Case No. 12-14657-C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERIJET INTERNATIONAL, INC.,

Plaintiff—Appellant,

v.

NATIONAL LABOR RELATIONS BOARD, ROCHELLE KENTOV, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF NLRB REGION 12, AND WILMA B. LIEBMAN, INDIVIDUALLY AND AS CHAIRMAN, NATIONAL LABOR RELATIONS BOARD,

Defendants—Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

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Amerijet International, Inc. v. NLRB

UNITED STATES COURT OF APPEALS
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AMERIJET INTERNATIONAL, INC.,

Plaintiff – Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD, ROCHELLE KENTOV, individually and as Regional Director of NLRB Region 12, and WILMA B. LIEBMAN, individually and as Chairman, National Labor Relations Board,

Defendants – Appellees.

Appeal Case No. 12-14657-C

District Court Case No. 11-cv-22919-JEM (S.D. Fla.)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellees hereby certify under 11th Circuit Rule 26.1 that, in addition to the entities listed in Appellant's Certificate of Interested Persons filed with its opening brief on October 29, 2012, the following persons and entities have an interest in the outcome of this case:

1. Diaz, Margaret J. – current Regional Director of Region 12 of the National Labor Relations Board (defendant/appellee*)

2. Pearce, Mark Gaston – current Chairman of the National Labor Relations Board (defendant/appellee*)

*Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Regional Director Diaz and Chairman Pearce are "automatically substituted" as parties.

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the straightforward application of well-settled legal principles. Accordingly, the National Labor Relations Board ("the Board" or "the NLRB") maintains that oral argument is unnecessary.

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STATEMENT OF JURISDICTION

This case is before the Court upon the appeal by Amerijet International, Inc. ("Amerijet") of an August 8, 2012 decision of the United States District Court for the Southern District of Florida, Judge Jose E. Martinez. That decision dismissed for lack of subject matter jurisdiction Amerijet's complaint which sought review of the exercise of prosecutorial authority by the Acting General Counsel of the NLRB. *Amerijet Int'l, Inc. v. NLRB*, 11-cv-22919-JEM, 2012 WL 3526620 (S.D. Fla. Aug. 8, 2012). (RE 48.)[1] Amerijet filed a timely notice of appeal on September 6, 2012. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291, and should affirm the District Court's dismissal.

STATEMENT OF THE ISSUE

Whether the District Court correctly dismissed for lack of subject-matter jurisdiction a suit to prohibit the NLRB Acting General Counsel from investigating an unfair labor practice charge filed against Amerijet.

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

Under Section 3(d) of the National Labor Relations Act ("the NLRA"), 29 U.S.C. § 153(d), the General Counsel of the NLRB has "final authority in respect

[1] Documents contained in the Record Excerpts filed by Amerijet on October 29, 2012, are referenced by "RE [#]." Other documents are referenced by "DE [#]." ("Docket Entry No.") "Br." refers to Amerijet's opening brief.

of the investigation of [unfair labor practice] charges and issuance of complaints . . . ." The General Counsel's pre-complaint exercise of his Section 3(d) "final authority" is not subject to Board or judicial review. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 124-26, 129, 131 (1987).

Amerijet filed a complaint in district court alleging that the NLRB Regional Director, on behalf of the Acting General Counsel, acted in excess of her investigatory authority by not immediately dismissing an unfair labor practice charge against Amerijet, and by choosing instead to first conduct a preliminary investigation and to consult with the National Mediation Board ("the NMB") as to whether Amerijet and its relevant cargo handler employees were subject to Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("the RLA") and not the NLRA. (RE 48 pp. 2-3, 11.)

Under well-settled law, the District Court held that it lacked subject matter jurisdiction to review the Regional Director's pre-complaint exercise of prosecutorial discretion. The District Court properly rejected Amerijet's reliance on a very narrow and rarely used exception to the rule of no-review recognized by the Supreme Court in *Leedom v. Kyne*, 358 U.S. 184 (1958). That exception permits district courts to exercise jurisdiction under 28 U.S.C. § 1337 "to strike down an order of the Board," *id.* at 188, if, and only "'[i]f the absence of jurisdiction of the federal courts [would] mean[] a sacrifice or obliteration of a

right which Congress has created,'" *id.* at 190 (citation omitted). In this case, the District Court properly concluded that Amerijet could not satisfy the strict *Kyne* requirement to prove that the Board clearly acted in violation of a specific, mandatory provision of the NLRA and that without District Court review Amerijet would be deprived of a meaningful opportunity to vindicate its statutory rights. *Id.* at 190; *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 43 (1991).

B. Administrative Proceedings

During the spring of 2011, the International Brotherhood of Electrical Workers, Local Union 349 ("the Union") filed with NLRB Region 12 in Miami, Florida two unfair labor practice charges against Amerijet, one which Amerijet received on May 11, and the other it received May 25. (RE 48 pp. 1-2.) In the second charge, which is the subject of this action (*id.* p. 2; Br. at 6, 13), the Union alleged that Amerijet unlawfully terminated its cargo handler employees. (RE 1 ¶ 31, Exh. F, charge p. 1.) [2] Amerijet filed a position statement with the Region objecting to the investigation due to Amerijet's status as a "carrier" under the RLA and consequent exclusion from NLRA coverage. (RE 48 p. 2.) The NLRB Regional Director continued to consider the charges and served upon Amerijet an

[2] On May 23, 2011 the Regional Director approved the Union's withdrawal of the first charge. (RE 48 p. 1.)

investigatory subpoena *duces tecum* on July 14, 2011. *Id.* Amerijet filed a petition to revoke the subpoena with the Board and did not comply with it. *Id.* When Amerijet received another information request, its only response was to again argue that it was not subject to the NLRA. *Id.* The Board did not seek enforcement of its subpoena in district court. *Id.* at 11 n.7.

