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.	)
	)

MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION AND
FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

Defendants National Labor Relations Board, et al. (NLRB or Agency) respectfully move the Court to dismiss this Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1) & (6). The Complaint improperly seeks to enjoin the investigation and consideration by the NLRB General Counsel of any unfair labor practice charge filed against Amerijet International, Inc. (Amerijet). As set forth below, the Court lacks subject-matter jurisdiction to review this exercise of the General Counsel's prosecutorial discretion, and Plaintiff has failed to state a claim upon which relief can be granted.

[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).

INTRODUCTION

The NLRB has been charged by Congress with two basic tasks: investigating and remedying unfair labor practices defined in Section 8 of the National Labor Relations Act (NLRA) (29 U.S.C. § 158), and conducting representation elections under Section 9 (29 U.S.C. § 159). Pursuant to this mandate, Rochelle Kentov, Regional Director of NLRB Region 12, on behalf of the NLRB Acting General Counsel ("General Counsel"), has been responsible for investigating an unfair labor practice charge filed against Amerijet.[2]

Amerijet filed the instant Complaint under the Declaratory Judgment Act (28 U.S.C. §§ 2201 & 2202) and the Mandamus Act (28 U.S.C. § 1361), alleging that the NLRB has violated a non-discretionary duty to immediately dismiss all pending and future unfair labor practice charges filed against Amerijet, without conducting an investigation, and without considering the anticipated opinion of the National Mediation Board (NMB) as to whether the employees at issue fall under the NLRA or the Railway Labor Act (RLA) (45 U.S.C. § 151, *et seq.*). ECF No. 1 ¶¶ 5, 15, p. 18; ECF No. 23, p. 4 (alleging that Amerijet "together with all of Amerijet's employees" are "permanently excluded from National Labor Relations Act (NLRA) and National Labor Relations Board (NLRB) jurisdiction").

As explained below, the Court lacks subject matter jurisdiction to control the Regional Director's pre-complaint processing of unfair labor practice charges – which is within the discretion of the General Counsel and not subject to immediate judicial review. If and when the

[2] Given the structure of the NLRA, a Regional Director performs two roles: representing the General Counsel in the investigation and prosecution of unfair labor practice cases and representing the Board in the processing of representation proceedings. *See* 29 C.F.R. §§ 102.15; 102.60-102.63. Only the former role is relevant here. For this pleading, "Office of General Counsel" or "the General Counsel" will be used to refer to Region 19, the Office of Appeals in Washington, D.C., and the General Counsel himself. The phrase "the Board" will refer solely to the adjudicatory body that issues final Board orders. "The Agency" or "the NLRB" will refer to the Board and the Office of General Counsel, collectively.

Regional Director decides to issue an administrative complaint, Amerijet will be able to raise all appropriate legal and factual defenses before the Board, and if aggrieved by a final Board order at the end of an unfair labor practice adjudication, Amerijet can secure immediate review in the Circuit Court through the exclusive procedures established by Section 10 of the NLRA (29 U.S.C. § 160). However, Amerijet is not entitled to relief in this proceeding because the Court lacks jurisdiction to review the Regional Director's pre-complaint exercise of her prosecutorial discretion to investigate and consider the merit of the charges,[3] and because Amerijet has other adequate remedies should the Regional Director ultimately refuse to dismiss the charges and instead issue an administrative complaint alleging a violation of the NLRA.[4] Accordingly, the Complaint should be dismissed.

BACKGROUND

I. Administrative Proceedings

Since June 2004, the International Brotherhood of Teamsters has been the certified representative of Amerijet Pilots and Flight Engineers under the RLA. ECF No. 1-3. In early 2011, the International Brotherhood of Electrical Workers (IBEW) commenced organizing Amerijet cargo handlers, and on April 8, the IBEW filed with NLRB Region 12 a petition to be certified as the bargaining representative of those workers under of the NLRA (NLRB Exhibit 1; NLRB Case No. 12-RC-9487).[5] On April 15, the Regional Director approved the IBEW's withdrawal of the petition (NLRB Exhibit 2). On May 9, an Amerijet cargo handler employee filed an unfair labor practice charge with Region 12 (NLRB Case No. 12-CA-027146), alleging

[3] *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 124-26, 131 (1987).

[4] *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 51 (1938).

[5] Hereafter, all dates refer to 2011, unless otherwise noted.

that Amerijet discharged him because of his membership in and activities on behalf of the IBEW, and on May 23, the Regional Director approved the withdrawal of that charge (NLRB Exhibit 3; ECF No. 1-7).

On May 19, the IBEW filed with Region 12 the unfair labor practice charge at issue in this case (NLRB Case No. 12-CA-027156), alleging that Amerijet discharged various cargo handlers because of their IBEW membership and activities. ECF No. 1-8. Over the next several months, the Region sought to investigate facts relevant both to the merits of the IBEW's claim and to whether the NLRB has jurisdiction over the matter (NLRB Exhibit 4; ECF No. 1-9; 1-10). On July 21, Amerijet filed a petition to revoke an administrative investigatory subpoena, claiming it was exempt from NLRA jurisdiction. Amerijet separately submitted a statement to the Agency asserting the NLRB lacked jurisdiction, together with a copy of its certification as a common carrier, and NMB certifications for Amerijet Pilots and Flight Engineers, but nothing as to Amerijet cargo handlers. The petition to revoke the subpoena is pending with the Agency.

Pursuant to Section 11711.2 of the NLRB Casehandling Manual, on September 14 the NLRB submitted to the NMB the question of whether on the facts of this case, the cargo handlers of Amerijet fall under the jurisdiction of the RLA. ECF No. 16-1; NLRB Exhibit 5 (NLRB Casehandling Manual excerpts). The NLRB then announced that it would hold in abeyance the charge against Amerijet pending the decision of the NMB. On October 5, the IBEW filed an amendment to its unfair labor practice charge, alleging that Amerijet unlawfully solicited employee grievances and threatened employees. ECF No. 20-1. Consistent with the original charge, the NLRB held in abeyance the amended charge pending the decision of the NMB. *Id.*

II. District Court Proceeding

On August 12, Amerijet commenced this suit requesting that the Court (1) declare that Amerijet is exempt from NLRB jurisdiction, regardless of the function performed by Amerijet's employees, and (2) enjoin consideration of the pending and any future unfair labor practice charge filed against Amerijet. ECF No. 1, p. 18; ECF No. 23, p. 4. On October 14, Defendants timely filed an Answer to Plaintiff's Complaint. ECF No. 22. The Court ordered the instant Motion to be filed by November 28. ECF No. 24.

