UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

AMERIJET INTERNATIONAL, INC.,

Plaintiff,

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.
_____/

COMPLAINT FOR DECLARATORY RELIEF
AND PETITION FOR MANDAMUS

COMES NOW, Amerijet International, Inc., Plaintiff herein, and respectfully alleges:

NATURE OF THE ACTION

1. This is an action by Amerijet International, Inc. against the U.S. National Labor Relations Board ("Labor Board" or "NLRB") and certain of its officers, to obtain declaratory relief and a writ of mandamus.

2. Amerijet is undisputedly a "common carrier by air engaged in interstate or foreign commerce", 45 U.S.C. § 181. Amerijet is therefore a "carrier" as defined in the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, the federal statute governing labor relations for airlines and railroads, and is subject to the "duties, requirements, penalties, benefits, and privileges" of that Act in labor relations matters. *See* 45 U.S.C. § 182. Amerijet in turn is expressly excluded from coverage under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, the federal statute generally governing labor relations for all private industries other than airlines and

railroads, as section 2(2) of the NLRA, 29 U.S.C. § 152(2), provides that the term "employer" for purposes of the NLRA shall not include "any person subject to the Railway Labor Act."

3. This case presents a distilled and purely legal question of statutory construction: Whether the National Labor Relations Board ("NLRB"), the federal agency tasked with administering the NLRA, has the authority to investigate the merits of an unfair labor practice charge against an "employer" filed with the NLRB under the NLRA, where the named employer in that charge is clearly and unambiguously excluded from the NLRA's definition of "employer" because it is subject to the RLA, and therefore is not covered by the unfair labor practices provisions of the NLRA. The answer to that question unequivocally must be no.

4. Because Congress has expressly withheld from the NLRB the authority to investigate, prevent, or enforce NLRA provisions pertaining to alleged unfair labor practices by an employer that is an air carrier subject to the Railway Labor Act, Amerijet and other "carriers" subject to the RLA have been granted by Congress a statutory right to be free of such provisions of the NLRA, specifically including the right to be free of any NLRB investigation of unfair labor practice charges filed against them.

5. Despite the specific prohibition in the NLRA against jurisdiction over an employer that is a carrier subject to the RLA, and Amerijet's clear and undisputed status as a carrier subject to the RLA, the NLRB has failed to dismiss an unfair labor practice charge against Amerijet and instead has investigated and continues to investigate the merits of that charge in excess of the NLRB's delegated powers.

6. Amerijet therefore seeks declaratory relief (a) that the undisputed facts establish that Amerijet at all times pertinent is and has been a "carrier" subject to the RLA, (b) that the NLRB lacks authority, and instead authority has specifically been withheld by Congress from the

NLRB, to investigate unfair labor practice charges against an employer that is subject to the RLA, and (c) that the NLRB may not turn a blind eye to its lack of delegated power over Amerijet, an employer subject to the RLA, in order to investigate the merits of an unfair labor practice charge against such an employer in violation of Amerijet's statutory right under the NLRA to be free of such investigations as neither necessary nor proper to the NLRB's delegated powers. Amerijet further seeks a writ of mandamus compelling the NLRB and its officials to dismiss the unfair labor practice charge for want of jurisdiction due to Amerijet's status as a "carrier" subject to the RLA.

PARTIES

7. Amerijet International, Inc. is an air carrier certificated by the Federal Aviation Administration pursuant to 14 C.F.R. Part 121, and incorporated under the laws of the State of Florida. Amerijet's corporate office is located at 2800 South Andrews Avenue, Fort Lauderdale, Florida 33316, and its on-airport operations are located at Miami International Airport, at Amerijet's ramp-side facility in Building 716 of the airport's cargo area and the ramp adjacent to that facility.

8. Defendant National Labor Relations Board is an agency of the United States headquartered in Washington, D.C. It is the federal agency through which federal responsibilities under the National Labor Relations Act are carried out. The NLRB has a resident office within this judicial district at 51 SW 1st Avenue, Room 1320, Miami, FL 33130, which has been investigating and continues to investigate the unfair labor practice charge against Amerijet that is the subject of this action.

