ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 08-5479

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO,
Appellants

v.

FEDERAL SERVICE IMPASSES PANEL,

FEDERAL LABOR RELATIONS AUTHORITY,

and

UNITED STATES DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Appellees

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL SERVICE IMPASSES PANEL AND THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the district court proceeding before the United States District Court for the District of Columbia were the National Air Traffic Controllers' Association (NATCA), plaintiffs, and the Federal Service Impasses Panel (FSIP), and the Federal Labor Relations Authority (FLRA) and the United States Department of Transportation, Federal Aviation Administration (FAA), defendants. NATCA is the appellant in this court proceeding; FSIP, FLRA and the FAA are the appellees.

B. Ruling Under Review

The ruling under review in this case is the District Court's decision in *National Air Traffic Controllers Association, AFL-CIO v. Federal Service Impasses Panel, et al.*, Case No. 08-481 (D.D.C.), issued on October 23, 2008, reported at 2008 5 WL 418016.

C. Related Cases

This case has not previously been before this Court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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GLOSSARY

Authority or FLRA	Federal Labor Relations Authority
Beverly Health	*Beverly Health and Rehab. Servs. v. Feinstein*, 103 F.3d 151 (D.C. Cir. 1996)
Boire	*Boire v. Greyhound*, 376 U.S. 473 (1964)
Brewer	*Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984)
Br.	Brief
Cal. Racing Bd.	*NLRB v. Cal. Horse Racing Bd.*, 940 F.2d 536 (9th Cir. 1991)
FAA	Federal Aviation Administration
Florida Board	*Florida Board of Business Regulation v. NLRB*, 686 F.3d 1362 (11th Cir. 1982)
FLRC	Federal Labor Relations Council
Food and Commercial Wkrs.	*NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987)
JA	*Joint Appendix*
Karahalios	*Karahalios v. NFFE, Local 1263*, 489 U.S. 527 (1989)
Leedom	*Leedom v. Kyne*, 358 U.S. 184 (1958)
Lipscomb	*Lipscomb v. FLRA*, 200 F.Supp. 2d 650 (S.D. Miss. 2001), *aff'd* 333 F.3d 611 (5th Cir. 2003)

NATCA	National Air Traffic Controllers Association, AFL-CIO
NATCA I	*National Air Traffic Controllers Association, et al. v. FSIP and FLRA*, 2005 U.S. Dist. LEXIS 2964 (D. D.C. Feb. 22, 2005), *aff'd* 437 F.3d 1256 (D.C. Cir. 2006)
NATCA II	*National Air Traffic Controllers Association AFL-CIO, et al. v. FSIP and FLRA*. 437 F.3d 1256 (D.C. Cir. 2006)
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
New York Racing	*New York Racing Association v. NLRB*, 708 F.2d 46 (2d Cir. 1983)
Panel	Federal Service Impasses Panel
PASS	Professional Airways Systems Specialists, AFL-CIO
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006)
ULP	Unfair Labor Practice

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BRIEF FOR THE FEDERAL SERVICE IMPASSES PANEL AND THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The judgment of the district court under review in this case was issued on October 23, 2008. A copy of the district court's memorandum opinion and order is at Joint Appendix (JA) 205-212. The district court concluded that it was without subject matter jurisdiction over the complaint and dismissed the action. The appellants filed

their notice of appeal of the district court's judgment on November 10, 2008, within the 60-day period for filing such an appeal under Fed. R. App. P. 4(a)(1). This Court has jurisdiction to review the district court's decision and order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that it was without subject matter jurisdiction over a complaint requesting the district court to declare that the Federal Service Impasses Panel erred by declining to assert jurisdiction over a collective bargaining dispute, and to order the Panel to resolve the dispute.

STATEMENT OF THE CASE

This case arose out of contract negotiations between the National Air Traffic Controllers Association, AFL-CIO ("NATCA" or "union") and the United States Department of Transportation, Federal Aviation Administration (FAA). In April 2006, NATCA filed a request with the Federal Service Impasses Panel (Panel), an entity within the Federal Labor Relations Authority (FLRA), for assistance in resolving impasses in these negotiations. In response, the FAA contended that the FAA personnel system, authorized under 49 U.S.C. §§ 106(l) and 40122, divested the Panel of jurisdiction over the collective bargaining dispute. After receiving legal

arguments on the issue of the Panel's jurisdiction from the parties, the Panel declined to assert jurisdiction over the bargaining dispute.

Subsequently, NATCA filed charges with the FLRA's General Counsel (General Counsel) against the FAA alleging, among other things, that the FAA's failure to accede to the Panel's jurisdiction and its ultimate unilateral implementation of contract terms constituted unfair labor practices (ULPs) under § 7116(a) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) (Statute).[1] The General Counsel determined not to issue complaints in these cases.

NATCA then filed suit in the district court against the Panel, the FLRA, and the FAA seeking a declaration that the Panel erred in declining to assert jurisdiction, and an order requiring that the Panel resolve the bargaining impasses. The Panel and the FLRA, as well as the FAA, moved to dismiss the complaint for lack of subject matter jurisdiction or in the alternative for summary judgment. The district court, noting that it had previously dismissed a substantially identical complaint, *National Air Traffic Controllers Association, et al. v. FSIP and FLRA*, 2005 U.S. Dist. LEXIS 2964 (D. D.C. Feb. 22, 2005), *aff'd* 437 F.3d 1256 (D.C. Cir. 2006) (*NATCA I*), granted the motions and dismissed the complaint for lack of jurisdiction. This appeal followed.