ARGUMENT

The Complaint Must Be Dismissed For Lack of Jurisdiction Because None of the Standards for Relief Under the Mandamus Act Have Been Met

Plaintiff is seeking mandamus review of prosecutorial discretion exercised during the pre-complaint processing of unfair labor practice charges by agents of the NLRB's General Counsel. The basis for mandamus relief is set forth in 28 U.S.C. § 1361: "[t]he district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty to Petitioner."[6] Absent a

[6] Neither the Declaratory Judgment Act nor the Mandamus Act independently provide subject matter jurisdiction. *See Your Home Visiting Nurse Serv. v. Shalala*, 525 U.S. 449, 456-57 (1999); *Aguilera v. Dist. Director, USCIS*, 2011 WL 1458653, at *2 (11th Cir. April 18, 2011); *Cash v. Barnhart*, 327 F.3d 1252, 1257-58 (11th Cir. 2003). Plaintiff also cites to 28 U.S.C. §§ 1331 & 1337. However, these statutes are general grants of jurisdiction and do not confer jurisdiction where an applicable regulatory statute – here, the NLRA – precludes it. *Cf. Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642-44 (2001); *Shalala*, 525 U.S. at 456; *Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, n.3 (1st Cir. 2000); *Bishop v. NLRB*, 502 F.2d 1024, 1026-27 (5th Cir. 1974), *but see Boire v. Miami Herald Publ'g Co.*, 343 F.2d 17, 20 (5th Cir. 1965) ("limited" jurisdiction under Section 1337 to determine whether the court had jurisdiction pursuant to *Leedom v. Kyne* over an NLRB representation election case, *not* unfair labor practice case). *See infra*, Section I(C) for discussion of Fifth Circuit view of possible jurisdiction in *representation* cases under *Leedom v. Kyne*, 358 U.S. 184 (1958).

petitioner's demonstrating a right to mandamus relief, a district court lacks jurisdiction over such an action. *See Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003).

Mandamus is "an extraordinary remedy." *Id.* at 1257 (citation omitted). It is only available to compel an official to perform a duty if "(1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act, and (3) no other adequate remedy is available." *Id.* at 1258 (citation and quotes omitted); *see Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Amerijet can meet none of these criteria because the Regional Director's conduct at issue is discretionary, the NLRA precludes the district court review sought by the Complaint, and Plaintiff has an adequate statutory remedy for review.

I. Plaintiff's Claim is Not "Clear" and The Court Does Not Have Jurisdiction to Grant the Relief Sought

The Mandamus Act affords a petitioner only the relief to which it is clearly entitled. *See Kirkland Masonry, Inc. v. CIR*, 614 F.2d 532, 534 (5th Cir. 1980). Here, Plaintiff has no legal entitlement to a court order dictating the Regional Director's exercise of pre-complaint prosecutorial discretion in unfair labor practice cases because the NLRA prohibits such judicial review. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 124-26, 131-132 (1987).

A. The NLRA Precludes Judicial Review of the General Counsel's Pre-complaint Exercise of Prosecutorial Discretion

The NLRA guarantees employees and employers certain rights, including employees' Section 7 rights to engage in union or other concerted activity and to refrain from such activities. 29 U.S.C. § 157. The NLRA protects these and other rights contained in Section 7 by deeming certain employer and union activity to be "unfair labor practices" under Section 8. 29 U.S.C. § 158. The NLRA also grants the Agency exclusive authority to prevent and remedy such

practices. 29 U.S.C. § 160; *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-43 (1959).

The NLRA's 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 Agency's 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. If the Regional Director determines that the charge has merit, he or she has discretion to issue an administrative complaint if the mater can not be settled. 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) and (c). Congress determined that only such a final Board order is 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).[7]

Alternatively, the Regional Director may decide not to issue a complaint and instead dismiss the charge. A dissatisfied charging party may appeal the dismissal to the General Counsel in Washington. *See* 29 C.F.R. §§ 101.6, 101.19. However, neither the NLRA nor the NLRB's regulations permit Board or judicial review of the General Counsel's pre-complaint investigation and consideration of the charge or his decision not to issue a complaint. The investigation and disposition of unfair labor practice charges by the NLRB General Counsel are

[7] 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]

committed entirely to his or her prosecutorial discretion, and judicial review of that discretion is precluded. *United Food and Commercial Workers*, 484 U.S. at 124-26. The Supreme Court has repeatedly stated that the General Counsel's "final authority" with respect to whether to issue complaint forecloses judicial review of the General Counsel's pre-complaint prosecutorial functions. *Id.; Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979); *Sears*, 421 U.S. at 138-39, 155; *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

The Fifth Circuit and other Courts of Appeals have adhered to this principle. *See, e.g.*, *Smith v. Local No. 25, Sheetmetal Workers Int'l Ass'n*, 500 F.2d 741, 747 (5th Cir. 1974); *Hernandez v. NLRB*, 505 F. 2d 119, 120 (5th Cir. 1974). Not only is the General Counsel's decision whether to prosecute unreviewable, but the manner in which he makes this determination is likewise foreclosed from review. *See, e.g.*, *Mayer v. Ordman*, 391 F.2d 889, 891 (6th Cir. 1968); *Hourihan v. NLRB*, 201 F.2d 187, 188 (D.C. Cir. 1952) (holding no review of allegations that Regional Director based decision on perjured affidavits and failed to conduct investigation).[8]

B. Even If Complaint Should Issue Against Amerijet, the NLRA Provides for Judicial Review Only in the Circuit Courts Upon Issuance of a Final Board Order, At the Conclusion of the Administrative Process

Since 1938, the Supreme Court has held that Congress did not grant federal district courts jurisdiction over pending unfair labor practice proceedings. *Myers v. Bethlehem Shipbuilding*

[8] Not at issue here is the NLRA's subpoena process. Although the Board has broad authority through Section 11(1) of the NLRA, 29 U.S.C. § 161(l), 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 has not done so in this case. *See Wilmot v. Doyle*, 403 F.2d 811, 815-16 (9th Cir. 1968); *NLRB v. CEMEX, Inc.*, 2010 WL 352856, at *1 (D. Ariz. Sept. 3, 2010).

Corp., 303 U.S. 41, 48, 51 (1938); *see also Sears*, 421 U.S. at 138, 155. Rather, Congress provided exclusive jurisdiction initially to the Agency to administer those provisions of the NLRA. *Id.; see* 29 U.S.C. §§ 153(a), 160(a), (c). As noted, the Board's adjudication of such cases was made subject to judicial review *only* upon the issuance of a final Board order at the conclusion of an unfair labor practice proceeding, and then only in a United States court of appeals. *Myers*, 303 U.S. at 48. Long ago, the Fifth Circuit underscored this principle:

> [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.

Bokat v. Tidewater Equip. Co., 363 F.2d 667, 671 (5th Cir. 1966) (citations omitted).

