INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE SC711, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

International Association of Machinists and Aerospace Workers, Local Lodge SC711, AFL-CIO (Petitioner) seeks to represent a unit of Avionics Technicians, Aircraft Mechanics, AGE Mechanics, Quality Assurance Munitions Technicians Aircraft Scheduling & Document, Supply Technicians, and Avionics/Com Technicians in the deployment pool (the Unit) employed by AECOM Management Services, Inc. f/k/a URS Federal Services, Inc. (the Employer) at Kandahar Airfield (KAF) in Kandahar, Afghanistan. There are approximately 84 employees employed in the Unit.

The Employer asserts that the National Labor Relations Act (the Act) does not apply to the Unit employed at KAF, and that even if the National Labor Relations Board (the Board) has

1 At the hearing, the parties stipulated, and I find that the correct legal names of the Employer and the Petitioner as set forth in the above-enumerated caption.

2 At the hearing, the Petitioner moved to amend the petition to seek to represent the employees in the Unit, as amended below, with no objection from the Employer. I, therefore, grant Petitioner’s unopposed motion to amend the Unit, as set forth below:

Included: All full-time and regular part-time Avionics Technicians; Aircraft Mechanics; AGE Mechanics; Quality Assurance; Munitions Technicians; Aircraft Scheduling & Document; Supply Technicians; Avionics/Com Technicians in the deployment pool employed by the Employer at Kandahar Airfield, in Kandahar, Afghanistan.

Excluded: All other employees, office and clerical employees, guards and supervisors as defined in the National Labor Relations Act.
statutory authority to assert jurisdiction over the Unit, it should refrain from exercising statutory jurisdiction for prudential reasons.\(^3\)

The Petitioner contends that the Board has statutory jurisdiction over the Unit employed at KAF for two reasons. First, as the plain language of the Act demonstrates an intention to broadly interpret the scope of the Act’s coverage. Second, there are effects of the Employer’s employment of the Unit as it relates to pay, benefits, and taxation within the United States of America.

A hearing officer of the Board held a hearing in this matter, and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record as a whole and relevant legal precedent, I find that the Board has statutory jurisdiction over the instant petition and that jurisdiction should be exercised in this matter.

I. FACTS

The Employer is a defense contractor that provides services to the Federal Government and the United States military, including at KAF. The Unit is comprised of mechanical and technical employees (Unit employees) who oversee the landing, maintenance, repair, and loading of munitions for the MQ-9 Reaper, a Remotely Piloted Aircraft (RPA) that is used by the United States military and the Federal government for national security. All of the Unit employees are United States citizens and the vast majority of their work for the Employer is conducted at KAF.

Below, I will first set forth facts relevant to the question of whether the Board has statutory jurisdiction over the instant petition.

A. The Employer’s Operations at KAF

1. Employer’s Contract with United States Air Force, including its Services at KAF

KAF is located in Kandahar in Afghanistan and serves as an international airport and a military base. About January 2019, the United States Air Force (AF) awarded the Employer its contract to provide RPA Operations & Maintenance (O&M) Support for CONUS\(^4\) & OCONUS\(^5\) Locations (AF contract), including its RPA O&M services at KAF.

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\(^3\) At the hearing, the Employer moved to dismiss the instant petition because the Board lacks statutory jurisdiction. Based on the record as a whole, I deny the Employer’s motion to dismiss this petition for the reasons detailed in this decision.

\(^4\) CONUS is generally defined as the continental United States, referring to the 48 continental states of the United States, excluding Alaska and Hawaii.

\(^5\) OCONUS is generally defined as outside of the continental United States, referring to everything outside the 48 continental states of the United States, including Alaska and Hawaii.
In order to operate at KAF, the Employer is required to annually complete Contractor Certificate of Registration forms, signed by a United States Military garrison manager. Additionally, the Employer must complete an Investment License with the Afghanistan Investment Support Agency (AISA License) to register its company in accordance with the Private Investment Law of Afghanistan, affording the Employer the right to operate in compliance with the legal frameworks of Afghanistan. The AISA license states that “holder(s) of this license is/are obliged to comply with the laws and regulations of the Islamic Republic of Afghanistan.”

