

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

SAM DATE: June 20, 2016

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sallyport Global Holdings, Inc. 122-0100
Case 05-CA-138613 220-5014
220-5028
220-7517
240-0150

The Region resubmitted this case for advice as to whether the Board possesses jurisdiction over the Charging Party's otherwise unlawful discharge.¹ The Charging Party is an American citizen who was employed by an American contractor as a firefighter on a military base in Balad, Iraq. The Charging Party engaged in protected concerted conduct while in Iraq, and was subsequently discharged in retaliation for that conduct after being evacuated to Dubai, United Arab Emirates. We conclude that this case presents compelling reasons for urging the Board to reexamine the scope of its extraterritorial jurisdiction under the Act, and to find that it possesses statutory jurisdiction over unfair labor practices occurring extraterritorially. We conclude that under controlling precedent there is no clearly-defined geographic boundary on the Board's authority to protect the free flow of American commerce, given the broad jurisdictional language contained in the Act. In a given case, a number of potential factors might influence the Board's decision to decline such jurisdiction or the General Counsel's decision not to issue complaint. But the facts of this case fall squarely within the scope of labor relations that Congress intended to regulate through the Act. The employer-employee relationship at issue is exclusively American, the employer at issue has a substantial and direct impact on American commerce, and there are no conflicting foreign interests or comity considerations that might counsel against the Board's assertion of jurisdiction.

As a result, we conclude that the Board should find that it does possess extraterritorial jurisdiction, based on the text of the statute and other contextual

¹ The Division of Advice previously concluded in *Sallyport Global Holdings, Inc.*, Case 05-CA-138613, Advice Memorandum dated July 21, 2015, that the Charging Party's social media posts, for which (b) (6),¹ was subsequently discharged, constituted protected concerted activity. The facts of the case are summarized in that memorandum.

evidence of congressional intent, and should assert such jurisdiction to find that the Charging Party's discharge violated Section 8(a)(1) of the Act, for the reasons discussed in the previous Advice Memorandum.

Accordingly, the Region should issue complaint, absent settlement, alleging the violations set out in the previous Advice Memorandum.²

ACTION

As set forth below, this case presents compelling facts and policy reasons for requesting that the Board reconsider its precedent regarding the extraterritorial application of the Act, and that the Board conclude that the statute does provide for such application. The Board has not had the opportunity to properly consider the issue because, among other reasons, it has misconstrued Supreme Court precedent as precluding its own analysis of the Act's reach. However, the Act's text and its legislative purpose of reducing industrial strife to promote the free flow of commerce support finding that the Board may exercise its discretion to assert extraterritorial jurisdiction in appropriate cases, including the current matter.

I. This Case Underscores Why the Board Should Reconsider Its Precedent and Find that the Act Grants It Extraterritorial Jurisdiction.

As outlined in the initial Advice Memorandum in this case, the Employer discharged the Charging Party in retaliation for conduct that would be protected under the Act assuming the existence of statutory jurisdiction. Indeed, the Charging Party and (b) (6), (b) (7)(C) coworkers were acting concertedly out of fear for their lives while under siege by the Islamic State of Iraq and Syria (ISIS).³ It is difficult to imagine a more concrete example of "mutual aid and protection," particularly given the special consideration Congress has given to life-threatening working conditions.⁴

The Employer is an American corporation headquartered in Virginia, and the subsidiary of at least one larger American corporation. The sole one-year contract in the record, governing the Employer's operations on the Balad base, was worth \$248 million. The Employer has or had several other operations in Iraq, and it is feasible

² *Id.* at 12-13.

³ Lest there be any doubt about the seriousness of the security risks faced by the Employer's workforce, at least 23 Sallyport employees have been killed abroad in recent years. See Tim Shorrock, *Contractor Kidnappings and the Perils of Privatized War*, Nation (Feb. 2, 2016), <http://www.thenation.com/article/contractor-kidnappings-and-the-perils-of-privatized-war>; see also *Charron v. Sallyport Global Holdings, Inc.*, Case No. 12-cv-6837, 2014 WL 7336463, at *1 (S.D.N.Y. Dec. 24, 2014) ("Those contracts involved great risks: a number of [Sallyport] employees were killed, including 19 who were pulled off a bus and executed on the side of the road.").

⁴ *Cf.* 29 U.S.C. § 143 (excepting work stoppages responding to "abnormally dangerous conditions for work" from the definition of a strike).

that the Employer generates revenues in excess of one billion dollars per year. Meanwhile, the Charging Party is a resident of California who was stationed in Iraq solely because of (b) (6), (b) employment for the Employer. Given that both the Employer and the Charging Party are American, and that both parties fall within the Board's jurisdictional thresholds and the definitions of "employer" and "employee" in Section 2 of the Act, the sole question presented by this case is the territorial reach of the Board's jurisdiction.

Despite the perilous conditions faced by the Employer's workforce, and despite the Employer's considerable revenues and its impact on American commerce, in the absence of Board jurisdiction the Employer's civilian employees would likely not be left with any meaningful legal right to engage in concerted conduct. Since the Charging Party's protected conduct occurred in Iraq, yet (b) (6), (b) actual discharge occurred in Dubai, it is unclear whether either Iraqi or Emirati labor law would even be applicable. Moreover, even assuming that the Charging Party would have recourse to the Iraqi government, the Iraqi labor law in effect during 2014 was evidently a relic of the Ba'ath regime of Saddam Hussein.⁵

Nor is it clear what interest the Iraqi or Emirati governments would have in regulating the Charging Party's employment relationship. The Charging Party was paid in American dollars, does not appear to have any permanent ties to Iraq, and was employed on a self-contained military base. The Employer's contract was with the U.S. government, and it is unclear what impact it had on the Iraqi economy. Meanwhile, the actual unfair labor practice occurred in the United Arab Emirates, where the Charging Party performed no work and was only present for a matter of days.

In contrast, the United States has an obvious interest in the rights of American workers and in the regulation of quarter-billion-dollar contracts. In addition, the Charging Party's protected conduct involved online communications solely directed at recipients within the United States, and a large part of the Employer's animus toward those communications appears to stem from the reactions of individuals within the United States—including the Charging Party's (b) (6), (b) (7)(C) who contacted a news station.

The regulatory vacuum created by the absence of Board jurisdiction would not only be problematic from an equitable standpoint, but it would also clearly frustrate the purposes of the Act and the judgment of Congress that the rights contained in Section 7 are the best mechanism for protecting the free flow of American commerce and preventing industrial strife. If the Board lacks jurisdiction in the present case, then the Employer would be left unregulated despite the fact that a labor dispute or work stoppage at just this worksite would impact a quarter-billion-dollar contract with the U.S. government. We conclude that this case demonstrates why the Board should reconsider its precedent and find that it does possess extraterritorial jurisdiction under the Act.