On September 14, 2011, consistent with NLRB *Casehandling Manual* ¶ 11711.2, the NLRB Associate General Counsel ("AGC") of the Division of Operations-Management wrote to the NMB requesting an opinion as to whether Amerijet and its cargo handler employees were subject to the RLA. (RE 48 p. 3); (RE 39 ¶¶ 7, 15.); (DE 16-1 pp. 5-9.) In the letter to the NMB, the AGC reasoned that "an employer's status as a common carrier, without more, is not necessarily sufficient to establish National Mediation Board jurisdiction over all employees of that common carrier," but that "evidence demonstrates that the NMB has arguable jurisdiction over [Amerijet] and the affected employees . . . ." (RE 39 ¶ 7.)

The NLRB Regional Director held its investigation in abeyance pending the NMB's decision. (RE 48 pp. 3-4.) The Union's amended unfair labor practice charge, filed on October 5, 2011, also was held in abeyance. *Id.* p. 4. The NMB issued a decision on November 15, 2011, finding that "Amerijet and its employees are subject to the RLA." *Id.* (*see Re: Amerijet Int'l, Inc.*, 39 NMB 48 (Nov. 15, 2011)). On November 21, 2011, the Regional Director approved the Union's

request to withdraw its amended charge against Amerijet. (RE 48 p. 4.)

C. Amerijet's District Court Complaint

Meanwhile, on August 12, 2011, Amerijet filed a two-count complaint against the NLRB, the Regional Director of Region 12, and the NLRB Chairman. (RE 1.) Amerijet claimed that "there has been a plain violation of the NLRA" because the Regional Office, on behalf of the Acting General Counsel, sought to investigate the charge against Amerijet "when it is clearly excluded under the NLRA." (RE 48 p. 10). Amerijet sought declaratory relief that it is a "carrier" subject to the RLA and that the NLRB lacks authority to investigate charges against Amerijet. (RE 48 p. 3 (citing RE 1 ¶ 6)). Amerijet also sought a writ of mandamus compelling the NLRB Acting General Counsel to immediately dismiss the pending charge. *Id.*

D. The District Court's Decision

On August 8, 2012, the District Court dismissed Amerijet's Complaint for lack of jurisdiction. (RE 48.) The District Court cited case law precluding judicial review of the NLRB General Counsel's prosecutorial authority, and held that Amerijet did not satisfy the *Kyne* exception to the rule of no review: "there has not been a plain violation of an unambiguous and mandatory provision of the statute nor has the [NLRB's] interpretation of the NLRA deprived [Amerijet] of meaningful and adequate means of vindicating its statutory rights." (RE 48 p. 9.)

The District Court "agree[d]" that the NLRA excludes from its definition of an "employer" a person subject to the RLA, and from its definition of an "employee" an individual employed by an employer subject to the RLA. *Id.* p. 10. The Court nonetheless found that the General Counsel did not act in excess of his authority by investigating the charge because "whether an entity is subject to the RLA requires investigation, which is precisely what [the NLRB is] required to do under the NLRA—investigate claims." *Id.* pp. 10-11.

The District Court also denied Amerijet's motion to strike the NLRB's motion to dismiss. (RE 48 pp. 13-14.) The Court explained that it had considered only the parties' statement of undisputed facts and further, that none of those undisputed facts were even "essential for the Court's finding that it lacked subject matter jurisdiction." *Id.* at 13-14.[3]

STANDARD OF REVIEW

The subject matter jurisdiction of federal courts is limited to matters expressly authorized by both Constitution and statute. *Taylor v. Appleton,* 30 F.3d

[3] Previously, on July 9, 2012, the District Court had denied Plaintiff's Motion for Consolidation of this case with a separate action Amerijet filed seeking an exemption from a county living wage ordinance. (RE 47 p. 1); (DE 42). The Court correctly found that, under Federal Rule of Civil Procedure 42(a), consolidation "would not promote judicial economy or efficiency" because the two cases "involve different Defendants, different facts, and seek declaratory relief under different statutes. In addition, this case was filed on August 12, 2011, and has fully briefed dispositive motions awaiting this Court's decision; whereas, the new case was filed on June 21, 2012, and Defendants have yet to even appear." (RE 47 p. 2).

1365, 1367 (11th Cir. 1994). The plaintiff bears the burden of proving that the district court has jurisdiction. *Ishler v. Internal Revenue*, 237 F.App'x. 394, 395 (11th Cir. 2007). When evaluating a district court's conclusions on a motion to dismiss for lack of jurisdiction, the Eleventh Circuit reviews the "district court's legal conclusions *de novo* and its factual findings for clear error." *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1166 (11th Cir. 2012) (citation omitted).

SUMMARY OF ARGUMENT

Section 3(d) of the NLRA provides the NLRB General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board . . . ." 29 U.S.C. § 153(d). Under settled law, federal courts lack jurisdiction to review the General Counsel's pre-complaint exercise of his prosecutorial authority to investigate and consider whether to prosecute or dismiss an unfair labor practice charge filed under the NLRA. *United Food and Commercial Workers*, 484 U.S. at 124-26, 129, 131.