With respect to the Employer’s RPA O&M services at KAF, the AF contract requires the Employer to furnish approximately 101 Unit employees to provide 24/7 coverage for the RPA mission requirements at KAF. In the context of the Employer’s AF contract applicable to services provided at KAF, a combat line is the mission duration for the RPA, from launch to return, which is typically from about 18 to 24 hours in duration. The record reflects that at the time of the hearing in mid-October 2019, the Employer’s RPA mission requirements at KAF represented about 53% of the AF combat lines in Afghanistan.

As of the hearing in mid-October 2019, the Employer was contracted to produce roughly 500 combat lines per month. On a day to day basis, the Employer is contracted to produce approximately 16 combat lines per day, with an additional approximate two commander-directed lines with no more than approximately 20 commander-directed lines in a 30-day rolling period. To meet these contractual requirements, Unit employees work seven days a week for approximately 12 hours per day. As of mid-October 2019, the Employer employed approximately 84 Unit employees at KAF.

At the hearing, the Employer argued that its AF contract requirement to provide 24/7 coverage for the RPA mission requirements at KAF is inconsistent with economic weapons such as strikes or work stoppages. This argument is somewhat diminished as the record contains two current contracts the Petitioner has entered into with two different employers for similar services at Creech Air Force Base in Nevada, in which the Petitioner has agreed to no-strike/no-lockout clauses.

2. Employer’s Pre-Employment Procedures for Prospective Unit Employees

The Employer posts its job openings for Unit employees on its website and on Indeed, Inc.’s website, and its applications are primarily reviewed by the Employer’s Program Management Office (PMO) in Las Vegas, Nevada, with some assistance from its recruiting department in its management services division in Germantown, Maryland. The vast majority of interviews for prospective Unit employees are conducted by Deputy Maintenance Manager Greg McPhail (McPhail), who possesses primary responsibility for the Employer’s KAF site and is physically located at the Employer’s PMO in Las Vegas. If the Employer selects a prospective Unit employee for hire, the Employer sends the applicant an offer letter setting forth the requirements to accept the job offer and the steps the applicant must take to become eligible for hire as a Unit employee.
Specifically, before a Unit employee is deployed to KAF, the Unit employee is required to electronically accept the Employer’s offer letter through the Employer’s employment portal, within 10 calendar days from the date the Employer emailed the offer. Also, Unit employees must successfully complete a pre-hire screening, including drug screening, verification of security clearance, and background check. The Employer’s background check includes a review of criminal records, employment, education, references, and credit checks when required. If not already completed, once a Unit employee accepts the Employer’s offer of employment, the background check will be initiated by email from the Employer’s vendor. Additionally, Unit employees are required to successfully complete a pre-employment drug screening within three business days from acceptance of the Employer’s employment offer, conducted at a certified testing facility near the Unit employee’s location.

The Employer’s employment offer to prospective Unit employees is contingent upon their ability to obtain and maintain a U.S. Government security clearance or Position of Public Trust associated with their positions. If prospective Unit employees are waiting on security clearance eligibility to begin employment, they must begin employment within 30 days of their security clearance eligibility being granted. In furtherance of this requirement, prospective Unit employees must successfully complete the forms necessary for their security review and/or clearance processing, as directed by the Employer’s Security Department, which may include Standard Form 86 Questionnaire for National Security Positions (SF 86), credit release, background and criminal check, and other forms.

Prospective Unit employees are required to contact the Employer’s Security Department within five business days of their offer acceptance to receive instructions on the procedures to be followed to start or update their security clearances. All actions required by prospective Unit employees to obtain and maintain their security clearances must be completed no later than 30 days from the date of the employees employment offers. If required by the Employer’s customer (in this case, the AF), prospective Unit employees may be required to successfully complete a polygraph examination, obtain and maintain security authorization, clearance and/or access(es) within a reasonable time from date of hire, based on AF needs and program security requirements. The Employer utilizes its sole and absolute discretion in determining whether and how long to extend the security clearance timeframe based on AF and Employer business needs. Failure to complete and submit these forms in a timely manner as directed may result in administrative or disciplinary action up to and including termination.