Amerijet mistakenly characterizes this lawsuit, seeking review of the General Counsel's pre-complaint investigation, as "an action for review on an administrative record" pursuant to Federal Rule of Civil Procedure 26. ECF No. 17 n.3. Even aside from the settled preclusion of judicial review, where, as here, the General Counsel has not issued complaint, there is no "administrative record." If complaint should issue in this case, "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals" upon issuance of a final Board order. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). If, alternatively, the NMB decides the cargo handlers fall under the RLA and the NLRB General Counsel dismisses the administrative charge,

there will be "nothing left of [Plaintiff's] claim." *See Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 772-73 (1947).[9]

Moreover, availability of court of appeals review of final Board orders affords Amerijet "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board," because "until the Board's order has been affirmed by the . . . Court of Appeals, no penalty accrues for disobeying it. . . ." *Myers*, 303 U.S. at 48; *Bokat*, 363 F.2d at 671. Congress understood that this method of review under the NLRA provided an aggrieved party "a full, expeditious and *exclusive* method of review in one proceeding after a final [Board] order is made." H.R. 1147, 74th Cong., 1st Sess., p. 24 (1935) (emphasis added) (cited by *Myers*, 303 U.S. at n.5). The circuit courts, reviewing a final order of the Board, 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); *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57-58 (1938) (lower court jurisdiction is lacking for interlocutory review of an NLRB "preliminary informal inquiry . . . for the purpose of informing itself whether a particular concern is subject to its authority").

C. This Case Does Not Fall Within the *Leedom v. Kyne* Exception to the Prohibition of District Court Review of NLRB Proceedings

There is no merit to Plaintiff's contention that the Region's pre-complaint investigation and refusal to immediately dismiss the unfair labor practice charge exceeds the Agency's

[9] It is irrelevant whether the NLRB or NMB has "primary jurisdiction" over whether these cargo handlers are subject to the NLRA. If the NMB decides that cargo handlers fall under the RLA and the NLRB General Counsel does not defer to that conclusion and instead issues an administrative complaint, Amerijet could then pursue its no NLRB-jurisdiction claims through the normal administrative and statutory review process under 29 U.S.C. § 160. In any event, the NLRB has represented to the Court that the NLRB will defer to the NMB's jurisdictional decision (ECF No. 16 ¶¶ 4-6) as it has in previous cases. *See Federal Express*, 317 NLRB 1155, 1155-56 (1995).

jurisdiction, and for that reason is subject to immediate judicial review under *Leedom v. Kyne*, 358 U.S. 184 (1958). As we show below, *Leedom* can not overcome the settled preclusion of review principles where, as here, Plaintiff already has an adequate statutorily provided means of securing judicial review should the General Counsel issue complaint and the Board find a violation of the NLRA. Moreover, Plaintiff's argument that the NLRB can not even investigate a charge against an employer that for some other employees is a "carrier" under the RLA (ECF No. 1 ¶ 15; ECF No. 17, p. 3-4, 6, 11) has been rejected by the courts, the NMB, and the NLRB.

In *Leedom*, the Supreme Court created an extremely narrow exception to NLRA exhaustion requirements. To secure district court review under *Leedom*, a plaintiff must show *both* that the Agency is clearly acting in violation of a specific, mandatory provision of the NLRA, 358 U.S. at 188-89,[10] *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 not demonstrate either of these factors.

Taking the second requirement first, the Supreme Court in *Board of Governors*, *supra*, confirmed that the absence of any alternative means for judicial review was critical to the Court's decision to allow the *Leedom* plaintiffs an exception to exhaustion. *Leedom* does not authorize "judicial review of any agency action that is alleged to have exceeded the agency's statutory authority." *MCorp*, 502 U.S. at 43. Rather, "central" to *Leedom* "was the fact that the Board's interpretation of the Act would wholly deprive the [plaintiff] union of a meaningful and

[10] In *Leedom*, 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. Here, as we show below, the Board violated no NLRA provision; the question of whether a corporation is an "employer" under Section 2(2) of the NLRA is routinely decided after a fact-specific inquiry.

adequate means of vindicating its statutory rights." *Id.* The Supreme Court found the facts of *MCorp* to be entirely different and inappropriate for review under *Leedom:*

> [The Financial Institutions Supervisory Act] expressly provides MCorp with a *meaningful and adequate opportunity for judicial review* of the validity of the source of strength regulation. If and when the [Federal Reserve] finds that MCorp has violated that regulation, *MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application.*

MCorp., 502 U.S. at 43-44 (emphasis added). The Supreme Court held that under the circumstances, it was unnecessary even to consider the merits of MCorp's challenge to the regulation at issue. *Id.* at 44.

The absence of a statutory means of judicial review, critical in *Leedom,* can not be shown here. If an administrative complaint does issue in this case, Amerijet will have meaningful review of the Board unfair labor practice proceedings in the circuit court. *Myers*, 303 U.S. at 48, 51. At this point, prior even to issuance of an administrative complaint, the NLRB has done nothing to actually assert jurisdiction over, or otherwise prejudice, Amerijet. No further response to *Leedom* should be required.

In any event, *Leedom* jurisdiction is also unavailable here because the NLRB has taken no action contrary to a clear and mandatory statutory prohibition. There is simply no statutory mandate that the NLRB General Counsel immediately dismiss an unfair labor practice charge where employees of the charged employer who are not relevant to the case fall under RLA jurisdiction. It is true that the NLRA excludes a "person" subject to the RLA from the definition of employer. 29 U.S.C. § 152(2). Yet, Amerijet is mistaken in asserting that the NLRA creates a clear, bright line between coverage of the NLRA and the RLA. In *Emery Worldwide Airlines, Inc.*, 28 NMB 216, 240 (2001), for example, the NMB ruled that a corporation previously found to be a carrier for some purposes, was nonetheless an NLRA employer of its employees who

moved freight and mail from one place to another on the ground and were not sufficiently supervised by the company. *Id.* at 217-18, 240. "[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*." *Id.* at 216 (emphasis added). The NMB specifically rejected the company's assertion "that to subject it to two statutory schemes could create havoc," because the NMB "examines each case on the facts presented." *Id.*

In another similar case, the NLRB did not immediately assert or reject jurisdiction upon an employer's claim of RLA carrier status, but instead analyzed the operations at issue and deferred to a prior NMB opinion concerning those operations. There, the district court remarked "the use of the NMB determination actually furthers the legitimate goal of consistency and predictability of decisions between two administrative agencies whose boundaries of jurisdiction may frequently be blurred." *Chicago Truck Drivers v. NLRB*, 1978 WL 1731, at *1, 4 (N.D. Ill. 1978) *aff'd*, 599 F.2d 816 (7th Cir. 1979). *See also*, *B'hood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969) (noting fact-specific inquiry into statutory coverage disputes between railway carriers or unions and "non-railway" employees); *Cunningham v. Elec. Data Sys. Corp.*, 2010 WL 1223084, at *3 (S.D.N.Y. Mar. 30, 2010) (describing as "often fuzzy" the "jurisdictional line between the two statutory regimes").[11]