Amerijet cannot show that the *Kyne* doctrine, which allows district court jurisdiction in exceptional circumstances, permitted the District Court jurisdiction here to review the Acting General Counsel's investigation of a charge. Amerijet cannot satisfy *Kyne*'s two-part conjunctive requirement: first, that the agency has acted "in excess of its delegated powers and contrary to a specific prohibition"

which "is clear and mandatory," *Kyne*, 358 U.S. at 188-89, and, second, that barring review by the district court "would wholly deprive [the party] of a meaningful and adequate means of vindicating its statutory rights." *Id.* at 190; *MCorp*, 502 U.S. at 43.

First, there exists no provision in the NLRA requiring immediate dismissal of charges against a carrier prior to any investigation as to whether the particular services of the relevant employees might nonetheless fall within the NLRA. To the contrary, courts and agencies have, for decades, concluded that some investigation into the nature of employee services is generally necessary to determine whether a particular operation constitutes an "employer" under Section 2(2) of the NLRA, 29 U.S.C. § 152(2), and the individuals at issue constitute "employees" under Section 2(3) of the NLRA, 29 U.S.C. § 152(3). Section 3(d) of the NLRA provides the General Counsel "final authority" to do just that – investigate alleged facts.

Second, Amerijet was never obligated to take any action during the investigation, which ended with the Union's withdrawal of the charge. Had the NLRB acted either to enforce the agency investigative subpoena, or to issue complaint alleging NLRA liability, Amerijet would have been assured meaningful judicial review through the normal statutorily-provided procedures before being

required to comply with a subpoena (29 U.S.C. § 161(2)) or to remedy any alleged violation (29 U.S.C. § 160(f)).

In addition, in granting the Board's motion to dismiss, the District Court properly applied the Federal Rule of Civil Procedure 12(b)(1) standard where it did not rely upon any material disputed fact or matter outside the pleadings.

ARGUMENT

The District Court correctly dismissed this suit for lack of subject-matter jurisdiction. The District Court generally has no jurisdiction to review unfair labor practice proceedings, let alone to prohibit the NLRB Acting General Counsel from undertaking his statutory duty to investigate an unfair labor practice charge.

A. The District Court Properly Concluded that the NLRB General Counsel has Unreviewable "Final Authority" to Investigate and Decide Whether to Prosecute Unfair Labor Practice Charges; Only "Final Orders" of the Board are Judicially Reviewable

The NLRB has been charged by Congress with two basic tasks: investigating and remedying unfair labor practices defined in Section 8 of the NLRA (29 U.S.C. § 158), and conducting representation elections under Section 9 (29 U.S.C. § 159). This case concerns the NLRB's unfair labor practice proceedings.

NLRA unfair labor practice proceedings commence upon the filing of a charge by any person. 29 U.S.C. § 160; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). On behalf of the NLRB General Counsel, the Regional Director

for the office where a charge is filed then conducts any relevant investigation and considers the merits of the charge. 29 C.F.R. § 101.4. Under Section 3(d) of the NLRA, the General Counsel has "final authority . . . in respect of the investigation of charges and issuance of complaints . . . [and] the prosecution of complaints before the Board". 29 U.S.C. § 153(d).

If, after investigation, the Regional Director determines that the charge has merit and the matter cannot be settled, she has discretion to issue an administrative complaint. In such a case, after a hearing, briefing, and decision by an Administrative Law Judge, and an opportunity for parties to file with the Board exceptions to that decision (29 C.F.R. § 102.46), the Board issues a decision and order, constituting the final agency determination. 29 U.S.C. § 160(b), (c).

Congress determined that only such a final Board order is judicially reviewable, and then only in an appropriate federal court of appeals pursuant to Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e), (f). *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938).[4] "Since *Myers* the courts have, without exception, ruled that . . . interlocutory rulings of the Board in the course of

[4] Sec. 10(f) of the NLRA, 29 U.S.C. § 160(f), which allows an aggrieved party to obtain judicial review, provides in part:

> Any person aggrieved by a *final order of the Board* granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . . by filing in such court a written petition praying that the order of the Board be modified or set aside. [emphasis added]

such proceedings may not be considered by federal District Courts." *United Aircraft Corp. v. McCulloch*, 365 F.2d 960, 961 (D.C. Cir. 1966). *Accord: Bokat v. Tidewater Equipment Co.*, 363 F.2d 667, 671 (5th Cir. 1966).[5] The NLRA simply leaves no room for "over-the-shoulder supervision . . . [by] District Courts who, for that matter, have a very very minor role to play in this statutory structure." *Id.* at 673 (NLRA grants district courts jurisdiction only to consider Board requests for either temporary injunctive relief (29 U.S.C. §§ 160(j), (l)) or Board applications for enforcement of administrative subpoenas (29 U.S.C. § 161)). The Fifth Circuit explained:

> [A]ny effort by the Federal District Courts to review or supervise unfair labor practice proceedings prior to the issuance of the Board's final order 'is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' . . . We may echo the 7th Circuit's words that the 'principle which requires administrative finality as a prerequisite to judicial review has particular force where, as here, the interlocutory order sought to be reviewed relates to the agency's case-handling procedures. Of course this rests on the dual premise that Congress has prescribed the method and course of judicial review §§ 10(e), (f), 29 USCA §§ 160(e), (f), and that this method is sufficiently adequate to meet constitutional demands.