⁵ See Labour Law No. 71 of 1987 (Iraq).

II. Neither Supreme Court nor Board Precedent Precludes the Board from Properly Reconsidering Whether It Possesses Extraterritorial Jurisdiction.

A review of the case law reveals that the Board has not fully considered whether and under what circumstances Congress intended to apply the Act to representation and unfair labor practice cases arising outside the territorial limits of the United States. In part, this is due to the Board misconstruing Supreme Court precedent as precluding it from engaging in such an analysis. The Court's more recent decisions in this area confirm that it has never squarely held that the Act cannot be applied extraterritorially. Indeed, on the one early occasion when the Board did independently analyze its extraterritorial jurisdiction, it concluded that it was not precluded from asserting such authority.⁶ That Board decision, in combination with more recent cases where the Board has demonstrated a willingness to assert jurisdiction over unfair labor practices occurring outside the United States, provide strong support for urging the Board to reconsider its precedent in this area and to conclude that it does possess extraterritorial jurisdiction under the Act.

A. Supreme Court Precedent Does Not Deprive the Board of Extraterritorial Jurisdiction.

As discussed below, Supreme Court precedent does not deprive the Board of extraterritorial jurisdiction. The first two Supreme Court cases that the Board later cited in the context of its extraterritorial jurisdiction, *Benz v. Compania Naviera Hidalgo, S.A.*⁷ and *McCulloch v. Sociedad Nacional de Marineros de Honduras*,⁸ were expressly limited to the narrow context of foreign-flag vessels, which implicate unique maritime considerations not present in the context of general extraterritorial jurisdiction. The third Supreme Court opinion later cited by the Board, *EEOC v. Arabian American Oil Co. ("Aramco")*,⁹ involved a cursory misstatement of the Court's earlier opinions—not even rising to the level of dicta—which should not bind the Board. Indeed, more recent Supreme Court decisions confirm the limited reach of those earlier cases.

1. The Supreme Court's interpretation of the Board's jurisdiction over labor disputes on foreign-flag vessels does not apply to this situation.

The first of the relevant decisions, *Benz v. Compania Naviera Hidalgo, S.A.* (1957), involved a ship owned by a Panamanian corporation, sailing under the Liberian flag, and staffed by a crew of German and British sailors. While temporarily

⁶ See *West India Fruit & Steamship Co.*, 130 NLRB 343 (1961), and accompanying discussion, *infra*.

⁷ 353 U.S. 138 (1957).

⁸ 372 U.S. 10 (1963).

⁹ 499 U.S. 244 (1991).

docked at Portland, Oregon, a labor dispute broke out between the foreign employer and the foreign crew. Three American unions subsequently began picketing the foreign-flag vessel in support of the foreign crew, and the employer secured an injunction and award for damages against the three unions. On appeal, the Court was faced with the question of whether damages against individual representatives of the three American unions were preempted by the Act.¹⁰

Although the coverage of the Act was at issue, by its own terms *Benz* was clearly not a case implicating the Board's *extraterritorial* jurisdiction. The disputed conduct involved picketing by American unions within the territorial bounds of the United States—indeed, the damages at issue were derived from an alleged violation of Oregon law.¹¹ Instead, the Court determined that Congress had not intended to vest the Board with jurisdiction in the narrow subject-matter context of “disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters.”¹² The Court emphasized that both the employer and the sailors involved in the underlying labor dispute were foreign nationals, and that the legislative history of the Taft-Hartley Act suggested that it was intended as a “bill of rights both for American workingmen and for their employers.”¹³ More importantly, the Court relied on a number of cases and historical considerations specific to the maritime context and to the application of American laws to conduct aboard foreign-flag vessels. Thus, for example, the Court distinguished the Board's decision in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*,¹⁴ which involved an alleged secondary boycott of a foreign-flag vessel, because that case did not involve a dispute concerning “employment aboard a foreign vessel.”¹⁵

Subsequently, the Board attempted in a series of cases to limit the application of *Benz* to the context of foreign-flag vessels that were only “transiently” in American

¹⁰ 353 U.S. at 141-42.

¹¹ Even if the picketers had been aboard the foreign-flag vessel itself, the Supreme Court has long rejected the “figure of speech” that a ship constitutes the physical territory of the country whose flag it flies. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923). Nor was the *Benz* Court relying on such a notion.

¹² *Benz*, 353 U.S. at 142.

¹³ *Id.* at 144 (quoting Representative Hartley). Of course, in the non-maritime context, the Board has long held that foreign employees and foreign employers operating within the United States are under the jurisdiction of the Act. *State Bank of India*, 229 NLRB 838, 840-42 (1977).

¹⁴ 92 NLRB 547 (1950).

¹⁵ *Benz*, 353 U.S. at 143, n.5.

waters and that had only minimal contacts with the United States.¹⁶ As a result, the issue was back at the Supreme Court several years later, in *McCulloch v. Sociedad Nacional de Marineros de Honduras* (1963). That case involved a representation petition filed with the Board by an American union concerning a fleet of vessels sailing under the Honduran flag, owned by a Honduran corporation (which the Board found to be part of an integrated enterprise with an American corporation), and staffed by a crew of Jamaican and Honduran nationals. The crew was already represented by a Honduran union pursuant to Honduran law, and the employer and Honduran union both petitioned for an injunction restraining the Board from conducting an election, which was scheduled to occur when the ships docked in American ports and by mail ballot.

In upholding the injunctions, the *McCulloch* Court rejected the contacts-based balancing test for foreign-flag vessels developed by the Board after *Benz*, and instead reiterated that the Act was not intended to cover conduct aboard “foreign registered vessels employing alien seamen” regardless of the vessel’s American contacts.¹⁷ The Court again relied solely on citations and reasoning unique to the maritime context, as well as the fact that the sailors at issue were exclusively foreign nationals. The Court did not cite any of its extraterritoriality jurisprudence, and made no mention of the territorial reach of the Act. Indeed, the Court did not even definitively cover the field of foreign-flag vessels, as the Court left open the possibility of a contacts-balancing approach to jurisdiction over foreign-flag vessels “in different contexts . . . where the pervasive regulation of the internal order of a ship may not be present.”¹⁸ With respect to the Act, however, the Court’s holding was expressly limited to the context of foreign-flag vessels with foreign crews.

The Court subsequently clarified the narrowness of its holdings in *Benz* and *McCulloch* on numerous occasions. In *Ingres Steamship Co. v. International Maritime Workers Union* (1963),¹⁹ a companion case to *McCulloch*, the Court restated its holding as involving the narrow conclusion that “*maritime operations of foreign-flag ships employing alien seamen* are not in ‘commerce’ within the meaning of [the Act].”²⁰ In *International Longshoremen’s Local 1416 v. Ariadne Shipping Co.* (1970),²¹ the Court clarified that its holdings in *Benz* and *McCulloch* were based on unique considerations of “internal discipline and order” on foreign-flag vessels. Thus, the *Ariadne* Court held that American workers employed by a foreign-flag vessel were

¹⁶ See *West India Fruit & Steamship Co.*, 130 NLRB at 361-63, and accompanying discussion, *infra*.