9. Defendant Wilma B. Liebman is the Chairman of the National Labor Relations Board. As such, she has overall responsibility for all aspects of the operation of the NLRB and

is authorized to act on behalf of the NLRB with respect to compliance with the National Labor Relations Act, and the rules, regulations and policies promulgated by the NLRB pursuant to that statute.

10. Defendant Rochelle Kentov is Regional Director of NLRB Region 12, the region with jurisdiction over this federal judicial district and the NLRB region that has acted in excess of its delegated powers as alleged in this Complaint. She has been delegated authority to decide, *inter alia*, whether to investigate or dismiss unfair labor practice charges against an employer due to lack of statutory jurisdiction over that employer, among other delegated powers.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1337, and 1361, and under the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* Declaratory and other relief is authorized by the Federal Declaratory Judgment Act, as amended, 28 U.S.C. §§ 2201 and 2202.

12. In particular, this Court is authorized by *Leedom v. Kyne*, 358 U.S. 184 (1958), and its progeny to review non-final action of the NLRB in excess of the agency's jurisdiction or its delegated powers. In *Leedom v. Kyne*, the U.S. Supreme Court held that the district court had jurisdiction to set aside a representation election certification of the NLRB where that agency had refused to poll professional employees before combining them in a bargaining unit with non-professional employees. Section 9(b)(1) of the NLRA, which provides that the NLRB "shall not" certify a bargaining unit comprising both professional and non-professional employees "unless a majority of such professional employees vote for inclusion" in the unit, is "clear and mandatory," according to the U.S. Supreme Court, and the district court therefore had jurisdiction to review because the NLRB had acted "in excess of its delegated powers and contrary to a specific

prohibition" in that Act. The Supreme Court concluded that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers". *Id.* at 185, 188, 190.

13. As stated more fully, the Supreme Court found in *Leedom v, Kyne*:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. . . . Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Id. at 187.

14. By exercising its investigatory powers under Section 11 of the NLRA to investigate the merits of the unfair labor practice charge filed against Amerijet, rather than summarily dismissing that charge for lack of statutory jurisdiction over Amerijet, the NLRB is exercising power that has been specifically withheld from the agency, as Congress has withheld from the NLRB any delegated power over an employer that is a "carrier" subject to the Railway Labor Act. Therefore this Court has jurisdiction under *Leedom v. Kyne* and its progeny.

15. More specifically, in the NLRA, Congress has given any "carrier" subject to the RLA the statutory right to be free from unfair labor practice charges against it under the NLRA, and concomitantly the right to be free from exercise of the NLRB's investigatory powers and other formal or informal administrative action by the NLRB with respect to such charges, by excluding any carrier subject to the RLA from the definition of an "employer" in the NLRA. The NLRB's investigatory powers with respect to an unfair labor practice charge against an employer are not plenary but depend upon the existence of an unfair labor practice charge against an "employer" covered by the NLRA. As the NLRB has acted in plain violation of an

unambiguous and mandatory prohibition of the NLRA by its investigation into the merits of an unfair labor practice charge against an employer that is undisputedly excluded from the definition of an "employer" in the NLRA, *Leedom v. Kyne* and its progeny (including, *inter alia*, *U.S. v. Feaster*, 410 F.2d 1354 (5th Cir. 1969) and *Boire v. Miami Herald Publishing Co.*, 343 F.2d 17 (5th Cir. 1965), binding precedent from the U.S. Fifth Circuit[1]), provide this Court with clear jurisdiction to enforce Amerijet's statutory right to be free from the NLRB's investigation and any other administrative action with respect to that charge.

