

**THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN**

MENARD, INC.,)	
)	
Plaintiff,)	Civil Action No. 18-CV-376
)	
v.)	NLRB’S REPLY IN SUPPORT OF
)	ITS MOTION TO DISMISS
NATIONAL LABOR RELATIONS BOARD,)	
)	
Defendant.)	
)	

The issue presented by Defendant National Labor Relations Board’s¹ motion to dismiss is straightforward: has Plaintiff Menard met the exacting standards of the two-part test in *Leedom v Kyne*, 358 U.S. 184, 188-89 (1958), sufficient to justify this District Court’s exercise of extraordinary jurisdiction under 28 U.S.C. § 1331 over the NLRB’s ongoing unfair labor practice proceeding? Menard must demonstrate *both* that it has no alternative “meaningful and adequate means of vindicating its statutory rights,” *and* that the NLRB has violated a clear and mandatory provision of the National Labor Relations Act. 358 U.S. at 185, 188-90; *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991); *Squillacote v. Int’l Bhd. of Teamsters*, 561 F.2d 31, 37 - 40; (7th Cir. 1977). Menard has met neither prerequisite, much less both.

1. Menard’s only response to the first *Kyne* prerequisite is that it “has no alternative opportunity for review to prevent the Agency from moving forward with its complaint.” (Dkt. 11

¹ References to “the NLRB” refer to the agency as a whole; “the Board” refers to the appointed five-member statutory body known as the National Labor Relations Board, as defined in 29 U.S.C. § 153.

at 11-12). This response elides the entire point of the *Myers/Kyne* structure for non-statutory review, i.e., that such review can only be obtained when a plaintiff possesses no alternative means of vindicating its statutory rights. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 47-48, 51 (1938) (“Obviously, the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage.”); *Frey v. Commodity Exch. Auth.*, 547 F.2d 46, 49 (7th Cir. 1976) (noting the “long settled rule of judicial administration that no one is entitled to judicial relief, for a supposed or threatened injury, until the prescribed administrative remedy has been exhausted. This doctrine has retained its vitality, and apart from narrow exceptions . . . , the federal courts continue to apply it in order to avoid the untimely interruption of the administrative process.”) (quotations omitted, citing *Myers* and *Leedom*). Menard’s failure to meet the point that it already possesses a fully adequate means of review for its claims before the administrative law judge, Board, and court of appeals, means that *Kyne* jurisdiction is entirely lacking for the instant complaint.

2. Menard also has not shown that the Agency has violated a clear and mandatory provision of the Act. Contrary to Menard’s initial assertion (Dkt. 11 at 4-8), the NLRA permits charges to be filed by any person. *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17-18 (1943) (even a “stranger” to the dispute may bring a charge); *NLRB v. Teamsters Local 364*, 274 F.2d 19, 25 (7th Cir. 1960) (“Anyone may file a charge.”); 29 C.F.R. § 102.9 (“Any person may file a charge”). As Menard further acknowledges (Dkt. 11 at 8), the NLRB’s General Counsel has unreviewable discretion as to whether to issue a complaint on the charges and thereby initiate the administrative hearing process. *NLRB v. United Food and Commercial Workers Union, Local 23*, 484 U.S. 112, 126 - 27 (1987); *Int’l Union of Operating Engineers, Local 150 v.*

NLRB, 325 F.3d 818, 830 (7th Cir. 2003). Most importantly, since the Act’s inception, the courts have been uniform in holding that the Board has exclusive authority in the first instance to interpret the Act and its many provisions, including its scope of authority. As the Supreme Court explained in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959):

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.

Id. at 242 (quotation omitted). Although Menard clearly disagrees with the General Counsel that Section 8(a)(1) or (4) can be interpreted to protect independent contractors in certain instances (Dkt. 11 at 12-14), such a disagreement does not make out a *Kyne* violation.

For here, analogous case law establishes that there is no “patent disregard by the Board of the bounds of its statutory jurisdiction.” *Grutka v. Barbour*, 549 F.2d 5, 8 (7th Cir. 1977). The Board has previously decided, with appellate court (and Seventh Circuit) affirmance, that in some situations, retaliation against statutorily excluded supervisors can serve as a basis for finding a Section 8(a)(1) or (4) violation (Dkt. 8 at 13- 14).² In this case, the Board must be given the first opportunity to decide whether retaliation against an independent contractor *may* violate Section 8(a)(1) or (4) of the Act.

3. Menard’s reliance on *Califano v. Sanders*, 430 U.S. 99 (1977) for the proposition that 28 U.S.C. § 1331 grants jurisdiction to federal courts regardless of whether the APA serves as a jurisdictional predicate is inapposite. *Califano*, in fact, confirms that non-statutory review is not

² In its opposition, Menard argues that the Board’s comparison of independent contractors with supervisors is misplaced. (Dkt. 11 at 12-14). Menard also seeks to distinguish the Board’s arguments regarding the breadth of *Parker-Robb Chevrolet, Inc.* 262 NLRB 402, 404 (1982). (Dkt. 11 at 16-17). All of the cases relied upon by Menard may be argued during the course of its “meaningful and adequate means of vindicating its statutory rights,” i.e., the normal statutory NLRA review process.

available under Section 1331 where, as here, there exists a specific review mechanism in the applicable statute. *Id.* at 105 (Section 1331 subject to “preclusion-of-review statutes created or retained by Congress”); *accord Dhakal v. Sessions*, 895 F.3d 532, No. 17-1377, 2018 WL 3404712 at *5 (7th Cir. July 13, 2018) (“where federal jurisdiction is not precluded by statute, general federal question jurisdiction exists under 28 U.S.C. § 1331”) (emphasis added).³

For the foregoing reasons, as well as those presented in its Motion, the Board requests

³ None of the other cases relied upon by Menard (Dkt. 11 at 5-6) for the existence of jurisdiction here is apposite. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), similar to *Leedom*, held that, “A claim of error in the exercise of [an Agency’s] power is . . . not sufficient,” (as contrasted with *ultra vires* agency action), to exercise non-statutory jurisdiction. *Id.* at 690. And although *Trudeau v. Federal Trade Commission*, 456 F.3d 178 (D.C. Cir. 2006) and *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) unsurprisingly hold that non-statutory review may be permitted under certain circumstances, neither says that *Leedom* is not the proper test when a plaintiff is seeking review of the NLRB’s actions in district court.

And in *Sutton v. Napolitano*, 986 F. Supp. 2d 948, 956 (W.D. Wis. 2013), an immigration case, this Court concluded that the APA could, in conjunction with the Mandamus Act, 28 U.S.C. § 1361, serve as a basis for jurisdiction to review an agency’s failure to act. But the Mandamus Act is not at issue here. More to the point, as the Court noted, 986 F. Supp. 2d at 962 n. 9, in that case (unlike here) no argument was raised that the plaintiff had “an adequate alternative remedy.” *See also City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir. 1975) (Mandamus Act only applies, if, among other requirements, “no other adequate remedy [is] available.”) (quotation omitted).

that Menard's complaint be dismissed for lack of subject matter jurisdiction.

Dated: August 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I electronically transmitted the attached document to the Clerk of the Court for the U.S. District Court for the Western District of Wisconsin using the CM/ECF system for filing, and the foregoing document was transmitted by Notice of Electronic Filing to the following CM/ECF registrants:

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