¹⁷ *McCulloch*, 372 U.S. at 19.

¹⁸ *Id.* at 19, n.9.

¹⁹ 372 U.S. 24 (1963).

²⁰ *Id.* at 27 (emphasis added).

²¹ 397 U.S. 195 (1970).

within the jurisdiction of the Act when they were not regular members of the crew, since application of the Act would not pose a threat to internal discipline or order on the foreign-flag vessel.²² Likewise, in *ILA v. Allied International, Inc.* (1982), the Court found the Act applicable to an American union's refusal to handle cargo arriving from or destined for the Soviet Union, and distinguished *Benz* and *McCulloch* on the grounds that the union's conduct "in no way affected the maritime operations of foreign ships."²³

2. The *Aramco* Court's cursory misstatement of *McCulloch* as involving extraterritoriality should not deprive the Board of jurisdiction.

Almost three decades after *McCulloch*, in *EEOC v. Arabian American Oil Co. ("Aramco")* (1991), the Court was faced with the question of whether Title VII applied to extraterritorial job discrimination involving a naturalized American citizen working for an American corporation in Saudi Arabia. The Court interpreted the statutory grant of jurisdiction in Title VII and determined that it did not have extraterritorial scope. (*Aramco* was later superseded by statute when Congress promptly amended Title VII to correct the perceived error by the Court.) In reaching its conclusion in *Aramco*, the Court noted that "broad language in [statutes'] definitions of 'commerce' that expressly refer to 'foreign commerce'" are insufficient to overcome the interpretive presumption against extraterritoriality.²⁴

²² *Id.* at 198-200. See also *Windward Shipping Ltd. v. American Radio Association*, 415 U.S. 104, 109-12 & n.10 (1974) (citing additional cases involving the unique context of foreign-flag vessels). In keeping with the Court's jurisprudence, the Board analyzes its jurisdiction based on whether it would interfere with internal operations of foreign-flag vessels. Compare *Longshoremen ILA Local 27 (Kingcome Navigation Co.)*, 285 NLRB 357, 359 (1987) (finding no jurisdiction to resolve jurisdictional dispute over work performed on foreign-flag vessel because Board's potential award of work to American union members could have interfered with maritime operations of the foreign vessel), and *National Maritime Union (Shippers Stevedoring Co.)*, 245 NLRB 149, 157 (1979) (finding no jurisdiction over union's secondary boycott of foreign-flag vessel, since picketing was aimed at affecting the maritime operations of the ship), with *Longshoremen ILA (Kansas Farm Bureau)*, 264 NLRB 404, 405-06 (1982) (finding jurisdiction over union's threat to boycott foreign-flag vessel, where internal operations of ship not affected).

²³ 456 U.S. 212, 221-22 (1982). The Division of Advice has previously recognized that *Benz* and *McCulloch* are premised on the Court's concern about the Act's interference with the internal operations of foreign-flag vessels, rather than territoriality. See *Global Industries Offshore LLC*, Case 15-CA-17046, Advice Memorandum dated April 13, 2004, at 6-11 (finding no jurisdiction over foreign-flag vessel in the Gulf of Mexico, and discussing the Court's reasoning in *Benz* and *McCulloch*).

²⁴ 499 U.S. at 251. The Court's holding regarding the strong interpretive presumption against extraterritoriality is, of course, not in dispute in the present memorandum. As

Merely as an example to support its invocation of this presumption, the *Aramco* Court cited *McCulloch* for the proposition that, despite the broad definition of commerce in the Act, the *McCulloch* Court had held that there was no “congressional intent to apply the statute abroad.”²⁵ However, in fact, the *McCulloch* Court made no mention of territorial limits on the Act’s application to conduct occurring abroad, and did not analyze the text of the statute or its grant of jurisdiction. As discussed above, the Court’s reasoning in both *Benz* and *McCulloch* was expressly limited to the maritime context of foreign-flag vessels with foreign crews. Outside commentators have similarly noted that the *McCulloch* citation was inapposite to the Court’s extraterritoriality analysis in *Aramco*.²⁶ Further, aside from its mischaracterization of *McCulloch*, the *Aramco* Court did not otherwise attempt to interpret the Act—nor was that issue before the Court.

3. The Court’s later decisions confirmed that the *Aramco* dicta

discussed below, however, that presumption can be rebutted by a showing of congressional intent to the contrary, which can be demonstrated by express language and/or legislative history and purpose.

²⁵ 499 U.S. at 251-52.

²⁶ See William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 Comp. Lab. L. & Pol’y J. 283, 304 (2007); Todd Keithley, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 Colum. L. Rev. 2135, 2153 (2005) (“*Aramco* treated *McCulloch* as precedent for the presumption against extraterritoriality, when in fact *McCulloch* did not deal with extraterritoriality at all. *McCulloch* dealt with foreigners who were in the United States . . . and neither *Aramco* nor [the Third Circuit in] *Asplundh* should have cited *McCulloch* for a strictly territorial application of the NLRA.”); see also Thomas B. Bennett, *The Canon at the Water’s Edge*, 87 N.Y.U. L. Rev. 207, 234 (2012) (“However, *McCulloch* dealt more directly with a conflict-of-laws issue than an extraterritoriality question, given that the ships in question traveled frequently in United States territory . . . [and in this way *McCulloch*] dealt with legal issues that were importantly different from the ones at issue in either *Foley Bros.* or *Aramco.*”); cf. *Dowd v. Longshoremen*, 975 F.2d 779, 788 (11th Cir. 1992) (“In *Benz* and the subsequent cases named above, the Court did not restrict the scope of the NLRA to conduct which occurs within the geographic boundaries of the United States. To the contrary, each of these cases dealt either with employment relations upon a foreign vessel docked at an *American* port or the picketing activity of a domestic labor union *in the United States.* . . . The *Benz* cases do not represent generally applicable boundaries of commerce, but instead a judgment that Congress did not intend to interfere with the internal operation of foreign vessels.”).

was an outlier and that *Benz* and *McCulloch* were limited to the narrow context of foreign-flag vessels.