Id. at 671; *see also Rogers v. Skinner*, 201 F.2d 521, 524 (5th Cir. 1953) (investigatory determination of coverage does not prejudice employer "since he

[5] In *Bonner v. Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

need not acquiesce in any contention of coverage from which follows liability for pecuniary response or other penalties until the question has been submitted to, and adjudged by, the Courts of the land.").

Alternatively, the Regional Director may decide not to issue a complaint and instead dismiss the charge. A dissatisfied charging party may then appeal the dismissal to the General Counsel in Washington. *See* 29 C.F.R. § 101.6. However, the NLRA does not permit judicial review of the General Counsel's pre-complaint investigation and consideration of the charge, or his decision not to issue a complaint.[6]

Even before the NLRA was amended in 1947, *inter alia*, to create the office of the General Counsel (29 U.S.C. § 153(d)),[7] the Supreme Court held that the NLRA "confers upon the Board *exclusive* initial power to make the investigation . . ." of charges. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57-58 (1938) (emphasis added); *cf. Endicott Johnson*

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[6] The NLRA-specific rule of no district court review of NLRB investigations is consistent with the general rule of administrative law that the target of an agency investigation cannot maintain a suit in district court to enjoin the investigation. *See, e.g.*, *Reisman v. Caplin*, 375 U.S. 440, 445-50 (1964); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 648-50 (5th Cir. 1977); *General Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983) ("You may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court . . . .") (Posner, J.).

[7] *See* Labor-Management Relations (Taft-Hartley) Act, Pub. L. 80-101, 61 Stat. 136, June 23, 1947).

Corp. v. Perkins, 317 U.S. 501, 509 (1943) (district court lacks authority to control agency's administrative investigation of a coverage question). The contention that the NLRB cannot investigate before deciding to assert (or not to assert) jurisdiction over an entity "would, in large measure, defeat the purpose of the legislation." *Newport News*, 303 U.S. at 58.

In the 1940s, the Fifth Circuit similarly concluded that there was no "concrete actual controversy" where a company filed suit to prohibit the NLRB from investigating and requesting information. *Elliott v. Am. Mfg. Co. of Texas*, 138 F.2d 678, 678-79 (5th Cir. 1943). The company asserted that a contract with the Army and Navy prohibited disclosure of the information sought by the NLRB. *Id.* at 678. The Fifth Circuit explained that the "remedy against forced improper disclosure, and the opportunity for testing its propriety, is simply to refuse to disclose and to have the District Court rule upon the matter in enforcement proceedings." *Id.* at 679 (finding it inappropriate for courts to "interfere prematurely" in administrative proceedings).

Even earlier, the Fifth Circuit affirmed a district court's dismissal of a suit by a charged party seeking to enjoin an NLRB investigation, where the plaintiff complained that the NLRB had exceeded the bounds of the Commerce Clause. *Bradley Lumber Co. of Arkansas v. NLRB*, 84 F.2d 97 (5th Cir. 1936). The Court explained:

> The relation of the appellants to each other and of their operations to interstate commerce, and the consequent jurisdiction under the act of the Board over them, *we think is initially for the investigation of the Board itself*, and not to be contested with a Regional Director before any District Court that may get jurisdiction of his person . . . No doubt an investigation may, as the bill asserts, stir up some feeling among employees and cause some inconvenience by taking witnesses from their work, but these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage which equity will interfere to prevent; and a suit in equity would not wholly obviate them.

Id. at 100 (emphasis added). The Fifth Circuit has thus determined that, for justiciability purposes, an NLRB investigation simply does not harm the entity under investigation so as to support judicial review.

Congress amended the NLRA in the 1947 Taft-Hartley Act (*see supra*, n.7). Relevant here, it provided in Section 3(d) for the creation of the office of the General Counsel, and invested it with all the Agency's prosecutorial powers. Since then, the Supreme Court has adhered to the rule of no judicial review of pre-complaint prosecutorial functions. *United Food and Commercial Workers*, 484 U.S. at 124-26, 129, 131; *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979) (NLRA "cannot be read to provide for judicial review of the General Counsel's prosecutorial function."); *Sears*, 421 U.S. at 138-39, 155; *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

The Courts of Appeals have consistently followed this principle, finding it improper for district courts to "police the procedural purity of the NLRB's proceedings long before the administrative process is over, or for that matter,

scarcely begun." *E.g.*, *Bokat*, 363 F.2d at 669; *Smith v. Sheetmetal Workers Int'l Ass'n*, 500 F.2d 741, 747-48, n.4 (5th Cir. 1974); *Hernandez v. NLRB*, 505 F. 2d 119, 120 (5th Cir. 1974). Thus, the NLRA "precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint thereon." *Mayer v. Ordman*, 391 F.2d 889, 891 (6th Cir. 1968); *Hourihan v. NLRB*, 201 F.2d 187, 188 (D.C. Cir. 1952) (no review of allegations that Regional Director based decision on perjured affidavits and failed to conduct investigation).[8]

B. The District Court Properly Concluded that it Lacked Jurisdiction Under *Leedom v. Kyne* to Prohibit the General Counsel From Investigating a Charge Against Amerijet