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[1] Pertinent statutory and regulatory provisions are set forth in the Addendum to this brief.

STATEMENT OF FACTS

A. The Panel

The Panel was originally created by Executive Order 11491, 3 C.F.R. 861, 864 (1966-70 Compilation) and was designated as an entity within the Federal Labor Relations Council (FLRC). *See Council of Prison Locals v. Brewe*r, 735 F.2d 1497, 1499 n.2 (D.C. Cir. 1984) (*Brewer*). The FLRC was created by the Executive Order as the central policy-making and adjudicative agency for federal sector labor-management relations. Exec. Order 11491, § 4. The Panel was composed of at least three members appointed by the President, serving on a part-time basis. Under the Executive Order, the Panel had the authority to recommend procedures for the resolution of collective bargaining impasses or to settle the impasse "by appropriate action." Exec. Order 11491, §§ 5 and 17. Under its regulations, the Panel also had the discretion to "dismiss" a request for assistance in resolving an impasse. 5 C.F.R. § 2471.6 (1978).

The Panel was reconstituted by § 7119 of the Statute essentially as it had existed under the Executive Order, as an "entity within" the FLRA. *See Brewer*, 735 F.2d at 1499-1500. Under the Statute, the Panel is composed of a Chairman and at least six other members, all of whom are appointed by the President "solely on the basis of fitness to perform the duties and functions involved, from among individuals

who are familiar with Government operations and knowledgeable in labor-management relations." 5 U.S.C. § 7119(c)(2). The Panel's function continued to be to "provide assistance in resolving negotiation impasses between agencies and exclusive representatives" of agency employees. 5 U.S.C. § 7119(c)(1). Any party engaged in collective bargaining under the Statute may request the Panel's assistance in resolving an impasse. 5 U.S.C. § 7119(b). Upon the submission of a request for Panel assistance, the Panel "shall promptly investigate any impasse presented to it" and assist the parties in resolving the impasse through whatever means the Panel "may consider appropriate." 5 U.S.C. § 7119(c)(5)(A). If the parties are unable to settle the dispute voluntarily, the Panel then "may . . . take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse." 5 U.S.C. § 7119(c)(5)(B)(iii).

The Panel has published regulations implementing § 7119 of the Statute. 5 C.F.R. §§ 2470.1-2473.1 (2009). As relevant here, the regulations provide that after having conducted an investigation and having given due consideration, the Panel shall either: "[d]ecline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction. . . ;" or take jurisdiction and take steps to resolve the impasse. 5 C.F.R. § 2471.6(a)(1) and (2).

B. The FAA Personnel System

The genesis of this litigation is found in the FAA's unique personnel system. Congress has granted the FAA the authority to establish its own personnel system, exempt from many of the provisions of Title 5 of the United States Code and other federal personnel laws. The relevant statutory provisions are found at 49 U.S.C. §§ 106(l) and 40122. The general grant of the authority to establish the FAA personnel system appears at 49 U.S.C. § 40122(g)(1), where Congress required that, in order to address "the unique demands on the agency's work force[,]" the system must provide for flexibility in "hiring, training, compensation, and location of personnel." 49 U.S.C. § 40122 (g)(1). Despite the FAA's exemption from many of the provisions of Title 5 that govern federal employment, certain of these provisions were to continue to apply. Among those provisions remaining applicable to the FAA are those in the Statute relating to collective bargaining.[2] 49 U.S.C. § 40122(g)(2).

[2] As the current 49 U.S.C. § 40122(g) was originally enacted, the FAA was exempt from the Statute. Pub. L. No. 104-50 § 347, 109 Stat. 460 (1995). Congress subsequently amended § 347 and added "chapter 71, relating to labor management relations[,]" to those provisions of Title 5 that were to remain applicable to the FAA. Pub. L. 104-122 § 1, 110 Stat. 876 (1996). The legislative evolution of the relevant provisions of Title 49 is set out in this Court's decision in *National Air Traffic Controllers Association AFL-CIO, et al. v. FSIP and FLRA*. 437 F.3d 1256, 1259-60 (D.C. Cir. 2006) (*NATCA II*).

Thus, the FAA was to be subject to the collective bargaining requirements of the Statute, including § 7119 relating to impasse resolution procedures before the Panel. However, Congress established a special procedure for the FAA to follow when negotiating over "changes to the [FAA] personnel management system." 49 U.S.C § 40122(a). Specifically, 49 U.S.C § 40122(a) provides:

> (a) In general.—
>
> (1) Consultation and negotiation.--In developing and making changes to the personnel management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.
>
> (2) Mediation.--If the Administrator does not reach an agreement under paragraph (1) with the exclusive bargaining representatives, the services of the Federal Mediation and Conciliation Service shall be used to attempt to reach such agreement. If the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the personnel management system shall not take effect until 60 days have elapsed after the Administrator has transmitted the proposed change, along with the objections of the exclusive bargaining representatives to the change, and the reasons for such objections, to Congress. The 60-day period shall not include any period during which Congress has adjourned sine die.