Indeed, the NLRB, with court approval, has long referred cases of arguable RLA jurisdiction to the NMB for consideration. *See United Parcel Serv., Inc.*, 318 NLRB 778, 780 (1995), *enf'd*, 92 F.3d 1221, 1225-27 (D.C. Cir. 1996) ("Statutory provision, precedent, and

[11] With court approval, the NLRB routinely bases its jurisdiction decisions on the facts of the case, and its "determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *E.g.*, *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303-04, n.14 (1977) (agricultural laborers) (quoting *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944) (newsboys)).

practice do not suggest that we can take it upon ourselves to establish some judicially enforceable agency hierarchy in these [administrative referral] matters.").[12]

Thus, contrary to Amerijet's assertion, a company's status as a "carrier" for some purposes or employees is *not* dispositive of whether it is a RLA carrier for others. Years ago, when Pan Am World Airways made essentially the same argument as Amerijet here, the Ninth Circuit disagreed. "Pan American says, obviously correctly, that it is a carrier, hence the person who works in its shoe factory, or in its [nuclear research] enterprise is an employee within the meaning of the RLA. Even literally and textually the matter is not quite that simple . . . ." *Pan Am. v. Carpenters*, 324 F.2d 217, 220 (9th Cir. 1963), *cert. denied*, 376 U.S. 964 (1964) (finding some Pan Am employees to be covered by the NLRA and not the RLA). Congress created "two quite different bodies of federal labor law," but could it "have intended to make [] coverage . . . depend, not at all upon the employee's relation to transportation, but upon the logically irrelevant fact that his employer owned a railroad [or airline], in addition to [a] shoe factory in which the 'employee' worked?" *Id.* The Ninth Circuit answered in the negative and, notwithstanding its reference to shoe-making and nuclear research, the same principle is applicable here. *See also*, *Federal Express Corp.*, 23 NMB 32, 72 (1995) (discussing the "limit" on RLA's coverage of a "carrier"). As the Board explained in *Trans World Airlines*, 211 NLRB 733, 733 (1974),

> Where a group of employees are involved in work which would normally be covered by the [NLRA], *the mere fact that the employer is one within the definitional sweep of the [RLA] will not serve to bar [the NLRB's] jurisdiction.*

[12] *See also Chicago Truck Drivers*, 599 F.2d at 817, 820 (district court lacks jurisdiction to review the NLRB's representation case decision whether an employer is covered by the RLA); *Chicago Truck Drivers v. NMB*, 670 F.2d 665, 670 (7th Cir. 1981) (observing the "considerable latitude [given] to the NMB and NLRB to divide their respective jurisdictions—at least in the abstract—prior to initiation of their statutory processes").

In view of this acknowledgment by the Board, the NMB, and the courts that an employer can be a carrier for some employees and not others, the NLRB General Counsel reasonably submitted this case to the NMB to determine whether the cargo handlers are sufficiently supervised by Amerijet and integrated into its carrier function to constitute an operation covered by the RLA. ECF No. 16-1 (NLRB submission to NMB discussing, *inter alia*, application of *Emery* case to Amerijet cargo handlers).[13]

In other cases, courts have repeatedly rejected contentions that an agency finding of "employer" status was in excess of its statutory duty to exclude from its coverage the company claiming to be outside the statutory 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, unlike the question in [*Leedom*]."); *United States v. Feaster*, 410 F.2d 1354, 1371-72 (5th Cir. 1969) (no *Leedom* jurisdiction to review NMB determination that Docks Department fell within RLA).

Plaintiff's reliance upon *Florida Bd. of Bus. Regulation v. NLRB*, 686 F.2d 1362 (11th Cir. 1982) as supporting an assertion of jurisdiction here 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. NLRB representation cases, unlike unfair labor practice cases, do not result in final Board orders subject to immediate judicial review in the circuit courts. *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

[13] The NMB certifications of Amerijet's Pilots and Flight Engineers cited by Plaintiff (ECF No. 1-3, 31 NMB No. 88 and 31 NMB No. 89) are simply not controlling.

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 ground that the election was held in an inappropriate bargaining unit." *Boire*, 376 U.S. at 477. In the circumstances of *Florida Board*, the Eleventh Circuit thus concluded "*that a plaintiff 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).

Here, Plaintiff is a charged party in an unfair labor practice case and can seek review of any adverse Board order in the Court of Appeals under NLRA Section 10(f). This opportunity for review was foreclosed to the State in *Florida Board* because that case not only arose in a representation proceeding, 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. Amerijet simply cannot establish the lack of judicial review that was critical in *Florida Board* and other *Leedom* cases.[14] Indeed, it should be noted that federal courts, including this Circuit, have expressed doubt whether district court jurisdiction under *Leedom* is ever available to review unfair labor practice cases, in contrast to representation cases,

[14] *Lipscomb v. FLRA*, 200 F. Supp. 2d 650, 654-56 (S.D. Miss. 2001), *aff'd*, 333 F.3d 611 (5th Cir. 2003), which involved federal public-sector labor law, erroneously relies on *Florida Board* to uphold the availability of declaratory relief in a district court suit brought by a state actor under Section 1331, even when the state actor is the purported "employer" in an ongoing representation proceeding and therefore controls the decision whether to bargain with the union in order to trigger subsequent judicial review. In so ruling, *Lipscomb* overlooks *Florida Board*'s express limitation on the availability of such relief to situations where the plaintiff "cannot seek review of the [agency]'s order in the Court of Appeals." 686 F.2d at 1370. On appeal, the Fifth Circuit affirmed the district court's judgment, but did not address the jurisdictional issue, which the FLRA presumably did not press because it had prevailed below on the merits. *See* Brief for the Appellees, *Lipscomb v. FLRA*, 333 F.3d 611 (5th Cir. 2003), *at* 2002 WL 32255917.

"as to which there is a deferred and more limited judicial review." *See Bokat*, 363 F.2d at 672-73; *AMERCO v. NLRB*, 458 F.3d 883, 890 (9th Cir. 2006) (citing cases); *see supra*, n.6.

D. The Alleged Violation of the Agency's Casehandling Manual Does Not Provide Jurisdiction under the Mandamus Act Because the Manual is Not Legally Enforceable

Amerijet cites no authority, nor can it, for the extension of extremely narrow *Leedom* jurisdiction to include non-statutory violations. *See UFCW, Local 400 v. NLRB*, 694 F.2d 276, 279 (D.C. Cir. 1982) (violation of Agency policy did not constitute statutory violation and consequently was not subject to *Leedom* review). The Agency's Casehandling Manual creates no legally enforceable duties. *See, e.g., Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) ("the Casehandling Manual does not bind the Board; it is intended merely as guidance to the Board's staff"); *Kirkland Masonry*, 614 F.2d at 534 ("a simple administrative directive to agency employees does not suffice to create a duty to the public"). Indeed, the NLRB's Casehandling Manual, under the heading "Purpose of the Manual," states:

> The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board. The Manual is also not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law . . . Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules.