The District Court properly found no merit to Amerijet's contention that the General Counsel's investigation of an unfair labor practice charge violated a clear and mandatory provision of the NLRA and was accordingly subject to district

[8] Contrary to Amerijet's argument (Br. 19-20), *United Food and Commercial Workers Union* and similar cases are fully relevant, despite the fact that most focus on the General Counsel's decision whether to issue complaint rather than on the pre-complaint investigation. The plain statutory language shows Congress' intent that the investigation and the decision whether to issue complaint are both part of the General Counsel's unreviewable Section 3(d) authority. Congress declared that the General Counsel has "final authority in respect of charges and issuance of complaints. . . ." 29 U.S.C. 153(d). The rarity of suits challenging the investigation shows no more than few parties are willing to invest resources in federal litigation to object to an investigation at a point where the Agency has *no* compulsory power over the charged party. In any event, there are ample opinions that find the Agency's investigatory proceedings are not directly reviewable. *See, e.g.*, *Newport News*, 303 U.S. at 57-58.

court review under *Leedom v. Kyne*, *supra*, 358 U.S. 184. In order to secure district court review under the narrow *Kyne* exception, a plaintiff must show *both* that the Board is clearly acting in violation of a specific, mandatory provision of the NLRA, 358 U.S. at 188-89, *and* that there is no meaningful alternative opportunity for judicial review of the Board's action. *Id.* at 190; *MCorp*, 502 U.S. at 43.[9] Amerijet cannot satisfy this test.

1. Amerijet Cannot Show That the General Counsel Violated a Clear and Mandatory Provision of the NLRA by Investigating and Then Approving the Withdrawal of a Charge Against Amerijet

There is simply no clear statutory mandate that the NLRB General Counsel immediately dismiss an unfair labor practice charge, without investigation, solely because a charged employer has previously been determined to be an RLA carrier, even less where, as here, the cargo handling services provided by the relevant employee group were *not* the focus of the previous determination of RLA coverage (e.g., Amerijet pilots and flight engineers) (Br. at 11-12).[10]

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[9] In *Kyne*, the Board conceded that it had acted contrary to a specific provision of the NLRA, Section 9(b)(1), which prohibits inclusion in a single bargaining unit of both professional and non-professional employees without first conducting a vote to determine if the professionals wish to be included in such a unit. 358 U.S. at 186-87.

[10] The NMB certifications of Amerijet's pilots and flight engineers cited by Amerijet (Br. at 11-12; RE 1-3, citing 31 NMB No. 88 and 31 NMB No. 89) are simply not controlling over the cargo handlers at issue in this case.

Courts have rejected similar contentions that an agency's consideration of "employer" status was in excess of its statutory authority because of a "duty" to exclude from coverage a company claiming to be outside the statutory jurisdiction. *See, e.g.*, *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, unlike the question in [*Kyne*]."); *United States v. Feaster*, 410 F.2d 1354, 1371-72 (5th Cir. 1969) (no *Kyne* jurisdiction to review NMB determination that Docks Department fell within RLA); *see generally Newport News*, 303 U.S. at 56-57.

Nor is there merit to Amerijet's contention that the Board lacks authority "*ab initio*" to investigate the merits of a charge prior to overcoming a charged party's claim of exemption from the Act (Br. at 27). Long ago, the Supreme Court rejected such a request to impose such compulsory prioritizing of issues upon a federal agency charged with law enforcement responsibilities. *See Endicott Johnson*, 317 U.S. at 508-09 (proper for Secretary of Labor to investigate both the merits of the allegations and coverage of employees at issue). Just as the Secretary, upon an allegation of an employer's unlawful underpayment, "might find it advisable to begin by examining the payroll, for if there were no underpayments found, the issue of [statutory] coverage would be academic" (*id.* at 509) – here, the Regional Director reasonably attempted to secure evidence related

to Amerijet's alleged unlawful termination of cargo handlers, because if she found no evidence of a violation, the jurisdiction question would have been academic.[11]

It is true that the NLRA excludes from the definition of employer a "person" subject to the RLA, and excludes from the definition of employee "any individual employed by an employer subject to the [RLA]." 29 U.S.C. § 152(2-3). However, it does not follow that Congress has given all "carriers" the "statutory right to be free" from unfair labor practice charges filed by parties like the Union here, or from an investigation of those charges by the NLRB (Br. at 30). The NLRB has no control over who files a charge and, as the District Court and other courts have recognized, what constitutes an "employer" under the RLA, given the particular function and operations at issue, is not always free from doubt, and sometimes reasonably requires some investigation.

The RLA itself does not cover all individuals employed by a carrier. Covered are "every air pilot or other person who performs any work as an employee or subordinate official of [a] 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) (general coverage provision); 45 U.S.C. § 151, Fifth (same; definition of "employee"). Here, the Regional Office

[11] *See also Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 210-14 (1946) ("purpose of [subpoena was] to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it").

reasonably sought information from Amerijet and an opinion of the NMB as to whether Amerijet had an "ongoing supervisory relationship" over the relevant operation. (DE 16-1 at 8, NLRB referral to NMB); (RE 1-10 at 2, NLRB information request) (seeking documents concerning Amerijet's "supervisory and managerial hierarchy," and "the supervisors and managers to whom the warehouse employees . . . report").