Finally, Congress expressly provided the FAA's Administrator with the authority to fix the compensation of FAA employees. 49 U.S.C. § 106(l). Section 106(l) also provides that, "[i]n fixing compensation and benefits of officers and employees, the Administrator shall not engage in any type of bargaining, except to the

extent provided for in section 40122(a), nor shall the Administrator be bound by any requirement to establish such compensation or benefits at particular levels."[3] 49 U.S.C. § 106(l).

C. Factual Background and Related Prior Litigation

1. Background to *NATCA I*

In 2003, separate contract negotiations between the FAA and NATCA, and the FAA and the Professional Airways Systems Specialists, AFL-CIO (PASS), another union that represented FAA employees, resulted in impasses. In July 2003, NATCA and PASS filed requests for Panel assistance in resolving the bargaining impasses. As in the instant case, the FAA contended that 49 U.S.C. §§ 106 and 40122(a) divested the Panel of jurisdiction over the collective bargaining disputes at issue. Thereafter the Panel solicited, and the parties provided, legal arguments on the issue of the Panel's jurisdiction. *NATCA I*, 2005 U.S. Dist. LEXIS 2964 at *3-*4.

On January 9, 2004, the Panel issued its decisions. In each case, the Panel concluded that "it is unclear whether the Panel has the authority to resolve the parties' impasse[s]." *NATCA II*, 437 F.3d at 1261. The Panel noted that it was not endorsing,

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[3] Generally, where employee compensation is not fixed by law, but is left to the discretion of the employing agencies, agencies are obligated to bargain over compensation. *See FDIC v. FLRA*, 977 F.2d 1493, 1494 (D.C. Cir. 1992) (citing *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990)).

either explicitly or implicitly, the FAA's statutory interpretations. *NATCA II*, 437 F.3d at 1262.

2. The District Court's Decision in *NATCA I*

Following receipt of the Panel's decisions, NATCA and PASS jointly filed suit in the United States District Court for the District of Columbia (district court), seeking an order declaring that the Panel's decisions violated specific provisions of the Statute, and requiring the Panel to resolve the impasses as requested by the unions. The district court dismissed the case for lack of jurisdiction.

The district court first identified the "relevant question" in the proceeding as "who should determine the interplay between [the Statute] . . . and the particular statutory provisions that affect labor relations at the FAA[.]" *NATCA I*, 2005 U.S. Dist. LEXIS 2964 at *8. Finding that the FLRA is the appropriate forum to decide the question in the first instance, the court concluded "that it is without jurisdiction" to entertain the union's complaint. *Id.* *9-*11. In so holding, the court stated that what was at issue before the Panel was essentially an "obligation to bargain issue" and that the Panel does not have the authority to resolve such issues (citing *Am. Fed. of Gov't Employees v. FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985) and *Interpretation and Guidance*, 11 F.L.R.A. 626, 628 (1983)). *Id.* at *9-*10. According to the court, such questions are to be decided by the FLRA. *Id.*

Noting the general rule that decisions of the Panel are not subject to judicial review, the district court also stated that a district court could exercise jurisdiction to invalidate a Panel order made "in excess of its delegated powers and contrary to a specific prohibition of the [Statute]" (citing *Brewer*, 735 F.2d at 1500-1501 (in turn citing *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (*Leedom*)). *NATCA I*, 2005 U.S. Dist. LEXIS 2964 at *11-*13. However, according to the court, "[t]he Panel's refusal to resolve the parties' impasses in light of arguable legal questions concerning the Panel's authority cannot be deemed a violation of a clear and mandatory statutory provision." *Id*. at *13-*14 (internal quotations omitted). In so finding, the court recognized that the Panel must initially determine whether the impasse at issue is subject to its procedures, noting that impasses *in fact* may not necessarily be impasses legally subject to procedures under § 7119 of the Statute. *Id*. at *13-*14.

For the reasons discussed above, the district court entered an order dismissing the unions' complaints. *NATCA I*, 2005 U.S. Dist. LEXIS 2964 at *15.

3. This Court's Decision in *NATCA II*

On appeal, this Court affirmed the district court's decision. Citing *Brewer*, the Court first stated that determinations of the Panel are not subject to judicial review. *NATCA II*, 437 F.3d at 1262. In addition, the Court held that *Leedom* jurisdiction is not available. In that regard, the Court stated that by declining to assert jurisdiction

where there was a reasonable question as to jurisdiction, the Panel did not violate a specific and unambiguous statutory directive as required for *Leedom* jurisdiction. *Id.* at 1264. The Court also held that the proper forum for addressing the underlying question of the Panel's jurisdiction is the FLRA, and that "if the Unions' interpretation of the disputed statutory provisions is correct, then . . . they have viable unfair labor practice charges that can be raised with and addressed by the FLRA." *Id.* at 1265.