During the clearance process and after Unit employees obtain their security authorizations/clearance/access(es), Unit employees must notify the Employer’s Contract Security Officer (CSO) of the following: 1) any foreign travel and any close or continuous foreign national contacts; 2) other unspecified changes in their personal status; and 3) any changes in the personal information provided on the SF 86 and other forms Unit employees may be required to submit.

Finally, before deployment to KAF, a Unit employee must complete and obtain a Letter of Authorization (LOA) from the AF, which the Unit employee is required to carry while at
KAF. The LOAs provided in the record indicate contractor status as “CAAF,” defined as “contractors authorized to accompany the force.” This LOA indicates that Unit employees are entitled to the following authorized government services: billeting; CAC (common access card, which must be worn at all times while deployed); local access badge; dining facility (DFAC); government furnished meals (GFM); APO/FPO/Postal Services; Other (See Remarks, specifying military air travel will be billed to a designated AF Accounting and Appropriation Fund Citation and Employer shall have all chemical warfare defense equipment (CWDE) and industrial plant equipment (IPE) issued before deployment); military issued equipment; MWR (morale, welfare, and recreation) facilities; military exchange, military banking; excess baggage, military air transport, and transportation other than military air.

3. Unit Employee’s Terms and Conditions of Employment at KAF

Deployments for Unit employees supporting RPA O&M requirements at KAF are based on a minimum average 120 consecutive days from date of arrival. Such deployments of Unit employees are managed from the Employer’s PMO in Las Vegas, Nevada. The travel route for Unit employees to arrive at KAF is to fly commercial to Doha, Qatar. Once in Doha, Unit employees get military transportation to Al Udeid Air Base and then military transport from Al Udeid Air Base to KAF. The record reflects that the Employer uses a United States travel agent to book commercial airline tickets for Unit employees from their locations, typically within the United States, to Qatar. The Employer books approximately 30 to 40 such international flights per month, and each flight costs approximately $1,500 to $2,000.

The record reflects that during the 29 weeks between February 18, 2019, and around mid-October 2019, the approximate 184 Unit employees worked a total of 232,691.4 hours transporting to/from KAF and at KAF and approximately 3,574.6 hours in the United States. Based on these reported work hours, Unit employees spend about 1.5% of their total work hours working in the United States. The Employer has a site lead located at KAF that is in charge of its operations at KAF and supervises all personnel present at KAF, including the Unit employees. While employed at KAF, Unit employees remain at KAF and are prohibited from leaving KAF without special permission.

While present at KAF, Unit employees are required to follow certain military standards of conduct, set forth in a document entitled COMCAF Standards Book (Standards) and a document entitled TAAC – South GENERAL ORDER 1 (Order 1). Failure by Unit employees to adhere to the Standards may lead to disciplinary action in accordance with applicable law, and debarment and expulsion. Order 1 states that Unit employees are prohibited from, among other things: possessing or consuming alcohol or controlled substances/drugs; possession of privately-owned firearms; and taking photographs and videos, except as authorized for official use and certain purposes required for official duties. As set forth in Order 1, Unit employees are required to familiarize themselves with and respect the laws, regulations, and customs of Afghanistan insofar as those laws, regulations, and customs do not interfere with the execution of their official duties. Violations of Afghan laws, regulations, and customs may be punishable under applicable United States criminal statutes or United States military administrative regulations.
The record reflects that the Standards and Order 1 would still apply to Unit employees regardless of whether they were represented by any labor organization.

Additionally, the AF contract requires the Employer to abide by Department of Defense Instruction 3020.41 Operational Combat Support (OCS), last revised on August 31, 2018 (DoDI 3020.41). DoDI 3020.41 states that it is Department of Defense (DoD) policy that OCS actions “[c]omply with applicable United States international, and local laws, regulations, policies, and agreements.” Enclosure 2, Section 1(b) of DoDI 3020.41 states, in relevant part, “Subject to the application of international agreements, all contingency contractor personnel must comply with applicable local and third-country laws.” Enclosure 2, Section 1(c) of DoDI 3020.41 states, in relevant part, “CAAF, with some exceptions, are subject to U.S. laws and Government regulations.” This subsection provides examples where CAAF may be subject to prosecution pursuant to Federal law for crimes committed outside U.S. Territory. Enclosure 2, Section 1(d) of DoDI 3020.41 states, in relevant part,

The contract is the only legal basis for the relationship between the DoD and the contractor. The contract shall specify the terms and conditions, to include minimum acceptable professional standards, under which the contractor is to perform; the method by which the contractor will be notified of the deployment procedures to process contractor personnel; and the specific support relationship between the contractor and the DoD.