Congress created "two quite different bodies of federal labor law" in the NLRA and the RLA – but it could not "have intended to make [] coverage . . . depend, not at all upon the employee's relation to transportation, but [instead] upon the logically irrelevant fact that his employer owned a railroad [or airline], in addition to [a] shoe factory in which the 'employee' worked[.]" *Pan Am. v. Carpenters*, 324 F.2d 217, 220 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964). Employees of a company that may be an RLA employer for certain aspects of its business may not themselves be RLA employees if they service other aspects of the carrier's business. *See, e.g., Thibodeaux v. Exec. Jet Int'l, Inc.*, 328 F.3d 742, 754 (5th Cir. 2003) (to determine RLA coverage, court should analyze "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 (10th Cir. July 18, 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."). *Cf.*, *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.") (cite omitted).

Thus, it is possible that the NLRA might apply to employees of "carriers" depending upon how far the employees are removed from the airline function. *See, e.g.*, *Carpenters*, 324 F.2d at 220; *Chicago Truck Drivers v. NLRB*, 599 F.2d 816, 817, 820 (7th Cir. 1979); *Northwest Airlines v. Jackson*, 185 F.2d 74, 79 (8th Cir. 1950) *cert. denied*, 342 U.S. 812 (1951); *Marshall v. Pan Am. World Airways, Inc.*, 1977 WL 1772, at *8 (M.D. Fla. Aug. 8, 1977) (noting that both the NLRB and NMB had investigated and "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) (NLRA coverage decision based upon analysis of employees' function; quoting from NLRA sections 2(2) and 2(3)); *Emery Worldwide Airlines, Inc.*, 28 NMB 216, 218 (2001) ("[W]hile [the company], when operating as a carrier, is subject to the RLA, its operations at issue here are not subject to RLA jurisdiction."); *Trans World Airlines*, 211 NLRB 733, 733, n.3 (1974).

The cases cited by Amerijet are not to the contrary (Br. at 17-18). In *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 375, 377 (1969), for example, the Supreme Court recognized the need to distinguish the situation "where railway unions are engaged in a dispute on behalf of their nonrail employees" from the "railway labor dispute, pure and simple." In determining whether the picketing there could be enjoined under state law, the Court had to consider whether the employee conduct was arguably protected by the NLRA so as to invoke NLRA preemption of the state's regulation. The Court noted that the unions' national membership included "employees who are not subject to the Railway Labor Act," but found that their number was so small that it was not sufficient to bring the dispute within the NLRA. *Id.* at 375-77. In *Local Union No. 25 v. New York, New Haven and Hartford R.R. Co.*, 350 U.S. 155, 231 (1956), another case involving union picketing, the Court decided that although "railroads' employer-employee relationships" are generally governed by the RLA, Congress intended that the NLRB have jurisdiction over certain disputes involving railroads. However, in neither case did the dispute actually involve a railroad's "nonrail employees," who might *not* be covered by the RLA. *Cf. Jacksonville Terminal*, 394 U.S. at 377.

Amerijet relies on other cases that are simply not relevant to whether this case presents an exception to the rule barring district court review of the General Counsel's

exercise of prosecutorial authority.[12] For example, in *Crafts v. FTC*, 244 F.2d 882, 893-95 (9th Cir. 1957) (Amerijet Br. at 21-22), the FTC had itself invoked the district court's jurisdiction seeking to enforce a subpoena. The Ninth Circuit applied the unremarkable principle that the district court could consider the legitimacy of the subpoena in deciding whether to force compliance with it. Indeed, although not mentioned by Amerijet, the Ninth Circuit's refusal to enforce the subpoena was reversed by the Supreme Court based upon the Circuit's improper licensing of the lower court to review the jurisdiction of the agency to conduct its investigation. *FTC v. Crafts*, 355 U.S. 9, 9 (1957), citing *Endicott Johnson*, 317 U.S. 501 and *Oklahoma Press*, 327 U.S. 186 (*see supra* pp. 17-18, n.11), (district court not authorized to decide the coverage of the act the agency seeks to enforce).

In *FTC v. Miller*, 549 F.2d 452, 455, 460 (7th Cir. 1977) (Amerijet Br. at 21-25), there was no question about the district court's undisputed jurisdiction to enforce the agency subpoena, and the FTC "conceded" that the subpoena target was a carrier outside the agency's jurisdiction. In this case, the Acting General Counsel did *not*

[12] In almost all cases Amerijet cites, jurisdiction was available to the plaintiff because, unlike here, the particular statutory scheme at issue provided it. (Br. at 20-21, 24-25, 28). *E.g.*, *Major League Baseball v. Crist*, 331 F.3d 1177, 1182 (11th Cir. 2003) (jurisdiction asserted over 42 U.S.C. § 1983 claims, and supplemental jurisdiction proper over state law claims); *Pinho v. Gonzales*, 432 F.3d 139, 200-04 (3d Cir. 2005) (Homeland Security Administrative Appeals Office's final, non-discretionary decision reviewable under the Administrative Procedure Act, 5 U.S.C. § 704); *Univ. of Richmond v. Bell*, 543 F. Supp. 321, 324 (E.D. Va. 1982) (district court jurisdiction proper under Title IX, 20 U.S.C. § 1683).

seek district court enforcement of the investigative subpoena served upon Amerijet. Accordingly, unlike in the cited FTC cases, the NLRA provision giving district courts jurisdiction, upon application by the Board, to grant – or deny – subpoena enforcement (29 U.S.C. § 161(2)) is irrelevant.[13]