NLRB Exhibit 5.[15]

[15] Plaintiff cites cases discussing rules or regulations carrying the force of law, not manuals like the one relied upon here. ECF No. 1 n.7; *but see Gulf States Mfg, Inc. v. NLRB*, 579 F.2d 1298, 1309 (5th Cir. 1978). The NLRB Manual, as discussed, falls within the category of expressly non-binding agency policies that do not create a legal duty on the agency. *E.g., Schweiker v. Hansen*, 450 U.S. 785, 790 (1980); *Kirkland Masonry*, 614 F.2d at 534; *United States v. Harvey*, 659 F.d 62, 63-65 (5th Cir. 1981) (citing cases where internal agency procedures were not enforceable). To the extent *Gulf States* holds otherwise, that case was not in a *Leedom* or mandamus context, and is otherwise inconsistent with Supreme Court and subsequent in-Circuit precedent on this issue.

In any event, contrary to Amerijet's contention, the General Counsel's referral to the NMB in this case is consistent with Section 11711.2 of the Casehandling Manual, entitled "Arguable RLA Jurisdiction." That provision states that the "Board's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion." *Id.* Plaintiff omitted mention of NLRB Manual Section 11711.2, and cited only Section 11711.1, which concerns cases where "*it is clear* that the employer falls under the jurisdiction of the RLA." *Id.* (emphasis added). For the reasons discussed above, the General Counsel reasonably found no such clarity here.[16]

In sum, the NLRB followed longstanding precedent and its Casehandling Manual by initially investigating the charge filed against Amerijet, and then referring the case to the NMB for an opinion on whether the cargo handler employees fall under the RLA. For all of these reasons, Plaintiff has failed to state a claim that is "clear."

E. Plaintiff's Request for Declaratory Relief Provides No Basis for the Court to Act

The declaratory judgment statute provides that in a "case of actual controversy within its jurisdiction," a court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995). However, even aside from the lack of jurisdiction here, there is no "actual controversy" present, as required by the statute and Article III of the U.S. Constitution.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an

[16] It is noteworthy that Plaintiff has also asserted, albeit in another pending lawsuit (*Diaz, et al. v. Amerijet International, Inc.*, Case No. 11-61812-CV-Altonaga-Simonton (S.D. Fla.)), that the *Diaz* cargo handler plaintiffs cannot assert a claim under the RLA. *See Diaz*, ECF No. 16 & 17, pp. 15-20.

administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (citation omitted). It is just that abstract disagreement that is presented by Plaintiff in this case and any as yet unfiled future charges that may be filed against Amerijet.

II. The Agency's Duties in Unfair Labor Practice Proceedings Are Discretionary and Non-Ministerial

Plaintiff also cannot meet its burden of demonstrating the second requirement for mandamus relief – that the official's duty is nondiscretionary and ministerial. *Kirkland Masonry*, 614 F.2d at 534. All the decisions concerning the Amerijet cargo handlers by the NLRB Regional Office on behalf of its General Counsel are discretionary and accordingly fall outside of the Mandamus Act.

The Regional Director's decision to initially investigate the matter and to refer the case to the NMB, are firmly committed to the General Counsel's prosecutorial discretion. 29 U.S.C. § 153(d); *United Food and Commercial Workers*, 484 U.S. at 124-26, 131. The Region's effort to secure evidence concerning Amerijet's alleged misconduct is a matter of discretion. Just as the Secretary of Labor "might find it advisable to begin by examining the payroll [as to an alleged underpayment violation], for if there were no underpayments found, the issue of coverage would be academic"—here, the Regional Director properly attempted an initial examination of whether Amerijet's termination of cargo handlers violated the NLRA, because if she found no evidence of a violation, the jurisdiction question would have been academic. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1941); *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").[17]

The Regional Director's investigation to assess the IBEW's charge, which to date has resulted in no complaint against Amerijet, can be classified as neither "meddl[ing] in [Amerijet's] labor relations" nor a "bald assertion of power." ECF No. 1 ¶¶ 49-50.

III. Plaintiff Has An Adequate Remedy At Law

For the same reasons set out in Section I(C) above, Plaintiff already has adequate remedies for the conduct about which it complains. Thus, Plaintiff cannot meet the third requirement for mandamus relief – that there be no other adequate remedy. *See Dennis v. U.S. Bureau of Prisons*, 325 Fed.Appx. 744, 746 (11th Cir. 2009) (unpublished) (affirming denial of mandamus because adequate alternative remedy was available).

CONCLUSION

For the reasons stated above, the Court lacks jurisdiction to order mandamus or declaratory relief regarding the Agency's conduct in unfair labor practice proceedings. The Complaint also fails to state a claim upon which relief may be granted. Accordingly, the Court should deny the requested relief and dismiss the Complaint.

Local Rule 7.1(a)(3) Certificate

Pursuant to Local Rule 7.1(a)(3), there is no requirement to confer concerning the instant motion to involuntarily dismiss this action. Counsel for the NLRB has nonetheless phoned and left counsel for Plaintiff a voicemail concerning the filing of this motion.

/s/ Eric G. Moskowitz

[17] Moreover, Plaintiff cannot show that it suffers irreparable harm by having to participate in administrative procedures prior to securing judicial review. *See Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

Dated: November 15, 2011

Respectfully submitted,

/s/ Eric G. Moskowitz
ERIC G. MOSKOWITZ (Counsel of Record)
E-mail: Eric.Moskowitz@nlrb.gov
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
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Special Litigation Branch
Phone (202) 273-2934

MARK G. ESKENAZI
E-mail: Mark.Eskenazi@nlrb.gov
Attorney
Special Litigation Branch
Phone: (202) 273-1947

Attorneys for Defendants National Labor Relations Board, et al.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on November 15, 2011 on all counsel or parties of record on the Service List below.

/s/Eric G. Moskowitz

Joan Canny, Esq.
jcanny@amerijet.com
2800 South Andrews Avenue
Fort Lauderdale, FL 33316
Telephone: (954) 320-5367
Facsimile: (305) 423-3246
Attorney for Plaintiff
Amerijet International, Inc.
Effective August 12, 2011

EXHIBIT 1

FORM EXEMPT UNDER 44 U.S.C.