16. Amerijet would be wholly deprived of its statutory right to be free from the NLRB's investigation if there were no judicial review of the agency's action investigating the charge in excess of the agency's delegated statutory authority. Thus this Court has jurisdiction precisely because Amerijet has no other means within its control to protect and enforce its statutory right: As the Supreme Court has stated subsequent to its *Leedom v. Kyne* decision, "central to [its] decision in *Leedom* was the fact that the [Labor] Board's interpretation of the Act would wholly deprive the [aggrieved party] of a meaningful and adequate means of vindicating its statutory rights." *Board of Governors of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43 (1991).

17. This Court also has jurisdiction to render a declaratory judgment to resolve the questions presented in this action, including to declare the Labor Board's action in excess of its delegated powers and contrary to a specific prohibition in the NLRA, according to binding Eleventh Circuit precedent in *Florida Board of Business Regulation v. NLRB,* 686 F. 2d 1362, 1368-69 (11th Cir. 1982). In that case, the Eleventh Circuit found that the district court had

[1]The Eleventh Circuit has adopted as binding precedent the decisional law of the former Fifth Circuit that was published before October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

jurisdiction over a declaratory judgment action to resolve the jurisdiction of the NLRB over a particular category of employees. *See also Lipscomb v. FLRA*, 200 F. Supp. 2d 650 (S.D. Miss. 2001), *aff'd* 333 F.3d 611 (5th Cir. 2003) (following *Florida Board of Business Regulation* and finding the district court had jurisdiction over a declaratory judgment action to resolve the jurisdiction of the Federal Labor Relations Authority over National Guard employees).

18. This case is ripe and properly before the Court for decision. Amerijet's challenge to the NLRB's jurisdiction over it is not premature, for the relevant facts pertaining to the issue of the NLRB's authority to investigate the unfair labor practice charge at issue are not disputed, as the NLRB apparently concedes: in the course of the NLRB's continuing investigation the agency has never sought any information at all which is reasonably relevant to determine whether Amerijet is subject to the RLA, and the undisputed evidence demonstrating that Amerijet is a "carrier" subject to the RLA has been before the agency for more than three months' time as of the filing of this action.

19. This case is ripe as well because exhaustion is not required where it would be futile, such as where the very administrative procedure under attack is the one the agency says must be exhausted. Here the NLRB has not completed its investigation into the merits of the unfair labor practice charge at issue, yet it is the very power of the agency to conduct that investigation which is being challenged here, and it is Amerijet's statutory right to be free of that investigation which Amerijet asks the Court to protect and enforce in this action. Efficiencies and the public interest also favor judicial scrutiny at this time, to give effect to Congress' intent to prohibit any NLRB investigation or other action against an employer subject to the RLA, to relieve such an employer of the completely unwarranted burden of such an investigation, and to

free the NLRB to pursue valid charges with the agency's limited resources against persons properly subject to the NLRA's unfair labor practice charge provisions.

20. Venue is proper in this federal district pursuant to 28 U.S.C. § 1391(e). Defendants are an agency of the United States and officers or employees of the United States purporting to act in their official capacity or under color of legal authority. A substantial part of the events or omissions giving rise to the claims in this action occurred in the judicial district of the Southern District of Florida and the Plaintiff resides in this judicial district.

FACTUAL BACKGROUND

21. The Railway Labor Act was enacted in 1926 to govern labor relations for "carriers" in the railroad industry. In 1936 the RLA was amended to extend the definition of "carrier" to encompass "every common carrier by air engaged in interstate or foreign commerce", and thereby to extend coverage of the RLA to the airline industry. *See* 45 U.S.C. §§ 181, 182.

22. The RLA's primary goal is "to avoid any interruption to commerce or to the operation of any carrier engaged therein". *See* 45 U.S.C. § 151a. In 1934 the RLA was amended to create the National Mediation Board (the "Mediation Board" or "NMB"), an agency whose primary function is to mediate labor disputes among employees and "carriers" covered by the RLA. *See* 45 U.S.C. § 154. The NMB also has exclusive authority to investigate representation disputes initiated by employees and to certify representatives of a carrier's employees. *See* 45 U.S.C. § 152, Ninth.