4. The Current Dispute Between FAA and NATCA

By letter dated April 7, 2006, NATCA requested assistance of the Panel in resolving a collective bargaining impasse resulting from negotiations between NATCA and the FAA. JA 80. By letter dated July 6, 2006, the Panel declined to assert jurisdiction over the impasse, stating that the FAA had raised arguable questions concerning whether the Panel has authority to resolve the collective bargaining disputes at issue. JA 83. The Panel further stated that it was not endorsing, either explicitly or implicitly, the FAA's statutory interpretations. *Id.* at n.1.

NATCA also filed ULP charges arising from these negotiations. As relevant here, one of the charges alleged that the FAA's implementation of contract terms without submission of the impasses to the Panel constituted bargaining in bad faith under § 7116(a)(5) of the Statute. JA 204. On July 25, 2007, the FLRA's San Francisco Regional Director (RD) dismissed this charge. JA 86-88. In dismissing

NATCA's charges, the RD stated that "[f]airly construed, [49 U.S.C.] § 40122(a)(1) and (2) replaced the provisions under the Statute for resolution of impasses."[4] JA 87.

5. The District Court's Decision in the Instant Case

As it had in the previous case, NATCA filed suit in the district court requesting the court to declare that the Panel "has mandatory jurisdiction to resolve impasses between the FAA and labor organizations acting as exclusive representatives of FAA [employees]" and to enjoin the Panel from "refusing to proceed . . . to exercise its jurisdiction" in such cases. JA 11. For the reasons discussed below, the district court dismissed the case for lack of jurisdiction.

As it previously stated in *NATCA I*, the district court determined that the relevant question is who should determine the interplay between the Statute and the particular statutory provisions that affect labor relations at the FAA. JA 208. The court held again that the FLRA, through the ULP process, is the appropriate forum to determine the Panel's jurisdiction. JA 208-09. The court noted in this regard that under those procedures, the General Counsel has unreviewable authority to determine whether a ULP complaint will issue. JA 209. According to the court, matters, such as

[4] A subsequent appeal of the RD's determination to the General Counsel and a request for reconsideration were denied without further analysis. JA 196-200.

those at issue here, that are subject to ULP procedures "must be examined first by the FLRA, or not at all." JA 209.

The district court also found that NATCA's reliance on *Florida Board of Business Regulation v. NLRB*, 686 F.2d 1362 (11th Cir. 1982) (*Florida Board*) for the proposition that the court could exercise general federal question jurisdiction to award declaratory and injunctive relief is misplaced. The court specifically noted that under this Court's precedent, general federal question jurisdiction is not available where judicial review is precluded by a specific statutory scheme (citing *Beverly Health & Rehab. Serv. v. Feinstein*, 103 F.3d 151, 154 (D.C. Cir. 1996) (NLRB General Counsel decisions not to issue a complaint are not reviewable) and *Brewer*, 735 F.2d at 1500 (general federal question jurisdiction is not available to review Panel decisions)). JA 210.

The district court dismissed as "unrealistic" NATCA's claim that it was not seeking review of the Panel's decision not to assert jurisdiction over the impasse or the General Counsel's refusal to issue a ULP complaint. In this regard, the court noted that NATCA's suit was seeking the same result as that sought first before the Panel and then before the General Counsel – namely, a determination that the Panel had jurisdiction to resolve the impasses between it and the FAA. JA 210.

The district court concluded that because exclusive jurisdiction to resolve the issues before it rests with the FLRA, "including the possibility that the FLRA General Counsel will refuse to issue a complaint," the court lacked jurisdiction. JA 210.

STANDARD OF REVIEW

The standard for this Court's review of the district court's dismissal of the complaint for lack of jurisdiction is *de novo*. *Ass'n of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 341 (D.C. Cir. 2002). However, to the extent that the Court finds it necessary to construe and apply provisions of the Statute, the Court must defer to the FLRA's interpretation of those provisions. *E.g., Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

SUMMARY OF ARGUMENT

This Court held in *NATCA II* that a Panel determination to decline to assert jurisdiction over the union's bargaining dispute was not subject to review in either the district courts or the courts of appeals. Nothing in the circumstances of this case warrants a different result. Accordingly, the district court's determination to dismiss the case for lack of jurisdiction should be affirmed.

1. It is beyond dispute that decisions of the Panel and determinations by the General Counsel not to issue ULP complaints are not subject to judicial review. In that regard, NATCA's contention that it is not seeking review of an administrative

determination by the FLRA's General Counsel of the FLRA or the Panel is, as the district court stated, "unrealistic." NATCA sought before the district court the precise result it sought before the Panel and the General Counsel, namely, a determination that the impasse between it and the FAA was subject to the Panel's processes.

2. In *NATCA II*, this Court expressly held that the union's avenue of redress for the remedy it seeks here is the Statute's ULP procedures. *Nat'l Air Traffic Controllers Ass'n AFL-CIO, et al. v. FSIP and FLRA*. 437 F.3d 1256, 1264-66 (D.C. Cir. 2006) (*NATCA II*). In accordance with the Court's direction, NATCA filed ULP charges over FAA's refusal to participate in Panel proceedings. However, NATCA did not achieve the results it sought because the FLRA's General Counsel, in her unreviewable discretion, refused to issue complaints based on NATCA's charges.