More recent Court cases, following *Aramco*, have confirmed the limited reach of the *Benz* and *McCulloch* decisions; i.e., that they involved unique maritime considerations in the narrow context of foreign-flag vessels. In a non-labor case, *Spector v. Norwegian Cruise Line Ltd.*, the Court observed that *Benz* and *McCulloch* stand for a “narrow rule” that is “applicable only to statutory duties that implicate the internal order of [a] foreign vessel rather than the welfare of American citizens.”²⁷ The Court emphasized that in those earlier cases it had found the NLRA inapplicable specifically because the regulatory scheme would “interfere with matters that concern only the internal operations of the ship,” and that in order for statutes to interfere with such operations in the maritime context there must be a “clear statement” of congressional intent.²⁸ The *Spector* Court went on to hold that the Americans with Disabilities Act does apply to foreign-flag vessels in United States waters, not because of some modified understanding of territoriality, but because *Benz* and *McCulloch* were subject-matter-oriented cases exclusively concerned with the internal order of foreign-flag ships.

Indeed, the characterization of *Benz* and *McCulloch* as involving a narrow “clear statement rule” makes plain that those cases did not involve an interpretation of the NLRA’s non-maritime extraterritorial reach, because the Court has simultaneously disclaimed a clear statement rule in the context of determining extraterritorial jurisdiction.²⁹

B. The Board Has Misconstrued the Supreme Court’s Holdings as Precluding Extraterritorial Jurisdiction under the Act.

The Board has stated in a handful of representation cases that it lacks general extraterritorial jurisdiction.³⁰ However, in none of those cases did the Board engage in an independent analysis of its potential extraterritorial jurisdiction, or attempt to interpret the statutory grant of jurisdiction in the Act. Instead, the Board concluded that the issue was foreclosed by a number of Supreme Court opinions—which, as discussed above, do not actually stand for such a proposition—therefore precluding

²⁷ 545 U.S. 119, 131 (2005).

²⁸ *Id.* at 131.

²⁹ Compare *Spector*, 545 U.S. at 131 (characterizing *Benz* and *McCulloch* as requiring a “clear statement” of congressional intent for a statute to apply to the internal operations of foreign-flag vessels), with *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (disclaiming a “clear statement rule” in the context of interpreting a statute’s extraterritorial jurisdiction).

³⁰ *Range Systems Engineering Support*, 326 NLRB 1047, 1048 (1998); *Computer Sciences Raytheon*, 318 NLRB 966, 968 (1995); *GTE Automatic Electric, Inc.*, 226 NLRB 1222, 1223 (1976); *RCA OMS, Inc.*, 202 NLRB 228, 228 (1973).

further analysis by the Board. Thus, there is a lack of Board precedent properly considering whether and under what circumstances Congress intended the Act to apply to American employees working outside of the United States.

In *RCA OMS, Inc.*,³¹ the Board dismissed an election petition involving a unit of radar operators who were employed by an American company, hired in the United States, but stationed at facilities in Greenland. After outlining the facts of the case, the Board summarily stated that Greenland “does not come within the jurisdiction of the Act,” citing the Supreme Court’s opinion in *Benz* as controlling. The Board provided no further analysis. Likewise, in *GTE Automatic Electric, Inc.*,³² the Board granted an employer’s unit clarification petition designed to exclude from the collective-bargaining unit telephone-equipment installers recruited from that unit to work on projects in Iran. The Board again provided no analysis before concluding that it was “clear that employees in Iran are not within the jurisdiction of the Act,” citing *Benz* and *RCA OMS*.

Two decades later, the Board was again confronted with an extraterritorial election petition in *Computer Sciences Raytheon*,³³ which involved United States citizens employed by an American company and stationed at military bases on the islands of Ascension and Antigua; a British territory and a sovereign nation, respectively. In addressing the jurisdictional question, the Board stated that it was required to apply a two-step test: the first step focusing on “the statute that a party seeks to extend beyond the geographical boundaries of the United States” and on whether there is any indication of congressional intent to establish jurisdiction abroad; and the second step focusing on whether, notwithstanding a lack of general extraterritorial jurisdiction, the United States still possesses sovereignty or “some measure of legislative control” over the location at issue.

However, the *Computer Sciences Raytheon* Board did not substantively address the first step, i.e., whether there is evidence of congressional intent regarding the Act’s statutory jurisdiction; instead it stated that “[t]he Supreme Court has already decided the first part of the test so far as the Act we administer is concerned.”³⁴ The Board asserted that it was “bound” by the Court’s purported finding of the lack of any “congressional purpose to apply the Act in other countries,” and by the Court’s construction of the Act as “not having extraterritorial application,” citing the Court’s opinions in *Aramco* and *McCulloch*.³⁵ As such, the Board provided no analysis regarding the appropriateness of asserting the Act’s extraterritorial jurisdiction, and proceeded on the assumption that it was precluded from doing so.

³¹ 202 NLRB at 228 & n.1.

³² 226 NLRB at 1223 & n.1.

³³ 318 NLRB at 968.

³⁴ *Id.*

³⁵ *Id.*

Likewise, in *Range Systems Engineering Support*, the Board denied review of a Regional Director's dismissal of an election petition involving employees of an American company assigned to work at its weapons-testing facility in the Bahamas, in which the Regional Director cited to *Aramco* and stated that the Supreme Court had ruled that "the Act does not apply outside the United States" absent some measure of sovereignty or legislative control.³⁶

In sum, in none of these cases has the Board substantively considered whether the Act exhibits a congressional intent to grant the Board extraterritorial jurisdiction. The Board has avoided such an inquiry under the assumption that the Supreme Court has already decided the issue; namely, in the *Benz*, *McCulloch*, and *Aramco* decisions. In light of the Board's prior misinterpretation of Court precedent, it has not been presented with an opportunity to properly consider the extent of its statutory jurisdiction over extraterritorial conduct.

C. The Board's Only Independent Examination of the Act's Grant of Extraterritorial Jurisdiction Came in a 1961 Decision Finding that the Board Does Possess Such Jurisdiction.

What is evidently the only substantive analysis of the Act's extraterritorial scope by either the Board or the Supreme Court in the eighty-year history of the Act came in between *Benz* and *McCulloch*, in *West India Fruit & Steamship Co.*³⁷ In that case, the Board expressly held that the Act extends to unfair labor practices occurring "within the territorial jurisdiction of a foreign nation," as long as the conduct in question affects commerce within the meaning of the Act.³⁸ *West India Fruit* involved an American-owned ship registered in Liberia and sailing under a Liberian flag of convenience. The ship regularly sailed between Cuba and Louisiana, and was staffed by a foreign crew of primarily Cubans. The complaint alleged unfair labor practices occurring outside the territorial waters of the United States, including the unlawful discharge of several union supporters in Havana, Cuba. As the lead case consolidating a number of similar cases involving the question of the Board's jurisdiction, *West India Fruit* was extensively litigated and involved briefs by the Attorney General

³⁶ 326 NLRB at 1048. On other occasions, the Board has declined to assert jurisdiction over conduct occurring outside the United States, but it has not stated that it lacks the authority to do so in any other cases, and it has certainly not provided an in-depth analysis of the statute. For example, in *North American Soccer League*, 236 NLRB 1317, 1319 (1978), the Board excluded two Canadian sports teams from its exercise of jurisdiction over the league as a whole. The Board reasoned that the teams were owned exclusively by Canadians and operated under Canadian laws but did not explicitly state that it lacked statutory jurisdiction; instead, its exclusion of the Canadian teams can be interpreted as discretionary. Moreover, the Board subsequently asserted jurisdiction over Canadian baseball and basketball teams. See Gould, *supra*, at 305-06.