23. Pursuant to its statutory authority under the RLA, the NMB has certified the representatives of certain of Amerijet's employees by decision in NMB Case nos. R-7000 and R-

7006. Those certification decisions each include the express finding that Amerijet is a "carrier" within the meaning of the RLA. (Copies of the certification decisions are attached as Ex. A.)

24. As recently as 2009, the NMB has mediated labor disputes among Amerijet and the representative of certain of Amerijet's employees, pursuant to the NMB's authority to do so for a "carrier" covered by the RLA. (A copy of the NMB correspondence acknowledging those mediation cases and successfully closing those cases is attached as Ex. B.)

25. In addition to the NMB's exercised jurisdiction over Amerijet under the RLA, the undisputed facts and law independently establish that Amerijet is subject to the RLA and not the NLRA. As noted above, according to the Railway Labor Act the statute applies, *inter alia*, to "[e]very common carrier by air engaged in interstate or foreign commerce …." *See* 45 U.S.C. § 151, First and § 181. Amerijet holds a U.S. Department of Transportation air carrier operating certificate, and several certificates of public convenience and necessity; such certificates, standing alone, establish Amerijet's status as a common carrier by air in foreign commerce for purposes of "carrier" status under the RLA. *See Southern Air Transport*, 8 NMB 31 (1980) ("The essential characteristic of a common carrier is its quasi-public character. If a carrier is under an affirmative duty to serve the public, or if the public has the right to demand service of the carrier, the carrier is a 'common carrier'…. [Where the carrier] holds certificates of public convenience and necessity…. The Federal Aviation Act of 1958, as amended, provides that an air carrier has a duty to provide air transportation as authorized by its certificate upon reasonable request for such service, without discrimination. 49 U.S.C. § 1374."). (Copies of certain of these certificates are attached as Ex. C.)

26. Amerijet clearly holds itself out to the public for air transportation of cargo in foreign commerce. (The Court may take judicial notice of this through the flight schedule and

information that may be found on Amerijet's website, www.amerijet.com, but for the Court's convenience copies of the pertinent schedules and information are attached as Ex. D.) Thus it is undisputed that Amerijet provides transportation by air, its air cargo transportation services are held out to the public, it has a duty to provide services to the public for public convenience and necessity, and it crosses U.S. national borders in the course of providing air cargo service. These undisputed facts independently establish, separate and apart from the NMB's determination, that Amerijet unequivocally is a "carrier" as defined in the RLA and thus subject to the "duties, requirements, penalties, benefits, and privileges" of the Railway Labor Act. *See* 45 U.S.C. § 182.

27. The National Labor Relations Act clearly and unambiguously excludes from the definition of employer "persons subject to the Railway Labor Act". Specifically, Section 2(2) of that Act, 29 U.S.C. § 152(2), provides that as used in the NLRA "[t]he term 'employer' … *shall not include* … any person subject to the Railway Labor Act." (Emphasis added). Section 2(3) of the NLRA, 29 U.S.C. § 152(3), also excludes from the definition of "employee" any individual "employed by an employer subject to the Railway Labor Act".

28. In addition to the statutory exclusion from coverage under the NLRA for employers subject to the RLA, the NLRB's *Casehandling Manual* addresses "National Mediation Board Jurisdiction" at ¶ 11711, stating that "[a]t 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 Mediations Board (NMB)", and expressly noting that "Section 2(2) of the National Labor Relations Act excludes from the definition of employer 'any person subject to the Railway Labor Act'". The *Casehandling Manual* directs at ¶ 11711.1 that "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."

29. On about May 11, 2011 Amerijet received an unfair labor practice charge filed with the NLRB against Amerijet. On May 12, 2011, Amerijet submitted a position statement, with accompanying undisputed evidence and authority, establishing that Amerijet at all times pertinent has been subject to the RLA and thus the NLRB lacked jurisdiction over the unfair labor practice charge according to sections 2(2) and 2(3) of the NLRA. More specifically, Amerijet's submission included the NMB's certification decisions holding that Amerijet is a "carrier" subject to the RLA, and the evidence separately and independently establishing that Amerijet is a common carrier by air engaged in interstate or foreign commerce and thus a "carrier" for purposes of the RLA contained in Exhibits C and D.