That the General Counsel's determination not to issue a complaint is final and unreviewable does not render the Statute's ULP processes inadequate or create jurisdiction in the federal courts. NATCA pursued vindication of its alleged statutory rights through the appropriate mechanism. *See Karahalios v. NFFE, Local 1263*, 489 U.S. 527, 533-34 (1989) (*Karahalios*) (FLRA's processes are the exclusive means of vindicating rights under the Statute). Congress has created a comprehensive remedial scheme for the disposition and review of the merits of ULP charges, including the unreviewable discretion of the General Counsel to issue complaints.

Where Congress has provided such a comprehensive scheme, courts "are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Karahalios*, 489 U.S. at 533. Further, where review of agency actions is precluded by a specific statutory scheme such as that present here, general federal question jurisdiction is not available to obtain review in the federal courts. *See, e.g.*, *Council of Prison Locals v. Brewe*r, 735 F.2d 1497, 1499 (D.C. Cir. 1984).

3. NATCA mistakenly relies on *Florida Board of Business Regulation v. NLRB*, 686 F.3d 1362 (11th Cir. 1982) (*Florida Board*) to establish general federal question jurisdiction in the instant case. The *Florida Board* court found federal question jurisdiction to declare a plaintiff's rights under the National Labor Relations Act (NLRA), even though the underlying action of the NLRB was itself unreviewable. This holding is in direct conflict with the law of this circuit that general federal question jurisdiction is not available where judicial review is precluded by a specific statutory scheme.

Further, the Second and Ninth Circuits have specifically rejected the *Florida Board* holding, and no other circuit court has adopted the rule. Both the Second and Ninth Circuits declined to find federal question jurisdiction where judicial review of the NLRB's action at issue was precluded by the specific provisions of the NLRA.

In addition to being inconsistent with the precedent of this and other courts, the *Florida Board* holding is clearly in error. The broad holding of *Florida Board* permits district court review of a federal agency action affecting a party's statutory rights, even where, as here, Congress had specifically determined that such an agency action was not subject to judicial review. Such a holding frustrates congressional intent that certain agency actions are to be beyond the purview of the federal courts.

NATCA has not established an independent jurisdictional basis for its request for declaratory relief. Accordingly, the district court's decision should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT IT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER A COMPLAINT REQUESTING THE DISTRICT COURT TO DECLARE THAT THE FEDERAL SERVICE IMPASSES PANEL ERRED BY DECLINING TO ASSERT JURISDICTION OVER A COLLECTIVE BARGAINING DISPUTE, AND TO ORDER THE PANEL TO RESOLVE THE DISPUTE.

As it did in *NATCA I* and *NATCA II*, the union is asking first the district court, and now this Court, to review and effectively overturn a determination of the Panel to decline to assert jurisdiction over the union's bargaining dispute. As discussed above, this Court held in *NATCA II* that such review is not available in either the district courts or the courts of appeals. Nothing in the circumstances of this case warrants a

different result. Accordingly, the district court's determination to dismiss the case for lack of jurisdiction should be affirmed.

As an initial matter, NATCA contends (NATCA Brief (Br.) 20), as it did before the district court, that it "does not seek review of, or relief from an administrative determination by the General Counsel of the FLRA or the [Panel]." As the district court stated, however, such a contention is "unrealistic." NATCA sought before the district court the precise result it sought before the Panel and the General Counsel, namely, a determination that the impasse in fact between it and the FAA was an impasse subject to the Panel's processes under 5 U.S.C. § 7119. It was NATCA's failure to achieve its desired results in these fora that precipitated the suit in the district court.[5]

It is beyond dispute that decisions of the Panel and determinations by the General Counsel not to issue ULP complaints are not subject to judicial review.[6]

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[5] In addition, NATCA's statement (Br.20) that the "district court's reliance upon the previous administrative determinations by the FLRA General Counsel as a basis for deciding this declaratory judgment action is fatally flawed" has no merit. The court did not rely at all on the substance of the General Counsel's determination. To the contrary, the district court relied solely on judicial precedent to determine that it was without jurisdiction to hear NATCA's complaint.

[6] "Congress precluded direct judicial review of Panel orders." *NATCA II*, 437 F.3d at 1262 (quoting *Brewer*, 735 F.2d at 1498). Similarly, determinations of the General Counsel of the FLRA, just as those of her counterpart with the National Labor

(footnote continued on next page)

NATCA, relying exclusively on the Eleventh Circuit's decision in *Florida Board*, mistakenly asserts that, nonetheless, general federal question jurisdiction pursuant to 28 U.S.C. § 1331 is applicable in the instant case. However, as the district court noted, this Court has plainly held that where, as here, judicial review is precluded by a specific statutory scheme, general federal question jurisdiction is not available.