³⁷ 130 NLRB 343 (1961).

³⁸ *Id.* at 352.

(representing the Department of State and Department of Defense) and several other intervenors and amici.

Upon full consideration of the issue, the *West India Fruit* Board found that it possessed jurisdiction over the foreign-flag ship and that it would assert such jurisdiction to adjudicate the unfair labor practices involving the foreign crew. In doing so, the Board bifurcated the extraterritoriality analysis from the foreign-flag analysis. The Board first addressed the employer's objection that the Board lacked extraterritorial jurisdiction.³⁹ Examining the text of the Act and the broad language defining "commerce" and "affecting commerce" in Section 2(6) and 2(7), the Board found that Congress has "expressly" granted it jurisdiction over the extraterritorial flow of commerce.⁴⁰ Moreover, the Board found that "a general grant of power over foreign commerce, such as in the Labor Act, *of necessity* includes the authority to reach prohibited acts even though occurring in foreign territory when such acts have a direct effect on trade between the United States and foreign countries."⁴¹ The Board concluded that the Act requires "an extraterritorial impact if the statutory policy is to be made effective."⁴²

As a separate section of its analysis, the Board then examined the fact that the case involved a foreign-flag vessel with a foreign crew.⁴³ In ultimately finding that it possessed jurisdiction, the Board was required to distinguish the Court's recent decision in *Benz*. To do so, the Board fashioned what was in essence a balancing test concerning the extent of a foreign-flag vessel's American contacts—an approach which was implicitly overruled by the Supreme Court in its subsequent decision in *McCulloch*. However, the portion of the Board's opinion concerning the foreign-flag

³⁹ *Id.* at 349-53.

⁴⁰ See Section 29 U.S.C. § 152(6) ("The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States . . . or between *any foreign country* and any State, Territory, or the District of Columbia, . . . or between points in the same State but through any other State or any Territory or the District of Columbia or *any foreign country*." (emphasis added)).

⁴¹ *West India Fruit*, 130 NLRB at 351 (emphasis added).

⁴² *Id.* at 353. The Board's statement that it was "not being asked to apply the Labor Act so as to regulate that conduct, if any[,] of the Respondent which in its operation *and effect* is 'confined within the limits of a foreign nation' and, thus, is the primary concern of a foreign government," 130 NLRB at 352 (emphasis added), does not contradict a finding of extraterritorial jurisdiction in this case. The Board went on to explain that, "[i]t is the foreign commerce of the United States that is involved in this proceeding, and that surely is a domestic interest of the United States as the provisions of the Labor Act themselves clearly exemplify." *Id.* Likewise, the current case clearly involves the foreign commerce of the United States.

⁴³ *Id.* at 353-64.

balancing test was clearly distinct from the Board's initial interpretation of the statutory language and its reasoning regarding extraterritorial jurisdiction. Significantly, the *McCulloch* Court cited the Board's *West India Fruit* decision numerous times, and yet the Court made no comment disapproving of the Board's separate extraterritoriality analysis.⁴⁴ Indeed, the Court's *McCulloch* opinion was devoid of any reference to issues of territoriality or the extraterritorial scope of the Act, despite the fact that the Board's interpretation of the Act's extraterritorial reach was specifically raised in the briefing to the Court.⁴⁵

Although *West India Fruit* appears to be a clear expression of the Board's interpretation of the Act, finding that it does apply to extraterritorial unfair labor practices, the Board began citing the decision sparingly after *McCulloch*. While the Board has never overruled *West India Fruit*, it has not cited the case since 1970.⁴⁶ Nonetheless, the Board's unrebutted interpretation of the Act remains compelling evidence that the Board should be presented with a proper opportunity to revisit the issue of extraterritoriality.

D. The Board Has More Recently Demonstrated a Willingness to Assert Jurisdiction over Unfair Labor Practices Occurring Abroad by Applying a More Limited Effects Test.

Despite its mid-1990s decision in the *Computer Sciences Raytheon* representation case, the Board has subsequently demonstrated a willingness to assert jurisdiction over unlawful conduct occurring abroad, although still avoiding a reconsideration of its general extraterritorial jurisdiction. In *Asplundh Tree Expert Co.*,⁴⁷ the Board asserted jurisdiction over employees who performed their regular work in the United States but who were unlawfully discharged while on assignment in Canada. The Board reasoned that "the main effect of the [employer's] actions (the loss by [the employees] of their jobs in the United States) was not extraterritorial," and that the "results of [the employer's] conduct were principally felt in the United States."⁴⁸ The Board reasoned that, despite *Aramco*, intervening Court precedent had established

⁴⁴ See *McCulloch*, 372 U.S. at 14, 17.

⁴⁵ See Brief for Petitioner National Labor Relations Board (Nos. 91, 93, 107), 1962 WL 115555, at *23 (arguing that "it cannot be assumed that Congress intended the Act to operate only within the territorial limits of the United States"); Brief for Petitioner National Maritime Union of America (No. 91), 1962 WL 115851, at *26-30 (arguing that the coverage of the Act "does not stop at the boundary lines of this nation").

⁴⁶ In *Bell & Howell Airline Service Co.*, the Board distinguished *West India Fruit* in a footnote excluding a Canadian technician who worked exclusively in Canada from a unit of American technicians. 185 NLRB 67, 68 n.9 (1970). However, the Board did not discuss the issue of jurisdiction. The Board has not cited *West India Fruit* since.

⁴⁷ 336 NLRB 1106 (2001), *enforcement denied*, 365 F.3d 168 (3d Cir. 2004).

⁴⁸ 336 NLRB at 1107.

the validity of an effects-based test for determining jurisdiction even when general extraterritorial jurisdiction was lacking.

More recently, in *California Gas Transport, Inc.*,⁴⁹ the Board asserted jurisdiction over an employer operating a transportation business between the United States and Mexico when it committed a number of Section 8(a)(1) violations in Mexico. The Board echoed its reasoning in *Asplundh Tree* and determined that the unlawful effects of the employer's unfair labor practices would be felt by its American workforce.⁵⁰ In *California Gas*, the Board reached its conclusion by noting that "conduct with effects in the U.S. is not necessarily deemed extraterritorial" in the first place.⁵¹ The Board also cited to earlier cases where it had asserted jurisdiction over an unlawful discharge in the United States based on protected concerted activity occurring in Australia,⁵² as well as an unlawful secondary boycott occurring in Japan but initiated by a union within the United States.⁵³

⁴⁹ 347 NLRB 1314 (2006), *enforced on other grounds*, 507 F.3d 847 (5th Cir. 2007).

