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' REPLY TO PLAINTIFF'S BRIEF OPPOSING DEFENDANTS' MOTION TO DISMISS

Defendants National Labor Relations Board, et al. (NLRB or Agency) submit this Reply in support of their Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Which Relief Can be Granted. There is no merit to Amerijet International, Inc.'s (Amerijet) requests for declaratory and mandamus relief here, where the Court plainly lacks subject matter jurisdiction over this extraordinary attack on Congress's settled procedure for judicial review of NLRB administrative proceedings.

1. Since November 21, 2011 there has been no charge against Amerijet pending before the NLRB. ECF No. 29-1. There is no "actual controversy," as is required by the Article III of

[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).

the U.S. Constitution, where there is no pending charge against Amerijet, and only the "abstract" potential for charges that may be filed. ECF No. 25, pp. 18-19; *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003). If future charges are filed, Amerijet then may avail itself of the same, normal course of review, pursuant to NLRA Section 10(f), that it could have followed here had the underlying charge resulted in an administrative complaint. 29 U.S.C. § 160(f).

2. Amerijet is mistaken that its suit concerning a closed case and mere potential for future cases is "ripe and properly before the Court" (ECF No. 37, p. 6). Amerijet has no cognizable claim to a court order dictating the Regional Director's exercise of pre-complaint prosecutorial discretion in any unfair labor practice cases, and certainly not in ones that exist only in its imagination. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 124-26, 131-132 (1987). Moreover, the NLRA can be *imposed* on Amerijet *only after* it obtains judicial review in a Court of Appeals, *if* and when the Board decides to assert jurisdiction over its business. "Obviously, the rule requiring exhaustion of administrative remedies cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage." *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 51 (1938).

3. Amerijet's statement that it has "no other means" to assert its RLA coverage is false. ECF No. 37, p. 5. That claim surely *can* be made to the Board, and the Court of Appeals, *if* another charge is filed and the Regional Director issues complaint. *See Bokat v. Tidewater Equip. Co.*, 363 F. 2d 667, 672-73 (5th Cir.1966) ("Insofar as all of this bears on the private rights of the Employer . . . there is an adequate judicial review under §§ 10(e), (f) if and when the unfair labor practice order is issued . . . If on §§ 10(e), (f), review of the unfair labor practice

order . . . the hearing is demonstrated to have denied due process or statutory rights, the remedy is denial of enforcement of the order or other appropriate relief by the Court of Appeals, not the over-the-shoulder supervision of District Courts who, for that matter, have a very very minor role to play in this statutory structure."). As a matter of law, merely participating in NLRB proceedings results in no irreparable harm, and the courts have repeatedly rejected the assertion that it is "futile" to exhaust statutory review procedures merely because "it is the very power of the agency to conduct an investigation which is being challenged" (ECF No. 37, pp. 6-7). *Myers*, 303 U.S. at 47-48 (review power vested in the Board and Court of Appeals is "exclusive," despite employer's assertion that NLRB proceedings concerning its statutory authority "would, at best, be futile"). *See also Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1947).

Since *Myers*, the Supreme Court has affirmed that district court jurisdiction is lacking where an employer alleges that an NLRB investigation into, or finding of, "employer" status is in excess of its statutory duty to exclude the employer from NLRA coverage. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). *See also Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 210-14 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1941) (proper for agency to investigate both the merits of the allegations and coverage of employees at issue); *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 56-57 (1938) (no lower court jurisdiction to review an NLRB "preliminary informal inquiry . . . for the purpose of informing itself whether a particular concern is subject to its authority").[2]

[2] Amerijet again mistakenly asserts that the NLRB's investigation of the now-closed unfair labor practice case concerned only the merits of the allegations against Amerijet as opposed to whether Amerijet's cargo handler operations were subject to the NLRA. ECF No. 37, p. 6. *See, e.g.*, ECF No. 16-1 (seeking "information relevant to performing the analysis of how the operations of

Moreover, the "[*Leedom v.*] *Kyne* exception [to non-reviewability of Board orders] is a narrow one, not to be extended to permit plenary district court review . . . whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." *Boire*, 376 U.S. at 481. The Eleventh Circuit in *Florida Bd. of Bus. Regulation v. NLRB*, 686 F.2d 1362, 1370 (11th Cir. 1982), which Amerijet cites (ECF No. 37, p. 6), explained that jurisdiction may be appropriate where "*a plaintiff who cannot seek review of the Board's order in the Court of Appeals* . . . claims that the Board violated his federal rights . . . ." (emphasis added). As discussed, the path to judicial review for Amerijet in the future is clear, as it is for all similarly situated companies, following a final Board order in the Court of Appeals. *See, e.g., Goethe House New York, German Cultural Center v. NLRB*, 869 F.2d 75, 80 (2d Cir. 1989) ("[S]ince Goethe House is an employer and can seek indirect review, there was no warrant for the district court to assert jurisdiction.").[3]