A. NATCA's Exclusive Avenue of Redress was the Statute's ULP Procedure

In *NATCA II*, this Court held that the union's contention that the Panel had jurisdiction over its bargaining impasses with the FAA must be addressed through the Statute's ULP procedures. *NATCA II*, 437 F.3d at 1264-66. As discussed above, NATCA pursued the course suggested by the Court and filed ULP charges with the General Counsel. However, in her unreviewable discretion, the FLRA's General Counsel refused to issue complaints based on NATCA's charges. Contrary to NATCA's contention before the district court (Complaint at ¶ 19, JA 8)), this fact does not make this case "ripe for the Court's resolution." NATCA pursued vindication of its alleged statutory rights through the appropriate mechanism. *See Karahalios v. NFFE, Local 1263*, 489 U.S. 527, 533-34 (1989) (*Karahalios*) (FLRA's

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Relations Board (NLRB), not to issue a ULP complaint are not subject to judicial review. *Patent Office Prof'l Ass'n v. FLRA*, 128 F.3d 751, 752-53 (D.C. Cir. 1997); *Turgeon v. FLRA*, 677 F.2d 937, 938-39 (D.C. Cir. 1982).

processes are the exclusive means of vindicating rights under the Statute). No private judicial remedy exists to enforce rights granted under the Statute. *Id.*

That the General Counsel's determination not to issue a complaint is final and unreviewable does not render the process inadequate or create jurisdiction in the federal courts. Modeling the Statute's ULP procedures after those of the NLRB, Congress created a comprehensive remedial scheme for the disposition and review of the merits of ULP charges, including the unreviewable discretion of the General Counsel to issue complaints. *See NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987) (*Food and Commercial Wkrs.*) (explaining the purposeful and comprehensive nature of the NLRB's ULP procedure). Where Congress has provided such a comprehensive scheme, courts "are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Karahalios*, 489 U.S. at 533. Further, and as this Court has repeatedly held, where review of agency actions is precluded by a specific statutory scheme, general federal question jurisdiction is not available in the federal courts. *Brewer*, 735 F.2d at 1499 (Panel decisions); *Beverly Health and Rehab. Servs. v. Feinstein*, 103 F.3d 151, 154 (D.C. Cir. 1996) (citing *Food and Commercial Wkrs.*, 484 U.S. at 131) (*Beverly Health*) (NLRB General Counsel determinations). It is "illogical in the extreme" to hold that Congress purposely excluded a matter from review only to permit review

under more general grants of judicial authority. *Food & Commercial Wkrs.*, 484 U.S. at 131.

B. NATCA's Reliance on *Florida Board* is Misplaced

Contrary to NATCA's assertion (Br. 13), the Eleventh Circuit's decision in *Florida Board* does not "establish that a district court does have subject mater jurisdiction to render a declaratory judgment on an issue of law relating to a federal labor agency's jurisdiction."[7] As the district court properly noted, *Florida Board* is contrary to the precedent of this Court. Further, *Florida Board* was wrongly decided.

In *Florida Board*, the court held that it had federal question jurisdiction to declare that the NLRB had jurisdiction to order a representation election for a group of

[7] The issue before this court is not, *assuming that jurisdiction is available*, whether the standards for a declaratory judgment are met. The issue is whether the district court had jurisdiction pursuant to 28 U.S.C. § 1331 in the first instance. It is not disputed that the Declaratory Judgment Act "is not an independent source of federal jurisdiction" and that "the availability of [declaratory] relief presupposes the existence of a judicially remediable right." *C&E Serv., Inc. of Washington v. Dist. of Columbia Water and Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002) (quoting *Schilling v. Rogers*, 363 U.S. 666, 677 (1960)). Further, federal courts may not declare a plaintiff's rights under a federal statutory scheme that Congress intended to be enforced exclusively through an administrative process if the administrative process is itself unreviewable. *Id.* As discussed above (p. 19-20), Congress intended that the FLRA's processes involved here are to be the exclusive means of vindicating the pertinent rights under the Statute and that no private judicial remedy exists to enforce such rights. *Karahalios*, 489 U.S. at 533-34.

employees.[8] The court found the general prohibition of judicial review of NLRB representation decisions enunciated in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) (*Boire*) to be inapplicable. The court held instead that "a plaintiff who cannot seek review of the [NLRB's] order in the Court of Appeals but who claims that the [NLRB] 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." *Florida Board*, 686 F.2d at 1370 (citing *Leedom* 358 U.S. at 190).[9]

Florida Board is in direct conflict with the law of this Court. Rather than grant district courts federal question jurisdiction where review is otherwise unavailable, this Court has held that where review of agency actions is precluded by a specific statutory scheme, general federal question jurisdiction is not available in the federal courts. *Brewer*, 735 F.2d at 1499; *Beverly Health*, 103 F.3d at 154. NATCA's attempt to distinguish those cases on the basis that they did not involve a plea for declaratory judgments (Br. 19) is unavailing. As noted above, p. 21 n.7, in a declaratory judgment

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[8] The court found federal question jurisdiction based on both the NLRA and the Constitution. *Florida Board*, 686 F.2d at 1370. There is, of course no allegation of a Constitutional violation in the instant case.

[9] To the extent that *Florida Board* based its jurisdiction on *Leedom*, it is clearly inapposite here. This Court expressly held in *NATCA II* that *Leedo*m jurisdiction was not available for the judgment it seeks here. *NATCA II*, 437 F.3d at 1262-1264.

action, the threshold question is always whether there is an independent basis for jurisdiction. *Brewer* and *Beverly Health* both address the jurisdictional question and hold that federal question jurisdiction is not available in circumstances substantially identical to those found in this case.