INTERNET FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
12-RC-9487	4-8-11

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [x] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel. No.
AMERIJET INTERNATIONAL, INC.	RASHEME RICHARDSON	(305) 704-9637

3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)	Fax No.
6185 NW 18 STREET, BUILDING 716-A, MIAMI,FL 33126	(305) 704-9656

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service	Cell No.
AIRPORT OPERATIONS	SHIPPING CARGO	e-Mail richardson@amerijet.com

5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.)	6a. Number of Employees in Unit: 34
Included: CARGO HANDLERS	Present: 34
Excluded: LEAD AGENTS, CLERICAL, SECURITY GUARDS, RAMP AGENTS	Proposed (By UC/AC)
(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)	6b. Is this petition supported by 30% or more of the employees in the unit?* [x] Yes [ ] No *Not applicable in RM, UC, and AC

7a. [ ] Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state.)	Affiliation
NONE	

Address	Tel. No.	Date of Recognition or Certification
	Cell No.	Fax No. / e-Mail

9. Expiration Date of Current Contract, If any (Month, Day, Year)	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year)

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes [ ] No [x]	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel. No.	Fax No.
		Cell No.	e-Mail

13 Full name of party filing petition (If labor organization, give full name, including local name and number)
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 349

14a. Address (street and number, city, state, and ZIP code)	14b. Tel. No. EXT	14c. Fax No.
1657 NW 17 AVE, MIAMI, FL 33125	(305) 325-1330	(305) 325-1521
	14d. Cell No. (305) 588-4137	14e. e-Mail chris_simpson@ibew349.org

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (To be filled in when petition is filed by a labor organization)
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 349

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title (if any)
CHRIS SIMPSON	Chris Simpson	BUSINESS DEVELOPMENT

Address (street and number, city, state, and ZIP code)	Tel. No.	Fax No.
1657 NW 17 AVE, MIAMI, FL 33125	(305) 325-1330	(305) 325-1521
	Cell No. (305) 588-4137	eMail chris_simpson@ibew349.org

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes.

EXHIBIT 2

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602-5824

Telephone 813-228-2641
Facsimile 813-228-2874
www.nlrb.gov

April 15, 2011

Joan M. Canny, Esq.
Vice President and General Counsel
Amerijet International, Inc.
2800 South Andrews Avenue
Fort Lauderdale, FL 33316

Re: Amerijet International, Inc.
Case 12-RC-9487

Dear Ms. Canny:

This is to advise you that, with my approval, the petition in the above-captioned case has been withdrawn.

Very truly yours,

Rochelle Kentov
Regional Director

cc: Rasheme Richardson
Amerijet International, Inc.
6185 NW 18 Street
Building 716-A
Miami, FL 33126

Edwin D. Hill, International President
International Brotherhood of Electrical Workers, AFL-CIO
900 Seventh Street, N.W.
Washington, DC 20001

Chris Simpson
Business Development
International Brotherhood of Electrical Workers Local
Union 349
1657 NW 17 Ave.
Miami, FL 33125

EXHIBIT 3

FORM NLRB-501

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
12-CA-27146	05/09/2011

INSTRUCTIONS
File an original and 4 copies of this charge with NLRB Regional Director for the Region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer		b. Number of workers employed
AmeriJet International Inc.		Approx. 200
c. Address (street, city, state, ZIP code)	d. Employer Representative	e. Telephone/ Fax No.'s
2800 S. Andrews Ave., Fort Lauderdale, Fl 33316	David Basen	305.593.5500/unknown
f. Type of establishment (factory, mine, wholesaler, etc.)	g. Identify principal product or service	
cargo company	cargo	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On or about April 29, 2011, the above named Employer, by its officers, agents and supervisors, discharged Pedro Galindo because of his membership in and activities on behalf of the International Brotherhood of Electrical Workers, Local 349, at all times such date, has refused and does now refuse to reinstate him.

By the above and other acts, the above-named Employer has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

Pedro Galindo

4a. Address (street and number, city, state and ZIP code)	4b. Telephone/Cell No./E-Mail
1616 NW 19 Terrace, Apt. 304, Miami, Fl., 33125	786.316.2323 (c) 305.324.7920 (h)

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization.

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Signature of representative or person making charge *Pedro Galindo*	*Title, if any* An individual	
Address	Telephone No.	Date
Same as above	Same as above	9 May 2011

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

ID

HM

EXHIBIT 4

United States Government

NATIONAL LABOR RELATIONS BOARD

Region 12 - Resident Office

51 Southwest First Avenue - Room 1320

Miami, FL 33130-1608

Telephone: (305) 536-5391

27 May 2011

Joan Canny, Esq.
Senior VP & GC
Amerijet International, Inc.
2800 S. Andrews Ave.
Ft. Lauderdale, Fl., 33316
Via email jcanny@amerijet.com & Regular US Mail

Re: Amerijet International Inc.
Case 12-CA-27156

Dear Ms. Canny,

This letter will set forth the specific allegations contained in the above charge. As you know, under Board procedures, an investigation is conducted upon the allegations set forth in the charge(s) to determine what, if any, merit they might have. Based upon the evidence adduced during the course of the investigation, a decision is made by the Regional Office as to whether or not there is reasonable cause to believe the Act has been violated. Therefore, it behooves you to have the Region consider your evidence/response to these allegations when the determination is made upon the merits of them.

The Charging Party, IBEW, Local Union 349 ("Local 349" or the "CP") alleges the Employer laid off all cargo handlers on April 29, 2011 because of their union activities and membership on behalf of Local 349 in violation of § 8(a)(1)(3)[1]. More specifically, on April 8, Local 349 filed a representation petition[2] in which it sought to represent all cargo handlers at the Employer's Miami International Airport warehouse. Local 349 avers that on April 28 and 29, the company, through VP Mr. Montella, notified the cargo handlers the decision had been made to eliminate their position, effective immediately, and outsource it to another company.

In order to complete the Regional investigation please provide or respond to the following:

1. a complete detailed explanation of the company's decision to outsource/subcontract the work performed by the cargo handlers and their subsequent permanent lay-off;
2. copies of internal memos, documents, records, memos, e-mails, that would show the company's deliberations in outsourcing the cargo handlers work;
3. copies of any memos or notices posted by the company apprising employees of their layoff and/or of the company's decision to subcontract the work performed by the cargo handlers;

[1] The Region may supplement this letter in the event it learns of other allegations to which a response is warranted.
[2] In Case 12-RC-9487

4. what company(ies) did Amerijet contract to provide the work previously performed by the cargo handlers?
5. a copy of the service agreement between the contractor(s) and Amerijet covering the work performed by the former cargo handlers;
6. a list of all former cargo handlers at the company's MIA warehouse and their last known addresses;
7. copies of the company's announcements/request for bids for the subcontracting of the work in question;
8. copies of all bids submitted in response to said announcement/request;
9. did Amerijet outsource cargo handlers at other facilities? If so, which ones? Please provide supporting documentation.
10. complete the attached Form NLRB-5081 ("Commerce Questionnaire");
11. address whether the Region ought to seek injunctive relief under §10(j) of the Act in these circumstances.