Also unlike the FTC in *Miller,* and contrary to Amerijet's unsupported claim, Amerijet's cargo handlers were not known and "determined by the NLRB" to be exempt from the NLRA at the time the NLRB Regional Office received and commenced to investigate the unfair labor practice charge (Br. at 3, 16). (*See* RE 39 ¶ 7, 15) (NLRB referral to NMB explaining that NLRB was unclear whether operations fell within RLA). While there was good reason for Amerijet to claim that its cargo handlers are RLA employees and not subject to the NLRA, there exists no clear prohibition in the NLRA against the Acting General Counsel investigating a charge before deciding whether to dismiss it. *See, e.g., New Orleans Public Serv. v. Brown,* 507 F.2d 160, 165 (5th Cir. 1975) ("[I]t is for the agency . . . to determine in the first instance the question of coverage in the course

[13] Although the Board has broad authority through Section 11(1) of the NLRA, 29 U.S.C. § 161(1), to issue subpoenas for any evidence "that relates to or touches the matter under investigation" (*NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 932 (10th Cir. 1979)), it has no independent authority to enforce them. Section 11(2) grants district courts the jurisdiction to enforce Board subpoenas. 29 U.S.C. § 161(2). However, that process can only be invoked by the NLRB, which did not do so in this case (RE 48 p. 11 n.7). *See Maurice v. NLRB,* 691 F.2d 182, 183 (4th Cir. 1982) (target of NLRB subpoena cannot invoke district court jurisdiction to enjoin Board from seeking enforcement of the subpoena).

of the preliminary investigation into possible violations."); *Miller*, 549 F.2d at 461 ("[W]here one agency's power to regulate depends on the absence of regulation by another, allowing the agency to make the primary jurisdictional determination is clearly the preferable solution.").

In sum, Amerijet has failed to show, as it must, that by initially investigating the charge, referring the matter to the NMB, and then approving the withdrawal of the charge, the Acting General Counsel plainly violated a clear and mandatory provision of the NLRA.

2. Amerijet Cannot Show That It Was Aggrieved by the Investigation and That It Lacked an Alternative Opportunity For Judicial Review

The Supreme Court in *MCorp* confirmed that the absence of any alternative means for judicial review to remedy a party aggrieved by agency action was critical to the Court's decision to allow the *Kyne* plaintiffs judicial review. *MCorp*, 502 U.S. at 43. "[C]entral" to *Kyne* "was the fact that the Board's interpretation of the Act would wholly deprive the [plaintiff] union of a meaningful and adequate means of vindicating its statutory rights." *Id.* Amerijet cannot make this showing.

Long ago, in a similar case, another charged party filed suit claiming that the NLRB Regional Office lacked authority to investigate an unfair labor practice charge or to request business records from it. *Elliott*, 138 F.2d at 678-79. The

Fifth Circuit found that the suit should have been promptly dismissed, explaining, "[w]e do not think a concrete actual controversy is disclosed. The . . . Labor Board has merely requested co-operation by a voluntary disclosure which the petitioner does not think it ought to give. The National Labor Relations Act states the functions and duties and powers of the Labor Board, and specifies the functions of the courts in the business of the Board." *Id*. The same is true here. That is, the Acting General Counsel's investigation of the charge against Amerijet, standing alone, caused Amerijet no judicially cognizable harm. *See also Bradley Lumber Co*., 84 F.2d at 100.

If an administrative complaint had ever issued, Amerijet would have had available meaningful circuit court review of any adverse final order issued by the Board at the conclusion of the unfair labor practice proceedings. *Myers*, 303 U.S. at 48, 51. The circuit court, in reviewing such a final order, can 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). Such review affords "an adequate opportunity" to secure judicial protection from the Board's proceeding because "until the Board's order has been affirmed by the appropriate . . . Court of Appeals, no penalty accrues for disobeying it." *Id.* at 48. "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" – or in this case, the even more innocuous holding of a pre-complaint investigation – "would result in irreparable damage." *Id.* at 51.

The Acting General Counsel's investigation also did not result in an application to a district court to enforce the investigatory subpoena. In these circumstances, the Acting General Counsel's investigation of Amerijet, standing alone, is not a ticket into district court. *See Newport News*, 303 U.S. at 56-57 (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"); *Elliott*, 138 F.2d at 678-79; *Bradley Lumber Co.*, 84 F.2d at 100.

Amerijet's reliance (Br. at 31) upon *Florida Bd. of Bus. Regulation v. NLRB*, 686 F.2d 1362 (11th Cir. 1982) as supporting an assertion of jurisdiction is misplaced. There the Court held that 28 U.S.C. § 1331 permitted a Florida state agency to challenge in federal court a Board order issued in a representation case where the state agency had intervened in, but lacked the ability otherwise to secure judicial review of the Board's action.[14] In *Florida Board*, the State Board plaintiff

[14] NLRB representation cases, unlike unfair labor practice cases, do not result in final Board orders subject to immediate judicial review in the circuit courts. 29 U.S.C. § 159(d); *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409 (1940). Instead, representation case rulings are later indirectly reviewable "only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a[n] [NLRB] certified representative on the

"*who cannot seek review of the Board's order in the Court of Appeals* but who claims that the Board violated his federal rights has the right to repair to the district court under any statute that may grant the district court the power to hear his claim." 686 F.2d at 1370 (emphasis added).