⁵⁰ A third such case is currently pending before the Board after an administrative law judge, applying *Asplundh Tree* and *California Gas*, concluded that an unlawful interrogation during a trip to the United Kingdom fell within the jurisdiction of the Act. *Durham School Services*, JD-62-15, Case 15-CA-106217, 2015 WL 6662909 (ALJD Oct. 30, 2015). The Division of Advice has taken a similar position. See *National Hockey League Players' Association*, Case 02-CB-20453, Advice Memorandum dated June 30, 2006, at 8-12; *Asplundh Tree Expert Co.*, Case 09-CA-36005, Advice Memorandum dated December 22, 1998, at 3-7, *decided by* 336 NLRB at 1107.

⁵¹ 347 NLRB at 1316. Relying on *Aramco*, the Third Circuit rejected the Board's attempt to exclude American employees who were only temporarily abroad from the definition of extraterritoriality, and denied enforcement of *Asplundh Tree*. 365 F.3d at 173-80. However, in *California Gas* the Board "respectfully disagree[d]" and declined to follow the Third Circuit's reasoning. 347 NLRB at 1316 n.11. In any event, in its briefing before the Third Circuit the Board relied on the notion that the conduct at issue was not actually extraterritorial given its primary effects within the United States, and the Board did not attempt to argue that it possessed extraterritorial jurisdiction. See Brief for Respondent National Labor Relations Board (Nos. 02-1151, 02-1543), 2002 WL 32872858, at *22-29.

⁵² *December 12, Inc.*, 273 NLRB 1, 3 n.11 (1984) ("That Alexander's activities occurred outside the United States did not render them any less protected."), *enforced mem.*, 772 F.2d 912 (9th Cir. 1985); see also *Freeport Transport, Inc.*, 220 NLRB 833, 834 (1975) (asserting jurisdiction over discharge of American employee who worked partially in Canada).

⁵³ *Dowd*, 975 F.2d at 789-91 (finding, in preliminary injunction proceeding, that there was reasonable cause to believe Board had jurisdiction over secondary boycott in

In the current case, the Charging Party's employment abroad was permanent, rather than temporary as in *Asplundh Tree* and *California Gas*. Nonetheless, these cases suggest a willingness on the part of the Board to apply the Act to unfair labor practices occurring outside the territorial limits of the United States, thus reinforcing the notion that the Board's earlier disclaimers of extraterritorial jurisdiction were predicated on the mistaken but correctable understanding that it is "bound" by inapposite Court precedent.

III. The Board Should Find that It Possesses Extraterritorial Jurisdiction under the Act.

We conclude that the Board should find that the Act reaches extraterritorial conduct.⁵⁴ In recent years, the Supreme Court has reasserted the canon of statutory interpretation that establishes a strong presumption against extraterritoriality absent a clear expression of congressional intent to the contrary.⁵⁵ However, the Court has expressly disclaimed a "clear statement rule," i.e., requiring explicit statutory language that the law applies abroad, and has held that "context can be consulted as well."⁵⁶ We take the Court's framework as the starting point of our analysis, and we conclude that there is sufficient language in the Act and evidence of congressional intent underlying the Act to rebut the presumption against extraterritoriality.

Japan initiated by American union); *see also Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 417-18 (1993), *remanded*, 56 F.3d 205 (D.C. Cir. 1995). The Board also has asserted jurisdiction over U.S.-flag vessels operating outside the territorial waters of the United States. *See Alcoa Marine Corp.*, 240 NLRB 1265, 1265 (1979) (directing an election on a U.S.-flag vessel stationed in Brazilian waters that was not intended to ever return to the United States); *see also NLRB v. Dredge Operators, Inc.*, 19 F.3d 206, 209-13 (5th Cir. 1994) (upholding Board's exercise of jurisdiction over U.S.-flag vessel operating permanently in Hong Kong territorial waters with a majority-American crew); *Phoenix Processor LP*, 348 NLRB 28, 28 n.7, 41, 44-46 (2006) (finding unfair labor practices on U.S.-flag vessel operating in the Bering Sea), *affirmed mem. on other grounds sub nom., Cornelio v. NLRB*, 276 F. App'x 608 (9th Cir.), *cert. denied*, 555 U.S. 994 (2008).

⁵⁴ Although *West India Fruit* has never been overruled in pertinent part and is thus arguably controlling precedent, we find it unnecessary to rely on *West India Fruit* given that the Board has declined to cite that case in the last 45 years, a substantial portion of the decision was impliedly overruled in *McCulloch* (i.e., the foreign-flag vessel balancing test), and the facts in *West India Fruit* involved a ship that regularly operated partially in American waters.

⁵⁵ *See Morrison*, 561 U.S. at 255; *Aramco*, 499 U.S. at 248.

⁵⁶ *Morrison*, 561 U.S. at 265.

A. The Text of the Act Supports Its Extraterritorial Application.

First, the text of the statute creates an express grant of jurisdiction over foreign conduct affecting commerce within the United States. This conclusion flows from the following sections of the Act:

- Section 2(6), 29 U.S.C. § 152(6), which defines “commerce” as “trade, traffic, commerce, transportation, or communication . . . between any foreign country and any State . . . or between points in the same State but through . . . any foreign country.”;
- Section 2(7), 29 U.S.C. § 152(7), which defines “affecting commerce” as “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”; and,
- Section 10(a), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices “affecting commerce.”

By the express terms of the statute, the Board should thus have jurisdiction to prevent a labor dispute “burdening or obstructing” the “free flow of commerce” between or through a “foreign country” and the United States. Nonetheless, the Act’s text does not necessarily decide the issue, as the Supreme Court has held that “broad language” in a statute’s definition of commerce referring to “foreign commerce” is insufficient by itself to overcome the presumption against extraterritoriality.⁵⁷ In *Aramco*, the Court referred to “boilerplate ‘commerce’ language” as being an inadequate expression of congressional intent.⁵⁸ However, the Act is readily distinguishable from the statutes interpreted in the cited opinions.

In Section 2(6) of the Act, the references to commerce involving foreign countries are far from mere “boilerplate” definitions hidden away in the statute, but instead are key components of the type of harm the Act sought to regulate. For example, the statement of congressional policy contained in Section 1 of the Act makes reference to “commerce” or the “free flow of commerce” thirteen times when outlining the purposes of the Act.⁵⁹ Indeed, the title of the Act as signed into law in 1935 was: “An act to

⁵⁷ See *Morrison*, 561 U.S. at 261; *Aramco*, 499 U.S. at 251. *But see Steele v. Bulova Watch Co.*, 344 U.S. 280, 286-87 (1952) (concluding that the Lanham Trademark Act applied to extraterritorial conduct where statute defined “commerce” as “all commerce which may lawfully be regulated by Congress”).