30. Consistent with Amerijet's submission and the NLRB's Casehandling Manual ¶ 11711.1, and NLRB past practice relying in part upon an NMB certification decision finding an employer to be a "carrier" under the RLA as a basis for the NLRB declining jurisdiction over an employer[2], the unfair labor practice charge against Amerijet was withdrawn and the withdrawal approved by Regional Director Kentov on May 23, 2011. (A copy of the letter approving the withdrawal of case no. 12-CA-27146 is attached as Exhibit E.)

[2]As discussed in *Chicago Truck Drivers, Helpers & Warehouse Workers Union v. NLRB*, 1978 U.S. Dist. LEXIS 15242, 99 L.R.R.M. 2967 (N.D. Ill., 1978), the NLRB regional director whose actions were at issue in that case dismissed a representation petition filed with the NLRB by the union for lack of jurisdiction, because the employer that was the subject of the representation petition was a "carrier" subject to the RLA. The regional director's decision was based upon the facts from the region's investigation and an NMB certification decision finding the employer at issue to be a "carrier" under the RLA.

31. On about May 25, 2011, Amerijet received from the NLRB another unfair labor practice charge, case no. 12-CA-27156, which is the subject of this action. (A copy of the charge is attached as Exhibit F.)

32. Following receipt of that charge, Amerijet inquired in a telephone conversation with the Labor Board agent assigned as to whether Amerijet needed to submit again the undisputed evidence and authority establishing that the NLRB lacked jurisdiction over Amerijet. Amerijet was advised that a letter seeking specific information would be forthcoming and further that the Labor Board agent had been instructed that Region 12 was "addressing the jurisdiction issue and the merits at the same time". Amerijet objected to this approach at that time, as the NLRB's clear lack of jurisdiction over Amerijet would prohibit any further proceedings on the charge and certainly any investigation into the putative merits of the charge, as manifestly outside the Board's statutory authority.

33. By letter to Amerijet dated May 27, 2011 from the NLRB Region 12 Miami resident office, the NLRB set forth the "specific allegations contained in" the unfair labor practice charge and requested substantial information from Amerijet "[i]n order to complete the Regional investigation" into the merits of that charge. The information requested included "a complete detailed explanation of the company's decision to outsources/subcontract the work performed by the cargo handlers", the decision forming the basis for the charge. The letter also requested an interview with any company representative "involved in the decision to eliminate the cargo handler position and outsource/subcontract that work". The NLRB noted that "[p]resenting these witnesses for Board affidavits constitutes full cooperation. Conversely, anything less is not considered full cooperation."

34. The NLRB's request for information and documentation, and to interview and obtain affidavits from company representatives, regarding the merits of the unfair labor practice charge against Amerijet was ostensibly pursuant to the NLRB's "investigatory powers" set out in Section 11 of the NLRA, 29 U.S.C. § 161, which include "access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question". However the investigatory powers granted to the NLRB and its duly authorized agents in Section 11 of the NLRA are expressly limited by Congress as only "[f]or the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10". *See* 29 U.S.C. § 161. Section 10 of the NLRA concerns "Prevention of Unfair Labor Practices".

35. As the NLRB had no investigatory power over Amerijet because the unfair labor practice provisions of the NLRA do not apply to Amerijet as a carrier subject to the RLA, Amerijet responded to the NLRB's request for information and presentation of witnesses by filing on June 15, 2011, a position statement addressed to the NLRB's lack of jurisdiction, again with supporting evidence and documentation. Thus in its response, Amerijet again demonstrated, through undisputed evidence and legal authority, that Amerijet at all times pertinent was and is a common carrier by air engaged in foreign commerce over which the National Mediation Board has and has exercised jurisdiction under the Railway Labor Act. Amerijet stated that the unfair labor practice charge again Amerijet therefore must be dismissed by the NLRB and no further investigation conducted.

