishing subject matter jurisdiction." *Ishler v. Internal Revenue*, 237 Fed.Appx. 394, 395 (11th Cir. 2007) (unpublished). The Supreme Court has soundly rejected the possibility of District Court jurisdiction where a company contends that an initial Board finding of "employer" status is in excess of its statutory duty to exclude the employer from NLRA coverage. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) ("whether Greyhound possessed sufficient indicia of control be an 'employer' is essentially a factual issue . . . Judicial review in such a situation has been limited by Congress to the courts of appeals . . . .").

And here, the General Counsel has not even issued an administrative complaint.[5] Rather, the General Counsel, through the Region Director, exercised prosecutorial discretion to initially investigate and then refer to the NMB the issue in dispute. Remarkably, Amerijet requests that the Court issue a declaration that would prohibit the Regional Director ever from exercising her discretion to investigate a charge—even one concerning, hypothetically, Amerijet shoe-makers.

It is well-established that the Court lacks jurisdiction to review the Regional Director's pre-complaint exercise of prosecutorial discretion to investigate and consider the merits of unfair labor practice charges. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 124-26, 131 (1987); *Smith v. Local No. 25, Sheetmetal Workers Int'l Ass'n*, 500 F.2d 741, 747 (5th Cir. 1974); *Mayer v. Ordman*, 391 F.2d 889, 891 (6th Cir. 1968).[6] The Regional Director's determinations in this regard are not, as is required for mandamus relief, "ministerial" and "non-discretionary." *Cf.*

[5] Amerijet appears to perceive the Agency's referral letter to the NMB to be one written by the adjudicatory body of the Board. ECF No. 26, p. 10, n.4. We can see no other reason for Amerijet relying on the inapposite case of Section 10(f) review of a final Board order in its pleading. *Id.* Of course, the Board has never considered any matter in this case. The referral letter was written by the Associate General Counsel, Division of Operations-Management, and the NMB's opinion was addressed to the Associate General Counsel. ECF No. 16-1, p. 9; ECF No. 27-1, p. 1.

[6] The Seventh Circuit has previously sanctioned a lawyer for seeking judicial review of the General Counsel's refusal to issue complaint. *Sparks v. NLRB*, 835 F.2d 705, 706-07 (7th Cir. 1987) (Posner, J., writing for the court).

Kirkland Masonry, Inc. v. CIR, 614 F.2d 532, 534 (5th Cir. 1980). *If* the instant charges against Amerijet had not been withdrawn, and *if* the General Counsel did issue a complaint, Amerijet would have had ample opportunity to make its jurisdiction arguments to the Board and, if necessary, to a Circuit Court on review. *Myers v. Bethlehem Shipbuilding Corp*., 303 U.S. 41, 48, 51 (1938). Nonetheless, as discussed, after the NMB issued its opinion in the underlying case, the NLRB promptly approved the IBEW's withdrawal of its unfair labor practice charge. *See* NLRB Exhibit A. There thus is no charge against Amerijet currently pending before the NLRB.

Nor did the Regional Director's pre-complaint actions injure Amerijet. The availability of U.S. Court of Appeals review of a final Board order affords Amerijet precisely the review process which Congress intended to be exclusive. *Id.* at 48 n. 5; *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 671 (5th Cir. 1966). The NLRA authorizes the circuit courts to address "*all questions of the jurisdiction of the Board* and the regularity of its proceedings [and] all questions of constitutional right or statutory authority." 303 U.S. at 49 (emphasis added).

As a basis for this Court's jurisdiction, Amerijet's claim of RLA status is no more availing than was a similar claim by the Catholic Church that the NLRB could not assert jurisdiction over its parochial school. *See, Grutka v. Barbour*, 549 F.2d 5, 9 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977) (Church required to exhaust administrative remedies notwithstanding its claim that such exhaustion infringed its First Amendment rights). *See also Goethe House New York, German Cultural Ctr. v. NLRB*, 869 F.2d 75, 80 (2d Cir. 1989) (exhaustion required for party claiming exemption for being regulated by German Government). *Myers* and its progeny require that Amerijet's RLA jurisdiction argument be asserted only pursuant to the procedures codified under the NLRA .[7]

[7] Amerijet does not refer in its Motion for Summary Judgment to *Leedom v. Kyne*, 358 U.S. 184 (1958), discussed at length in Defendants' Motion to Dismiss (ECF No. 25, pp. 10-17). The Supreme Court there created an extremely narrow exception to NLRA exhaustion requirements –

For the reasons discussed herein and in Defendants' Motion to Dismiss, Amerijet's Motion for Summary Judgment should be denied, and its Complaint dismissed.

Dated: November 22, 2011

Respectfully submitted,

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requiring a plaintiff to show *both* that the Agency is clearly acting in violation of a specific, mandatory provision of the NLRA, 358 U.S. at 188-89, *and* that there is no alternative opportunity for review of the Agency's action. *Id.* at 190; *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 43 (1991). Plaintiff can demonstrate neither of these factors.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on November 22, 2011 on all counsel or parties of record on the Service List below.

/s/Eric G. Moskowitz

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NLRB EXHIBIT A

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November 21, 2011

JOAN M. CANNY, ESQ., Vice President and General Counsel
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6185 NW 18TH ST
BLDG. 716-A
MIAMI, FL 33126-7335

Re: Amerijet International Incorporated
Case 12-CA-027156

Dear Ms. CANNY:

This is to advise you that I have approved the withdrawal of the charge in the above matter.

Very truly yours,

Rochelle Kentov

ROCHELLE KENTOV
Regional Director

cc: CHRIS SIMPSON, Business Development
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