⁵⁸ 499 U.S. at 252.

⁵⁹ An early draft of the Wagner Act used the phrase “interstate and foreign commerce” in several places in Section 1, but such language was removed as being superfluous given the definition of commerce in Section 2(6). See S. 1958, 74th Cong., 1st Sess., at 3-4 (4th House Print June 10, 1935), *reprinted in* 2 NLRB, Legis. History of the National Labor Relations Act of 1935, at 3033-34; S. 1958, 74th Cong., 1st

diminish the cause of labor disputes burdening or obstructing interstate *and foreign* commerce, to create a National Labor Relations Board, and for other purposes.”⁶⁰

The Board discussed the textual issue in *West India Fruit*, while acknowledging the interpretive presumption against extraterritoriality and distinguishing the Supreme Court’s opinion in *Foley Bros., Inc. v. Filardo*.⁶¹ The *Foley Bros.* case involved the Court’s determination that the Eight-Hour Law did not apply to the overtime pay of an employee working on a project in Iran. The only alleged jurisdictional grant in the statute at issue was its applicability to “every contract” between the United States and a private contractor. The Court found that this broad language was insufficient to overcome the presumption against extraterritoriality. In contrast, as the *West India Fruit* Board noted, the Act does not involve “broad, unlimited jurisdictional provisions,” but instead a specific and “limited” definition of commerce referring to trade passing through a “foreign country,” which should therefore rebut the presumption against extraterritoriality.⁶²

Likewise, more recent Court opinions finding that other federal statutes did not grant extraterritorial jurisdiction are distinguishable. *Aramco* involved Title VII, which defined “commerce” as including trade “between a State and any place outside thereof.”⁶³ As with the Eight-Hour Law in *Foley Bros.*, the definition of commerce in Title VII was thus much more general than the express, specifically-limited reference to commerce between or through a “foreign country” in Section 2(6) of the Act. The

Sess., at 3-4 (4th Senate Print June 21, 1935), *reprinted in* 2 Leg. Hist. 3239 (NLRA 1935); H. R. Rep. No. 1371 on S. 1958, at 3, *reprinted in* 2 Leg. Hist. 3254 (NLRA 1935). The focus of Congress in the Taft-Hartley Amendments continued to be labor disputes that “would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.” *See* 29 U.S.C. § 142 (defining “industry affecting commerce”).

⁶⁰ 49 Stat. 449 (July 5, 1935), *reprinted in* 2 Leg. Hist. 3270 (NLRA 1935) (emphasis added).

⁶¹ 336 U.S. 281 (1949).

⁶² 130 NLRB at 352 (“To be sure, the commerce reached by Section 2(6) and (7) may be extensive, but it is nevertheless limited by those provisions.”).

⁶³ 499 U.S. at 249. Title VII also defined industries affecting commerce as “any activity or industry ‘affecting commerce’ within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.” Although the *Aramco* Court (again) misleadingly stated that *McCulloch* had held that the LMRDA did not apply abroad (the LMRDA, of course, was not even at issue in *McCulloch*, which involved a representation petition), the LMRDA contains a separate definition of “commerce” from the NLRA and instead mirrors the more general commerce language in Title VII. *Compare* 29 U.S.C. § 402(a) *and* 42 U.S.C. § 2000e(g), *with* 29 U.S.C. § 152(6).

definition of “interstate commerce” in the section of the Securities Exchange Act at issue in *Morrison* is also distinguishable. Although that portion of the statute defined “*interstate* commerce” using similar language, i.e., trade “between any foreign country and any State,” the statute (enacted just one year before the NLRA) also conspicuously omitted “foreign” commerce from its definitions, despite familiar references to “interstate and foreign commerce” elsewhere in the statute.⁶⁴ In addition, neither Title VII nor the Securities Exchange Act contained the sort of clear statement of congressional intent contained in Section 1 of the Act, which is above all focused on obstructions “in” the flow of American commerce—as defined to include commerce between the U.S. and a foreign country, or through foreign countries.

B. The Legislative Purpose of the Act Further Supports Its Extraterritorial Application.

In addition to its express language, the legislative purpose underlying the Act provides contextual evidence of congressional intent supporting the *West India Fruit Board*’s conclusion that the Act “of necessity” must apply abroad.⁶⁵

As clearly set forth in Section 1, the primary purpose of the Act is to protect the free flow of American commerce writ large, throughout the “current of commerce,” by ensuring certain collective-bargaining rights in order to avoid industrial strife. However, the goal of achieving labor peace to protect American commerce cannot be effectively achieved if multinational employers are subject to a patchwork of varying labor regulations, or no regulation at all in certain geographical bounds. It stands to reason that obstructions anywhere in the flow of American commerce, which Congress defined as passing “through” foreign countries, should be within the jurisdiction granted to the Board by Congress. The Act is distinguishable from the statutes at issue in cases such as *Foley Bros.*, *Aramco*, and *Morrison*. Those cases all involved individual plaintiffs who suffered discrete harms (i.e., underpayment of wages, job discrimination, securities fraud on foreign exchanges, respectively) while abroad, and thus their injuries could have just as easily been remedied (at least in theory) within the jurisdiction of the foreign country.

In this respect, the Act more closely resembles the regulatory scheme of federal antitrust law.⁶⁶ Despite comparatively generic statutory language (for example, the

⁶⁴ Moreover, unlike the Securities Exchange Act’s more limited definition of “*interstate* commerce,” the NLRA’s definition of “commerce” also contains additional language referring to commerce between points within the United States but “*through* . . . any foreign country.” 29 U.S.C. § 152(6). Given overarching policy concerns about obstructions occurring anywhere in the “current of commerce,” the “channels of commerce,” and the “free flow of commerce,” 29 U.S.C. § 151, the text thus appears to expressly contemplate jurisdiction to prevent American labor disputes in foreign countries when the flow of commerce passes “through” those countries.

⁶⁵ See *Morrison*, 561 U.S. at 265 (“Assuredly context can be consulted as well.”).

⁶⁶ Indeed, the language used in the Act establishing the Board’s statutory jurisdiction, referring to obstructions in the free flow of commerce, appears to be derived from the

Sherman Act prohibits any “restraint on trade or commerce among the several States, or with foreign nations”), the Supreme Court has long found federal antitrust law to have extraterritorial reach in light of its regulatory purpose.⁶⁷ For example, in an early antitrust case, *United States v. Pacific & Arctic Railway & Navigation Co.*,⁶⁸ the Court rejected the argument that the Sherman Act did not apply to the portion of the defendant’s railroad that passed through Canada. The Court reasoned that the unlawful conspiracy in question involved actors in both the United States and Canada operating a single route, and that if the Sherman Act lacked jurisdiction over the Canadian portions of the route then it would place the conspiracy “out of the control of either Canada or the United States.”⁶⁹ Similarly, the Board cannot effectively regulate the “free flow of commerce” if extraterritorial portions of an American employer’s operations are left unregulated or are left subject to piecemeal foreign regulation.