4. Amerijet errs in asserting (ECF No. 37, pp. 4-5, 8), against the weight of authority, that the NLRA never covers cases concerning "carriers." The NLRA can cover employees of "carriers" depending upon how far the employees are removed from the airline function. *See, e.g., Chicago Truck Drivers v. NLRB*, 599 F.2d 816, 817 (7th Cir. 1979); *Northwest Airlines v. Jackson*, 185 F.2d 74, 79 (8th Cir. 1950); *Marshall v. Pan Am. World Airways, Inc.*, 1977 WL

Amerijet compared to those in [*Emery Worldwide Airlines*, 28 NMB 216 (2001) and 28 NMB 355 (2001)]").

[3] Amerijet relies on a dissenting opinion (without characterizing it as one) for the erroneous proposition that an agency's RLA coverage determination is subject to *Leedom* review. ECF No. 37, p. 7; *Federal Express*, 317 NLRB 1155 n.16 (1995) (Chairman Gould, dissenting). Chairman Gould's statement that "judicial redress is available should [the NLRB or NMB] clearly exceed its statutory limitations" (*id.*) is an incomplete statement of the *two* conjunctive requirements necessary to establish *Leedom* jurisdiction: (i) the agency clearly acts in violation of a specific, mandatory provision of the NLRA, and (ii) there is no alternative opportunity for review of the agency's action. *See Leedom v. Kyne*, 358 U.S. 184, 188-89, 190 (1958); *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 43 (1991).

1772, at *9 (M.D. Fla. Aug. 8, 1977) ("Both agencies [the NLRB and NMB] have made findings that the employees involved in this case are engaged in activities and functions which bear more than a tenuous, remote or negligible relationship to the regular carrier activities of the defendant."); *Pan Am. World Airways, Inc.*, 212 NLRB 744, 745-46, n.5 (1974) (same analysis; quoting from NLRA sections 2(2) and 2(3)); *Trans World Airlines*, 211 NLRB 733, 733, n.3 (1974); *see also Emery Worldwide Airlines, Inc.*, 28 NMB 216, 218 (2001).

Further, because the NLRA excludes an "individual employed by an employer subject to the Railway Labor Act," 29 U.S.C. § 152(3) but does not define that phrase, it is entirely appropriate, as courts have done, to look to decisions interpreting what constitutes an RLA employer in analogous circumstances:

> The Fair Labor Standards Act, like the National Labor Relations Act, applies to the generality of labor in the United States . . . The Railway Labor Act . . . is specially made for those who work in the transportation industry . . . .

See Pan Am. World Airways, Inc. v. Carpenters, 324 F.2d 217, 220, 222 (9th Cir. 1963) (guided by prior interpretations of the jurisdictional line between the NLRA and FLSA on the one hand, and the RLA on the other); *Slavens v. Scenic Aviation*, 2000 WL 985933, at *2 (10th Cir. 2000) (discussing various cases to determine if employee's duties were remote with respect to company's transportation activities). The NLRB can hardly be accused of violating a 'mandatory' NLRA provision by choosing to follow precedent looking realistically at the functions of the employees at issue. *See Trans World Airlines*, 211 NLRB at 733; *United Parcel Service, Inc. v. NLRB*, 92 F.3d 1221, 1225 (D.C. Cir. 1996) (discussing wide discretion afforded NLRB to determine NLRA-RLA coverage issues); *Chicago Truck Drivers v. NMB*, 670 F.2d 665, 670 (7th Cir. 1981) (same).

5. Finally, Amerijet complains that the NLRB did not dismiss the unfair labor practice charge following issuance of the NMB's opinion. ECF No. 37, p. 9. Instead, the Charging Party union voluntarily withdrew the charge with the approval of the NLRB. *Id.*; *see* ECF No. 29-1. Amerijet fails to articulate any functional distinction. *See* 29 C.F.R. § 102.9 ("Any . . . charge may be withdrawn . . . only with the consent of the regional director . . . .").

Amerijet states that it "has no assurance another charge will not be filed and Amerijet will be subject to investigation by the NLRB all over again" (ECF No. 37, p. 9). However, we have already explained above that (i) it is mere conjecture as to whether such a charge will be filed (the Agency itself is not permitted to file a charge), and (ii) any challenge to the lawfulness of a future NLRB prosecution may be properly be made before an Administrative Law Judge, the Board, and the Court of Appeals. *See Myers*, 303 U.S. 41.

Material facts are not in dispute here, and Amerijet simply cannot satisfy its burden of establishing the Court's subject-matter jurisdiction to grant the requested relief. Accordingly, the Court should dismiss this lawsuit.

Dated: December 16, 2011

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on December 16, 2011 on all counsel or parties of record on the Service List below.

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