I request to meet with and interview *Montella* and any other company representative involved in the decision to eliminate the cargo handler position and outsource/subcontract their work, as well as and anyone else you wish to present in support of your position. Presenting these witnesses for Board affidavits constitutes full cooperation. Conversely, anything less is not considered full cooperation. However, a position statement, while not considered full cooperation or accorded the same evidentiary weight, will be accepted so long as it is received in this Office by *June 15, 2011*. Please contact me as soon as possible if you decide to present the above witness(es) for Board affidavits so appointments can be scheduled. I may be reached at the number below during normal business hours.

Sincerely,

Ricardo Morillas
Field Examiner
305.530.7031

FORM NLRB-5081 (8-83) INTERNET

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

FORM EXEMPT UNDER 44 U.S.C. 3512

Please read carefully. Answer all applicable items and return to the Regional Office. If additional space is required, use plain bond paper and identify item number.

CASE NAME | CASE NUMBER

1. TYPE OF BUSINESS
[ ] CORPORATION [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP

2. CLASSIFICATION WHICH DESCRIBES YOUR BUSINESS
[ ] WHOLESALING [ ] NEWSPAPER [ ] OFFICE OF INDUSTRIAL BUILDING [ ] RETAIL
[ ] HOSPITAL [ ] HOTEL - MOTEL [ ] MANUFACTURING/PROCESSING [ ] SERVICE ORGANIZATION
[ ] TRUCKING [ ] PUBLIC UTILITY [ ] BROADCASTING STATION [ ] NURSING HOME
[ ] TRANSIT SYSTEM [ ] BUILDING AND CONSTRUCTION [ ] OTHER *(Describe)*

3. EXACT LEGAL TITLE OF FIRM

4. IF A CORPORATION
A. INCORPORATED IN STATE OF: | B. NAME(s) AND ADDRESS(es) OF PARENT, SUBSIDIARY, OR RELATED CORPORATION, IF ANY, AND DESCRIBE RELATIONSHIP.

5. IF A PARTNERSHIP
FULL NAME AND COMPLETE ADDRESS OF ALL PARTNERS.

6. IF A PROPRIETORSHIP
FULL NAME AND COMPLETE ADDRESS OF PROPRIETOR.

7. BRIEFLY DESCRIBE THE NATURE OF YOUR BUSINESS *(General products handled or manfactured, or nature of services performed).*

8. PRINCIPAL PLACE OF BUSINESS LOCATED AT: | BRANCH(es) LOCATED AT:

9. NUMBER OF PERSONNEL PRESENTLY EMPLOYED BY YOUR FIRM
A. TOTAL | B. AT THE ADDRESS INVOLVED IN THIS PROCEEDING.

10. DURING THE PAST [ ] CALENDAR, [ ] FISCAL YEAR *(If Fiscal Year indicate dates)* OR [ ] LAST 12 MONTHS *(Check appropriate box):*

A. DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES DIRECTLY TO CUSTOMERS OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
B. DID GROSS AMOUNT OF PURCHASES OF MATERIALS OR SERVICES DIRECTLY FROM OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
C. DID GROSS REVENUE FROM YOUR SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO FIRMS WHICH DIRECTLY MADE SALES TO CUSTOMERS OUTSIDE THE STATE AND/OR TO CUSTOMERS WHICH MADE PURCHASES FROM DIRECTLY OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
D. IF THE ANSWER TO 10(c) IS NO, DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO PUBLIC UTILITIES, TRANSIT SYSTEMS, NEWSPAPERS, HEALTH CARE INSTITUTIONS, BROADCASTING STATIONS, COMMERCIAL BUILDINGS, EDUCATIONAL INSTITUTIONS AND/OR RETAIL CONCERNS [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
E. DID GROSS AMOUNT OF YOUR PURCHASES EQUAL OR EXCEED $50,000 FROM FIRMS WHICH IN TURN, PURCHASED THOSE GOODS DIRECTLY FROM OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
F. GROSS REVENUE FROM ALL SALES OR PERFORMANCE OF SERVICES *(Check largest amount which firm equaled or exceeded):* [ ] $100,000 [ ] $200,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 IF LESS THAN $100,000 INDICATE AMOUNT	$

11. ARE YOU A MEMBER OF, OR PARTICIPATE IN, AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?
[ ] YES [ ] NO *(If Yes, give Name and Address of association or group).*

12. DID FIRM PERFORM NATIONAL DEFENSE WORK DURING THE PERIOD INDICATED IN 10 ABOVE? [ ] YES [ ] NO
(If Yes, amount of dollar volume and name(s) and address(es) for whom work was performed). | $

13. PROVIDE NAME & TITLE OF YOUR REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION CONCERNING THE OPERATIONS OF YOUR BUSINESS

NAME | TITLE | TELEPHONE NUMBER

SIGNATURE OR AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)* | SIGNATURE | DATE

☆U.S. Government Printing Office: 1987—181-574/62761

EXHIBIT 5

NATIONAL LABOR RELATIONS BOARD

CASEHANDLING MANUAL

PART ONE

UNFAIR LABOR PRACTICE PROCEEDINGS

December 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

INTRODUCTION

PREFACE

I am pleased to introduce this revised edition of the National Labor Relations Board Casehandling Manual for Unfair Labor Practice Proceedings. Last revised in June 1989, this comprehensive revision is more accessible and useful, increasing its value as a resource for the Agency and the public. This edition incorporates straightforward language to clarify instruction concerning ULP case processing; expands the scope of guidance in many areas and reorganizes the material to facilitate its use. In addition, several new sections address existing casehandling procedures and recent developments and update existing sections to reflect current case law and General Counsel policies.

I anticipate that the guidelines set forth in this revision will enhance the quality of casehandling and assist the Agency in its mission to fairly and efficiently process and resolve unfair labor practice cases.

This revised manual was prepared by a field committee composed of Richard Ahearn, Regional Director in Region 9; Michael C. Joyce, Assistant to the Regional Director in Region 6; Rik Lineback, Regional Attorney in Region 25; and Mark Carissimi, Deputy Regional Attorney in Region 8. Ellen Farrell, Deputy Associate General Counsel, Division of Advice made a significant contribution to the Manual in several areas. Individuals in Special Litigation Branch, Contempt Litigation and Compliance Branch and Regional Offices also played important roles in this project. As Chairman of the Committee Richard Ahearn deserves special recognition for his leadership and coordination of the Committee's work. Christina Stadtlander, Assistant Office Manager, Region 9, rendered invaluable assistance to the Committee in preparing this revision. Assistant General Counsel Nelson Levin coordinated this substantial project for the Division of Operations-Management. In closing, I wish to thank all the individuals who contributed to revising this Manual.