C. The Board’s Discretionary Authority to Decline to Assert Jurisdiction When It Determines that the Policies of the Act Would Not Be Effectuated Favors Finding Extraterritorial Jurisdiction.

It is also significant that the structure of the Act permits the Board to exercise discretion in deciding when to assert its statutory jurisdiction, thereby ameliorating possible concerns about comity and undue interference with the laws of foreign nations. The Board and Supreme Court have long recognized that the Board may decline to exercise its jurisdiction when it determines that the policies of the Act would not be effectuated.⁷⁰ This feature is not necessarily shared by

antitrust context. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274, 293 (1908) (noting that the Sherman Act prohibits conduct which “obstructs the free flow of commerce”).

⁶⁷ *See Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 795-96 (1993) (citing cases).

⁶⁸ 228 U.S. 87, 105-06 (1913).

⁶⁹ 228 U.S. at 106; *see Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962). *See also F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (“[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.”).

⁷⁰ *See, e.g., NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 684 (1951); *Contract Services, Inc.*, 202 NLRB 862, 863-65 (1973) (discretionarily declining to assert jurisdiction over the Panama Canal Zone based on diplomatic considerations).

other statutes.⁷¹ The Board recognized as much in *Computer Sciences Raytheon*, where it noted that issues of comity “are relevant concerns in deciding whether to exercise our discretion to assert jurisdiction,” but are separate from “the test for initially deciding whether we have statutory jurisdiction.”⁷²

The Board’s ability to discretionarily decline jurisdiction substantially undercuts many of the concerns that underlie the presumption against extraterritoriality in the first place.⁷³ The Board might reasonably conclude that representation cases involving the formation of an ongoing collective-bargaining relationship abroad present different prudential considerations and regulatory practicalities than discrete unfair labor practices. Thus, the Board could, in theory, decline jurisdiction in a representational context even if it asserts jurisdiction in situations where failure to do so would undermine the Section 7 right of American employees to engage in protected concerted activities without fear of reprisal.⁷⁴ The Board might also weigh issues of international comity and competing foreign laws in determining whether to decline jurisdiction. Thus, for example, the Board would be free to decline jurisdiction where Board processes would interfere with foreign labor laws—indeed, *McCulloch* arguably presented just such a case, given that the employees at issue were already represented by a union under Honduran law.

The preceding arguments are not an attempt to address every possible permutation of extraterritorial jurisdiction. The Board would be free to fashion a more nuanced approach to determining when extraterritorial conduct falls within the Act’s definition of “commerce,” just as the courts do in determining the contours of federal antitrust law’s extraterritoriality.⁷⁵ However, this case presents the straightforward

⁷¹ *Cf. Hartford Fire*, 509 U.S. at 797 (leaving open the question of whether courts may discretionarily decline extraterritorial antitrust jurisdiction based on principles of international comity).

⁷² 318 NLRB at 968, n.6.

⁷³ *See, e.g., Steele*, 344 U.S. at 285-86 (“[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even foreign countries when the rights of other nations or their nationals are not infringed.” (citation omitted)).

⁷⁴ *Cf., e.g., Northwestern University*, 362 NLRB No. 167, slip op. at 3-6 (Aug. 17, 2015) (in a representation case, Board exercised its discretion to decline jurisdiction over a proposed unit of college football players at a private university who received grant-in-aid scholarships because doing so would not have promoted stability in labor relations).

⁷⁵ *See generally Developments in the Law: Extraterritoriality*, 124 Harv. L. Rev. 1226, 1269-79 (2011) (discussing various approaches toward determining antitrust extraterritoriality); Justin Desautels-Stein, *Extraterritoriality, Antitrust, and the Pragmatist Style*, 22 Emory Int’l L. Rev. 499 (2008) (same). For a discussion of various tests applied to the labor context, see generally Keithley, *supra*; Gary Z. Nothstein &

scenario of an American employee stationed abroad, an American employer headquartered in the United States, and a discrete unfair labor practice that cannot be meaningfully remedied within the competing foreign jurisdiction.

Moreover, litigation under the Act is controlled and prosecuted by the General Counsel, and thus the Act does not present the same concerns with respect to extraterritorial jurisdiction as statutes involving private rights of action and litigation that can be initiated by individual plaintiffs.⁷⁶ As the Supreme Court has recognized, “private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.”⁷⁷ In contrast, the General Counsel is well-positioned to evaluate a variety of factors when determining whether to issue an unfair-labor-practice complaint on the facts of a given case, including the extent to which the case affects American commerce and American employees, and any countervailing considerations of comity or foreign law. As noted, however, the present case falls firmly within the interests of the United States in regulating American commerce and in protecting the statutory rights of American employees, and as a result, the issuance of complaint is warranted.

IV. Conclusion

For the reasons discussed above, we conclude that this case presents compelling reasons to urge the Board to reexamine the scope of its statutory jurisdiction over extraterritorial conduct. We conclude that under controlling precedent there is no clearly-defined geographic boundary on the Board’s authority to protect the free flow of American commerce, given the broad jurisdictional language contained in the Act. In a given case, a number of potential factors might influence the Board’s decision to decline such jurisdiction or the General Counsel’s decision not to issue complaint. But the facts of this case fall squarely within the scope of labor relations that Congress intended to regulate through the Act. The employer-employee relationship at issue is exclusively American, the employer at issue has a substantial and direct impact on American commerce, and there are no conflicting foreign interests or comity considerations that might counsel against the Board’s assertion of jurisdiction.

Jeffrey P. Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 Cornell Int’l L.J. 1 (1976).

⁷⁶ Cf. *F. Hoffmann-La Roche*, 542 U.S. at 170-73 (distinguishing between the government and private plaintiffs in bringing foreign antitrust suits).

⁷⁷ *Id.* at 171 (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999)); see also Brief for the United States as Amicus Curiae Supporting Vacatur at 32-33, *RJR Nabisco, Inc. v. European Community*, No. 15-138 (U.S. argued Mar. 21, 2016), 2015 WL 9268185 (urging Supreme Court to conclude that criminal provision of Racketeer Influenced and Corrupt Organizations Act (RICO) applies extraterritorially, but civil provision containing private right of action requires showing of domestic injury).

As a result, we conclude that the Board should find that it does possess extraterritorial jurisdiction, based on the text of the statute and other contextual evidence of congressional intent, and should assert such jurisdiction to find that the Charging Party's discharge violated Section 8(a)(1) of the Act, for the reasons discussed in the previous Advice Memorandum.

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing.

/s/
B.J.K.

H:ADV.05-CA-138613.Response.Sallyport(jurisdiction). b) (6), (b) (7)