36. One month after submitting its position statement, on July 14, 2011, Amerijet was served with a 17-item (including subparts) investigatory subpoena duces tecum from the NLRB,

ostensibly issued in "Amerijet International, Inc., Case no. 12-CA-27156" and pursuant to the NLRB's subpoena authority granted as part of the agency's investigatory powers in Section 11 of the NLRA. The subpoena sought such confidential information as "a list of all the employer's customers who transport goods into or out of" Amerijet's on-airport ramp-side facility at Miami International Airport. None of the 17 items pertained to the issue of Amerijet's status as a "carrier" subject to the RLA, as evidence clearly establishing Amerijet's status as a carrier subject to the RLA had previously been provided to the NLRB. (A copy of the subpoena duces tecum is attached as Ex. G.)

37. Amerijet timely filed a petition to revoke the subpoena on July 21, 2011, which included yet again the undisputed evidence and authority establishing that Amerijet is an air carrier subject to the RLA and outside the jurisdiction of the NLRB, and therefore demonstrating that the NLRB investigatory subpoena was ultra vires and outside the delegated investigatory powers of the NLRB. No response to that petition to revoke, and no ruling on that petition to revoke, has been served upon Amerijet as of the filing of this action.

38. Following the filing of Amerijet's petition to revoke the NLRB administrative subpoena, by letter dated July 27, 2011 Amerijet received a request for still more information from the NLRB, "[i]n order to assist the Region in completing its investigation of" the unfair labor practice charge against Amerijet. The additional information requested again included confidential business information but included no request for any information pertaining to Amerijet's status as an air carrier subject to the RLA. (A copy of the July 27, 2011 letter is attached as Ex. H.)

39. By letter of August 5, 2011, Amerijet responded to the NLRB letter requesting supplemental information by again pointing out the absence of NLRB jurisdiction over Amerijet

and thus the absence of any delegated power to investigate the unfair labor practice charge against Amerijet. Amerijet has not subsequently been advised of the withdrawal or dismissal of the charge, and therefore brings this action.

COUNT I
VIOLATION OF 29 U.S.C. § 152(2) AND § 161 AND IMPLEMENTING ADMINISTRATIVE PROCEDURES

40. Plaintiff incorporates by reference paragraphs 1 through 39 above.

41. It is a clear, specific and mandatory provision of the NLRA at 29 U.S.C. § 152(2) that the NLRB's jurisdiction over employers "shall not include" those "subject to the Railway Labor Act".

42. It is likewise clear, specific and mandatory that the investigatory powers of the NLRB regarding unfair labor practices at 29 U.S.C. § 161 are limited to investigations "necessary and proper for the exercise of the powers vested in" the NLRB regarding unfair labor practices.

43. The NLRB "is not granted unqualified powers to enforce the [National Labor Relations] Act. The statute conditions Board action against unfair labor practices upon the filing of a charge; it may not act on its own motion. The requirement is jurisdictional. The Board has no roving, unqualified power to prevent unfair labor practices…"[3] Rather, a valid charge is a prerequisite to exercise of the NLRB's powers vested in Section 10 to prevent unfair labor practices, and so is in turn a prerequisite to an investigation that is "necessary and proper" according to Section 11 of the Act.

[3]*See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 151-52 (1971) (White, J., dissenting) (internal citations omitted), and cases cited therein. *See also Texas Industries, Inc. v. NLRB*, 336 F. 2d 128, 132 (5th Cir. 1964) ("It is established that this section [Section 10 of the NLRA] precludes the Board from initiating a complaint on its own initiative, and that a charge is a prerequisite to the institution of proceedings before the Board").

44. It is beyond cavil that a charge sufficient to support formal Labor Board proceedings against an alleged unfair labor practice by an employer under Section 10 of the NLRA, and thus to support an investigation necessary and proper for the exercise of the NLRB's powers under Section 10, must be against an "employer" covered by the NLRA and thus over which the NLRB has delegated power under the NLRA. Therefore it is beyond the NLRB's authority to investigate an unfair labor practice charge against an employer that is subject to the RLA, as Congress has expressly withheld from the NLRB the power to exercise jurisdiction over such an employer under the NLRA.