The opportunity for Circuit Court review was foreclosed to the State in *Florida Board* because that case not only arose in a representation proceeding (*Boire*, 376 U.S. at 477), but the State could not itself obtain direct judicial review through an unfair labor practice case, nor impose upon the private employer to refuse to bargain in order to prompt such judicial review.[15] Here, by contrast, Amerijet was a charged party in an unfair labor practice case in which no complaint or Board order ever issued. If Amerijet had become aggrieved by an unfair labor practice order of the Board, Amerijet could have obtained review in the Court of Appeals under NLRA Section 10(f) (29 U.S.C. § 160(f)) to argue that Amerijet's "carrier" status must always shield

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ground that the election was held in an inappropriate bargaining unit." *Boire*, 376 U.S. at 477.

[15] Although not raised in Amerijet's Complaint nor addressed by the District Court, on April 8, 2011, the Union filed with the NLRB an election petition seeking to represent Amerijet cargo handlers as their exclusive bargaining representative. (RE 39 ¶¶ 1-3.) As with the unfair labor practice charges, the Union eventually withdrew its petition, which the NLRB approved (RE 39 ¶ 8.) If that petition had led to the election of the Union as exclusive bargaining representative, Amerijet could have refused to bargain with the Union, and if the Board issued a final order approving the underlying election results and concluding that Amerijet committed an unfair labor practice by not bargaining, Amerijet could have obtained Circuit Court review under Section 10(f) of the NLRA. *Boire*, 376 U.S. at 477.

it from an NLRB investigation and prosecution regardless of the nature of services performed by its employees. Thus, Amerijet simply cannot establish here the unavailability of judicial review for an aggrievement – a finding that was critical to the result in *Florida Board* and other *Kyne* cases.

C. By Relying Only on Undisputed Facts, the District Court Properly Applied the Rule 12(b)(1) Standard in Granting the Board's Motion to Dismiss

The District Court found that it lacked jurisdiction over the Regional Office's investigation of Amerijet based only on the unreviewable prosecutorial authority of the Acting General Counsel. The District Court made clear that it did *not* rely upon any material disputed fact or matter outside the pleadings. The District Court thus properly applied the Federal Rule of Civil Procedure 12(b)(1) standard, authorizing dismissal of a claim where the complaint and supplemented *un*disputed facts, assumed as true, do not establish a basis for subject matter jurisdiction. *McElmurray v. Consolidated Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007).

Where as here, there was no need to resolve a material factual dispute, the District Court had no duty to find that jurisdiction exists and then to deal with the defendant's merits argument, even if the jurisdictional basis of the claim may have been intertwined with the merits. *See Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256, 1261, 1265-66 (11th Cir. 1997); *Lawrence v. Dunbar*, 919 F.2d 1525,

1529-31 (11th Cir. 1990) ("[F]ederal claims should not be dismissed on motion for lack of subject matter jurisdiction when that determination is intermeshed with the merits of the claim *and when there is a dispute as to a material fact*.") (emphasis added).

Here, the District Court clearly resolved no dispute as to a material fact:

> [F]or the most part [the Board] has made a facial challenge to the Court's subject matter jurisdiction. Both parties, however, and the Court at times also discusses, events that occurred after the complaint was filed . . . .
> The Court has not considered [the Board's] motion to dismiss for failure to state a claim, finding it unnecessary to reach these issues as the Court is dismissing this action for lack of subject matter jurisdiction . . . . To the extent Defendants' arguments on [the jurisdictional] issue refer to matters outside the pleadings, the *Court has relied only on the parties submission of what they agree are undisputed facts in this case*. Moreover, while the Court mentions these facts to give a complete picture of this action, the Court does not find that any of the facts in these undisputed facts, which essentially merely explain what occurred in this case after the complaint was filed, are essential for the Court's finding that it lacked subject matter jurisdiction.

(RE 48 pp. 5, 13) (emphasis added). *Compare with Lawrence*, 919 F.2d at 1530 (in granting motion to dismiss, district court erred by relying on affidavit of witness who lacked personal knowledge of key events in order to resolve disputed factual matter).[16]

Accordingly, the District Court reasonably "treated the motion to dismiss as a facial attack and considered only" the parties' undisputed submissions, without need to resolve any factual issue. *McElmurray*, 501 F.3d at 1251; *see also EEOC v. Reno*,

[16] In its Complaint, Amerijet itself alleged that "[t]his case presents a distilled and purely legal question of statutory construction." (RE 1 ¶ 3.)

758 F.2d 581, 583 n.6 (11th Cir. 1985) ("Although matters outside the pleadings were presented to the court, defendant's motion to dismiss was not converted into a summary judgment motion. The lower court's order makes clear that the judge ruled only on the motion to dismiss, and we treat the case as being in that posture."). The District Court correctly applied the Rule 12(b)(1) standard to dismiss the complaint for lack of jurisdiction.

CONCLUSION

For the reasons stated herein, the National Labor Relations Board respectfully requests that the decision of the District Court be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared on a proportionally spaced type style using Microsoft Word in 14 point font Times New Roman type style.

/s/ Eric G. Moskowitz
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2012, I served the foregoing by overnight mail on counsel for Appellant, Joan M. Canny, at 2800 South Andrews Avenue, Fort Lauderdale, Florida 33316.

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