Further, not only is *Florida Board* in conflict with the law of this Court, but the *Florida Board* holding has been rejected by both the Ninth and Second Circuits.[10] In holding that the district court did not have jurisdiction over an otherwise nonreviewable action of the NLRB, the Ninth Circuit stated, as this Court also has, that "general federal question jurisdiction is qualified by more specific statutory limitations on that jurisdiction." *NLRB v. Cal. Horse Racing Bd.*, 940 F.2d 536, 539 n.3 (9th Cir. 1991) (*Cal Racing Bd.*) (citing *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 422 (1965) and *Louisville and Nashville R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983)). Contrary to the conclusion of the *Florida*

[10] The only court to adopt *Florida Board* was the United States District Court for the Southern District of Mississippi. *Lipscomb v. FLRA*, 200 F.Supp. 2d 650, 655-56 (S.D. Miss. 2001), *aff'd* 333 F.3d 611 (5th Cir. 2003) (*Lipscomb*). Although the district court found jurisdiction in *Lipscomb*, the court ruled against the plaintiff on the merits of the suit. *Lipscomb*, 200 F. Supp 2d at 664. Accordingly, both the appeal to the circuit court, *Lipscomb v. FLRA*, 333 F.3d 611 (5th Cir. 2003), and the petition for certiorari filed by the plaintiff, *Cross v. FLRA*, 541 U.S. 935 (2004), concerned only the district court's merits determination, and did not address the jurisdictional issue.

Board court, the Ninth Circuit found it did not have jurisdiction to review a nonfinal action by the NLRB. *Cal Racing Bd.*, 940 F.2d at 542.

In *New York Racing Association v. NLRB*, 708 F.2d 46, 56-57 and n.6 (2d Cir. 1983) (*New York Racing*), the court rejected the plaintiff's reliance on *Florida Board* to establish jurisdiction over an NLRB representation decision, finding that the *Florida Board* court misread *Leedom* and *Boire*. The court's "short answer" to the plaintiff's contention that without district court jurisdiction the NLRB's representation decision at issue would never be reviewable was that "not every governmental action is subject to review by judges." *New York Racing*, 708 F.2d at 56-57. Similarly, in the instant case, Congress has purposely created a scheme, where certain actions, namely Panel and General Counsel determinations, are not subject to judicial review.

In addition to being inconsistent with the precedent of this and other courts, the *Florida Board* holding is clearly in error. According to the *Florida Board* court, "a plaintiff who cannot seek review of the [NLRB's] order in the Court of Appeals, but who claims that the [NLRB] violated his federal rights has the right to repair to the district court under any statute that may grant the district court power to hear his claim." *Florida Board*, 686 F.2d at 1370. This unqualified principle is so broad that it would always permit district court review of a federal agency action affecting a party's statutory rights, even where, as here, Congress had specifically determined that

such an agency action was not subject to judicial review. Such a holding not only serves to frustrate Congressional intent that certain agency actions are beyond the purview of the federal courts, it is "illogical in the extreme." *Food & Commercial Wkrs.*, 484 U.S. at 131.

As demonstrated above, NATCA has not established an independent jurisdictional basis for its request for declaratory relief. Accordingly, the district court's decision should be affirmed.

CONCLUSION

The ruling of the district court should be affirmed

Respectfully submitted,

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October 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO, Appellant	)	
FEDERAL LABOR RELATIONS AUTHORITY, FEDERAL SERVICE IMPASSES PANEL, and UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Appellants	)	No. 08-5479

CERTIFICATE OF SERVICE

I certify that a copy of the Brief for the Federal Labor Relations Authority has been served this day, October 19, 2009, by the Court's electronic case filing system and a hard copy of the brief was served, by hand delivery, upon the following:

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§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In

the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules,

regulations, or other policy directives issued by the Office of Personnel Management.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what matter it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasses, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

Sec. 40122. Federal Aviation Administration personnel management system

(a) In General.--

(1) Consultation and negotiation.--In developing and making changes to the personnel management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.

(2) Mediation.--If the Administrator does not reach an agreement under paragraph (1) with the exclusive bargaining representatives, the services of the Federal Mediation and Conciliation Service shall be used to attempt to reach such agreement. If the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the personnel management system shall not take effect until 60 days have elapsed after the Administrator has transmitted the proposed change, along with the objections of the exclusive bargaining representatives to the change, and the reasons for such objections, to Congress. The 60-day period shall not include any period during which Congress has adjourned sine die.

(3) Cost savings and productivity goals.--The Administration and the exclusive bargaining representatives of the employees shall use every reasonable effort to find cost savings and to increase productivity within each of the affected bargaining units.

(4) Annual budget discussions.--The Administration and the exclusive bargaining representatives of the employees shall meet annually for the purpose of finding additional cost savings within the Administration's annual budget as it applies to each of the affected bargaining units and throughout the agency.

(b) Expert Evaluation.--On the date that is 3 years after the personnel management system is implemented, the Administration shall employ outside experts to provide an independent evaluation of the effectiveness of the system within 3 months after such date. For this purpose, the Administrator may utilize the services of experts and consultants under section 3109 of title 5 without regard to the

limitation imposed by the last sentence of section 3109(b) of such title, and may contract on a sole source basis, notwithstanding any other provision of law to the contrary.