Arthur Rosenfeld
General Counsel
September 2003

PURPOSE OF THE MANUAL

The Casehandling Manual is intended to provide procedural and operational guidance for the Agency's Regional Directors and their staffs when making decisions as to unfair labor practice and representation matters under the National Labor Relations Act. The Manual consists of three volumes: Part One—Unfair Labor Practice Proceedings; Part Two—Representation Proceedings; and Part Three—Compliance Proceedings.

This Manual has been prepared by the General Counsel for use by Agency personnel, pursuant to authority under Section 3(d) of the Act and as delegated by the Board. The Manual has been neither reviewed nor approved by the Board.

As to matters on which the Board has issued rulings, the Manual seeks to accurately describe and interpret Board law; while the Manual can thus be regarded as reflecting Board policies as of the date of its preparation, in the event of conflict, it is the Board's decisional law, not the Manual, that is controlling. Similarly, while the Manual reflects casehandling policies of the General Counsel as of the date of its preparation, such policies may be revised or amended from time-to-time.

The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board. The Manual is also not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law.

Although it is expected that the Agency's Regional Directors and their staffs will follow the Manual's guidelines in the handling of cases, it is also expected that in their exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances. Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules. Rather, they provide a framework for the application of the Board's decisional law and rules to the facts of the particular situations presented to the Regional Directors and their staffs, consistent with the purposes and policies of the Act.

MANUAL FORM

This Manual is available in printed form from the U.S. Government Printing Office (GPO) and in electronic form at the Agency's web site (www.nlrb.gov). (Agency employees also have access to the Manual on an Agency electronic Bulletin Board.) Periodic revisions to the Manual can only be obtained electronically through the Agency's website, not through the GPO.

MODIFICATIONS TO THE MANUAL

Modifications to the Manual will be announced through memoranda issued by the Division of Operations-Management. These memoranda are available to the public

through the Agency's publication "Weekly Summary of NLRB Cases." At the time of announcement, the electronic versions of the Manual maintained on the Agency's web site (www.nlrb.gov) and internal Bulletin Board will be revised in accord with the modifications. All memoranda announcing modifications will be retained for one year at the website and Bulletin Board UPDATE PAGE.

Printed versions of the Manual available in Agency libraries will be kept current. Printed compilations of modifications will be prepared annually. Printed copies of the Manual distributed following its original publication date will contain the original Manual as well as all annual compilations.

INSTRUCTIONS

The Casehandling Manual consists of three volumes: Part One—Unfair Labor Practice Proceedings; Part Two—Representation Proceedings; and Part Three—Compliance Proceedings. The Compliance Manual was revised in 1993. The Representation Casehandling Manual was revised in 1999.

This Unfair Labor Practice Casehandling Manual revision was issued in 2002. This revision has updated the Common to All Cases Sections 117000–11886, which appear in both the Unfair Labor Practice Casehandling Manual and the Representation Casehandling Manual. Accordingly, the Common to All Cases portion of the Representation Casehandling Manual must be replaced with the version contained in this revision.

11711 National Mediation Board Jurisdiction

At times, questions may arise as to whether a particular employer involved in an NLRB proceeding is under the jurisdiction of the Railway Labor Act (RLA), administered by the National Mediation Board (NMB). See 45 U.S.C. §§ 151 (railroads) and 181 (air carriers). Section 2(2) of the National Labor Relations Act excludes from the definition of employer "any person subject to the Railway Labor Act."

11711.1 Jurisdiction Clear

If it is clear that the NLRB has jurisdiction over the employer, the Regional Office should proceed with the processing of the case. See *United Parcel Service,* 318 NLRB 778 (1995), for circumstances in which referral to NMB is not appropriate.

Conversely, if it is clear that the employer falls under the jurisdiction of the RLA, the parties should be referred to the NMB and the charge or petition should be dismissed, absent withdrawal.

11711.2 Arguable RLA Jurisdiction

The Board's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue. *Federal Express Corp.,* 317 NLRB 1155 (1995). Thus, in such circumstances, the Regional Office should submit the case for referral either to the Executive Secretary or the Division of Operations-Management as specified below. In such cases, the written submission should contain the relevant facts as outlined in OM 90-83, concerning referrals to the NMB and should include the names, addresses, telephone numbers, fax numbers, and e-mail addresses of all parties to the proceedings and their representatives.

(a) *C Case:* In a C case, the Regional Office should initially contact the Division of Operations-Management to informally discuss the matter. If a formal submission is required, the Regional Office should draft a letter to the Chief of Staff of the NMB for the signature of the Associate General Counsel, Division of Operations-Management. The letter should be entitled "Request for Opinion on National Mediation Board Jurisdiction under the Railway Labor Act" and should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the Parties

The letter should conclude with a statement that the question of jurisdiction is being submitted for NMB consideration. The Regional Office should also submit its case file.

(b) *R Case:* Generally, in an R case, the Regional Office should conduct a hearing to develop a record on the jurisdictional issue. If, after review of the record, the

RLA jurisdictional issue remains doubtful, the Region should prepare a memorandum directed to the Office of the Executive Secretary which should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the parties

The memorandum should not contain a legal analysis by the Regional Office but should conclude with the recommendation that the Board consider whether the issue should be submitted to the NMB. If a hearing is held, the Regional Office should forward the transcript, exhibits and all briefs on the issue with the memorandum. If the Regional Office investigates the matter without a hearing, the Regional Office should submit all evidence and position statements relating to the jurisdictional issue. The Regional Office must also issue an Order Transferring the Case to the Board, NLRB Form-4481.

11712–11720 TRANSFER, CONSOLIDATION, AND SEVERANCE

11712 Generally

The transfer, consolidation and severance of cases are addressed at Sec. 102.33, Rules and Regulations as to charges and Sec. 102.72 as to petitions. Transfer, consolidation, and/or severance may be appropriate in order to effectuate the purposes of the Act and for cost and time considerations.

11714 Interregional Transfers

Generally, there are two categories of interregional case transfers.

11714.1 Individual Case(s) Transfer

Individual cases may be transferred from one Regional Office to another for the purposes set forth above at the time of filing or as soon thereafter as the necessity becomes apparent. In such circumstances, the Regional Offices involved in the transfer will confer about the proposed action and the reasons therefor. The sending Regional Office will then request that the Division of Operations-Management issue an order transferring the case. See Clerical Procedures, Sec. 12420. The request will contain the case name, petitioner or charging party, the present case number, and the case number to be assigned by the assisting Regional Office; a brief statement of the reasons for transfer; and an indication of whether the assisting Regional Office concurs in the proposed action.