45. A charge that is invalid to support a formal complaint proceeding under Section 10 of the NLRA, due to lack of jurisdiction of the NLRB over the employer that is being proceeded against, also cannot be valid to support an investigation by the NLRB into the merits of that same unfair labor practice charge, for the sole purpose of the charge investigation is to determine whether an administrative complaint should issue and formal proceedings commence according to NLRA Section 10(b), 29 U.S.C. § 160(b). [4]

---

[4] *Cf. Equal Employment Opportunity Commission v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) ("The EEOC cannot justify further investigating a charge for which it has conceded there is a valid affirmative defense."); *EEOC v. Ocean City Police Dep't*, 820 F.2d 1378 (4th Cir. 1987) (en banc), *vacated on other grounds*, 486 U.S. 1019 (1988). As stated in more detail by the *Ocean City* court:

> Ordinary logic indicates that it is beyond the authority of EEOC to investigate charges which cannot be pursued. EEOC is not empowered to conduct general fact-finding missions concerning the affairs of the nation's work force and employers. The only legitimate purpose for an EEOC investigation is to prepare for action against an employer charged with employment discrimination, or to drop the matter entirely if the Commission finds the charge to be unfounded. But if no action can be taken on the charge, there is no justification for an investigation absorbing the resources of both the employer and the Commission. It would be anomalous to hold that a charge that was invalid to support an action was nevertheless valid to support investigation, the sole purpose of which is preparation for the action.

46. The NLRB may not in good faith decline to make a decision as to its jurisdiction as a means of avoiding dismissal of a charge against an employer over which the NLRB clearly lacks authority to investigate, for "[t]he 'Board's jurisdiction will not be presumed but must be made to appear'."[5] Rather the NLRB's own administrative procedures implementing Section 2(2), set out in the Casehandling Manual at ¶ 11711, require action be taken when a question arises as to whether a particular employer is under the jurisdiction of the RLA, and further require dismissal of a charge where it is clear the employer is subject to the RLA.

47. Section 2(2) of the NLRA makes perfectly clear that the term "employer" for purposes of the NLRA -- including for purposes of the prevention of unfair labor practices by an employer as set out in NLRA Section 10 -- does not include a carrier subject to the RLA. Because only an "employer" within the NLRA definition can properly be accused of an unfair labor practice by an employer as described in Section 8(a) of the NLRA, only a charge alleging an unfair labor practice by an "employer" covered by the NLRA may support an investigation into that charge.

48. An agency's power is no greater than that delegated to it by Congress.[6] Because Congress did not delegate power to the NLRB over allegations of unfair labor practices by an employer subject to the RLA, the NLRB is prohibited from any action to investigate or otherwise pursue such a charge. Rather, the statute expressly negates the existence of any claimed administrative power by the NLRB over an employer subject to the RLA, and over that employer's employees.

---

[5] *Hercules Powder Company v. NLRB*, 297 F.2d 424, 428 (5th Cir. 1961) (quoting *NLRB v. Ingram*, 273 F.2d 670, 672 (5th Cir. 1960)).

[6] *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

49. A finding that the Labor Board may investigate a charge against an employer that is patently not an "employer" covered by the NLRA would give the Labor Board unrestricted power to meddle in labor relations for any carrier under NMB jurisdiction upon receipt of a charge alleging an unfair labor practice by such a carrier. Congress plainly did not intend for unfair labor practice charges to be investigated or pursued against employers that are excluded from coverage of the NLRA by virtue of their status as "carriers" subject to the RLA and governed by that statute as to labor relations matters.

50. The Board's investigation of the charge of an unfair labor practice by an employer, where the employer is clearly outside the NLRA definition of an "employer", represents an unsustainable arrogation of power not conferred by Congress and a gross violation of Sections 2(2) and 11 of the NLRA. The bald assertion of power by the agency cannot legitimize it.