(c) Pay Restriction.--No officer or employee of the Administration may receive an annual rate of basic pay in excess of the annual rate of basic pay payable to the Administrator.

(d) Ethics.--The Administration shall be subject to Executive Order No. 12674 and regulations and opinions promulgated by the Office of Government Ethics, including those set forth in section 2635 of title 5 of the Code of Federal Regulations.

(e) Employee Protections.--Until July 1, 1999, basic wages (including locality pay) and operational differential pay provided employees of the Administration shall not be involuntarily adversely affected by reason of the enactment of this section, except for unacceptable performance or by reason of a reduction in force or reorganization or by agreement between the Administration and the affected employees' exclusive bargaining representative.

(f) Labor-Management Agreements.--Except as otherwise provided by this title, all labor-management agreements covering employees of the Administration that are in effect on the effective date of the Air Traffic Management System Performance Improvement Act of 1996 shall remain in effect until their normal expiration date, unless the Administrator and the exclusive bargaining representative agree to the contrary.

(g) Personnel Management System.--

(1) In general.--In consultation with the employees of the Administration and such non-governmental experts in personnel management systems as he may employ, and notwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement, not later than January 1, 1996, a personnel management system for the Administration that addresses the unique demands on the agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.

(2) Applicability of title 5.--The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of--

(A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as

provided in chapter 12 of title 5;
(B) sections 3308-3320, relating to veterans' preference;
(C) chapter 71, relating to labor-management relations;
(D) section 7204, relating to antidiscrimination;
(E) chapter 73, relating to suitability, security, and conduct;
(F) chapter 81, relating to compensation for work injury;
(G) chapters 83-85, 87, and 89, relating to retirement, unemployment compensation, and insurance coverage; and
(H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

(3) Appeals to merit systems protection board.--Under the new personnel management system developed and implemented under paragraph (1), an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.
(4) Effective date.--This subsection shall take effect on April 1, 1996.

(h) Right To Contest Adverse Personnel Actions.--An employee of the Federal Aviation Administration who is the subject of a major adverse personnel action may contest the action either through any contractual grievance procedure that is applicable to the employee as a member of the collective bargaining unit or through the Administration's internal process relating to review of major adverse personnel actions of the Administration, known as Guaranteed Fair Treatment, or under section 40122(g)(3).
(i) Election of Forum.--Where a major adverse personnel action may be contested through more than one of the indicated forums (such as the contractual grievance procedure, the Federal Aviation Administration's internal process, or that of the Merit Systems Protection Board), an employee must elect the forum through which the matter will be contested. Nothing in this section is intended to allow an employee to contest an action through more than one forum unless otherwise allowed by law.
(j) Definition.--In this section, the term ``major adverse personnel

action" means a suspension of more than 14 days, a reduction in pay or grade, a removal for conduct or performance, a nondisciplinary removal, a furlough of 30 days or less (but not including placement in a nonpay status as the result of a lapse of appropriations or an enactment by Congress), or a reduction in force action.

§ 106. Federal Aviation Administration

(l) Personnel and Services.--

(1) Officers and employees.--Except as provided in subsections (a) and (g) of section 40122, the Administrator is authorized, in the performance of the functions of the Administrator, to appoint, transfer, and fix the compensation of such officers and employees, including attorneys, as may be necessary to carry out the functions of the Administrator and the Administration. In fixing compensation and benefits of officers and employees, the Administrator shall not engage in any type of bargaining, except to the extent provided for in section 40122(a), nor shall the Administrator be bound by any requirement to establish such compensation or benefits at particular levels.

(2) Experts and consultants.--The Administrator is authorized to obtain the services of experts and consultants in accordance with section 3109 of title 5.

(3) Transportation and per diem expenses.--The Administrator is authorized to pay transportation expenses, and per diem in lieu of subsistence expenses, in accordance with chapter 57 of title 5.

(4) Use of personnel from other agencies.--The Administrator is authorized to utilize the services of personnel of any other Federal agency (as such term is defined under section 551(1) of title 5).

(5) Voluntary services.--

(A) General rule.--In exercising the authority to accept gifts and voluntary services under section 326 of this title, and without regard to section 1342 of title 31, the Administrator may not accept voluntary and uncompensated services if such services are used to displace Federal employees employed on a full-time, part-time, or seasonal basis.

(B) Incidental expenses.--The Administrator is authorized to provide for incidental expenses, including transportation, lodging, and subsistence, for volunteers who provide voluntary services under this subsection.

(C) Limited treatment as federal employees.--An individual who provides voluntary services under this subsection shall not be considered a Federal employee for any purpose other than for purposes of chapter 81 of title 5, relating to compensation for work injuries, and chapter 171 of title 28, relating to tort

claims.

(6) Contracts.--The Administrator is authorized to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration. The Administrator may enter into such contracts, leases, cooperative agreements, and other transactions with any Federal agency (as such term is defined in section 551(1) of title 5) or any instrumentality of the United States, any State, territory, or possession, or political subdivision thereof, any other governmental entity, or any person, firm, association, corporation, or educational institution, on such terms and conditions as the Administrator may consider appropriate.