WHEREFORE, Plaintiff prays that judgment be entered declaring (a) that Amerijet at all times pertinent is and has been a "carrier" subject to the RLA, (b) that the NLRB lacks authority, and instead authority has specifically been withheld by Congress from the NLRB, to investigate unfair labor practice charges against an employer that is subject to the RLA, and (c) that the NLRB may not decline to determine its lack of jurisdiction over Amerijet, an employer subject to the RLA, in order to investigate the merits of an unfair labor practice charge against such an employer in violation of Amerijet's statutory right under the NLRA to be free of such investigations as neither necessary nor proper to the NLRB's delegated powers, and further prays for its costs and for such other and further relief as this Court may deem just and proper.

COUNT II
ACTION TO COMPEL AN AGENCY, BY ITS OFFICERS OR EMPLOYEES, TO PERFORM A DUTY OWED

51. Plaintiff incorporates by reference paragraphs 1 through 50 above.

52. The Mandamus Act, 28 U.S.C. § 1361, provides that "The district courts 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 owed to the plaintiff."

53. The NLRB, through its officers and employees including its Chairman and the Regional Director of NLRB Region 12, has a duty to dismiss the unfair labor practice charge against Amerijet as a result of the NLRB's lack of jurisdiction over Amerijet as a carrier subject to the RLA.

54. Amerijet has a clear right to the relief, as its status as a carrier subject to the RLA has been conclusively established before the NLRB through competent and undisputed evidence and legal authority.

55. The Defendants have a clear duty to act, pursuant to NLRA Section 2(2) and the NLRB Casehandling Manual at ¶ 11711.1 requiring dismissal of a charge, absent withdrawal, "if it is clear that the employer falls under the jurisdiction of the RLA."

56. The NLRB is bound by its own Casehandling Manual, which has the force and effect of law and creates a legal duty upon the NLRB and its officials to act.[7]

[7]*See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (governmental agencies are "bound to respect and to enforce" their own rules); *NLRB v. Kemmerer Village*, 907 F.2d 661, 664-65 (7th Cir. 1990). *See also Gulf States Manufacturers v. NLRB*, 579 F.2d 1298 (5th Cir. 1978) ("It is well settled that an Executive Agency of the Government is bound by its own regulations, which have the force and effect of law, and the failure of an agency to follow its regulations renders its decision invalid"); *Miami Nation of Indians of Indiana. v. U.S. Dep't of Interior*, 255 F.3d 342, 348 (7th Cir. 2001).

57. This Court has jurisdiction to decide whether the NLRB has violated its own procedures and thereby failed to perform a duty to Amerijet.[8]

58. No other adequate remedy is available, as Amerijet is otherwise wholly deprived of its statutory right to be free of NLRB investigation.

59. Because the NLRB has engaged in an abdication of its statutory and administrative responsibilities, the extraordinary remedy of mandamus should lie.

WHEREFORE, Plaintiff petitions this Court for a writ of mandamus, compelling the NLRB, through its Defendant officers and employees, to comply with their legal duties under Section 2(2) of the National Labor Relations Act and the NLRB Casehandling Manual ¶ 117711.1 and to dismiss the unfair labor practice charge against Amerijet, and grant Amerijet its costs and such other and further relief as the Court may deem just and proper.

Dated: August 12, 2011

Respectfully submitted,

AMERIJET INTERNATIONAL, INC.
JOAN CANNY, ESQ.
Fla. Bar No. 0492531
jcanny@amerijet.com
2800 South Andrews Avenue
Fort Lauderdale, FL 33316
Telephone: (954) 320-5367
Facsimile: (305) 423-3246
By: *s/Joan Canny*
Attorney for Plaintiff

[8]*See, e.g., Hollingsworth v. Harris*, 608 F.2d 1026, 1027 (5th Cir. 1979) ("We express no view on whether the Secretary in fact violated its own procedures; we hold only that the district court had jurisdiction to decide the question.").