Enclosure 2, Sections 1(h) and (i) of DoDI 3020.41 requires DoD to take international laws, local laws, and host nation support agreements into account when planning for contracted support and to review applicable SOFAs and related agreements to determine the effect on the status and use of contractors in support of applicable contingency operations.

Enclosure 2, Section 3(b) of DoDI 3020.41 states that CAAF employed in support of a DoD mission are considered DoD-sponsored personnel, and that contracting officers shall ensure that contracts include a requirement that CAAF must meet theater personnel security requirements and must obtain personnel clearances prior to entering applicable contingency operations. Further, this section states that contracts shall require that CAAF obtain proper identification credentials (e.g. passport, visa) as required by the terms and conditions of the contract. Enclosure 2, Section 3(d) of DoDI 3020.41 requires all CAAF who are issued a LOA by the contracting officer or designee to carry the LOA with them at all times.

Enclosure 2, Section 3(f) of DoDI 3020.41 instructs that all CAAF are to be issued an identification card (CAC) and shall be required to present their LOA as proof of eligibility at the time of identification card issuance. This section requires the contract to require defense contractors to provide its personnel who have the appropriate security clearance or are able to satisfy the appropriate background investigation to obtain access required for the applicable contingency operation.
Enclosure 2, Section 4(d) of DoDI 3020.41 requires contracts to require that CAAF comply with theater orders, applicable directive, laws, and regulations, and that employee discipline is maintained. This section states that the contractor is primarily responsible for its employees’ discipline but a commander also has the authority to take certain actions affecting contingency contractor personnel, such as the ability to revoke or suspend security access or impose restrictions from access to military installations or specific worksites. This section states that commanders possess significant authority over criminal activity and retain authority to respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs of the situation. This section indicates that contingency contractor personnel are subject to domestic criminal laws of the local nation absent a SOFA or international agreement to the contrary. The record reflects that DoDI 3020.41 would still apply to Unit employees regardless of whether they were represented by any labor organization.

B. Unit Employee’s Wages and Benefits

1. Unit Employees’ Wages and Out-of-Pocket Expenses

Unit employees are paid biweekly, on Fridays. Unit employees may submit their unspecified out of pocket expenses on expense reports on a weekly basis to the Employer’s PMO located in Las Vegas, Nevada. Direct deposit is optional but highly recommended by the Employer.

While Unit employees are employed at KAF, designated by the Employer as “OCONUS compensation,” they receive base pay, hazardous duty pay, and post differential pay based on current United States Department of State (DOS) allowances, subject to change by DOS, and a completion bonus. The completion bonus is based on an unspecified percentage of the Unit employee’s base wage rate if the employee remains in the position through the end of the rotation at KAF, payable at the end of the deployment, subject to satisfactory performance during the deployment. To receive the completion bonus, Unit employees must not receive “any form of discipline or retraining” during their deployment. The Employer reserves the right to reduce or eliminate Unit employees’ completion bonus should performance be less than fully successful during their deployments at the Employer’s sole and absolute discretion.

After Unit employees finish their deployment at KAF, designated by the Employer as “CONUS compensation,” they receive training/orientation pay and holiday pay. Any CONUS compensation Unit employees receive is adjusted to the hourly rate under the Service Contract Act (SCA). The record does not specify any dollar amounts of OCONUS or CONUS compensation that Unit employees receive from the Employer.

Two Unit employees testified at the mid-October 2019 hearing. The first employee testified that while he is working for the Employer at KAF, he transfers money to his children’s mother in the United States to provide his children financial support. That employee stated that he ordered items from Amazon, a United States company, while he was working at KAF.
The second employee testified that he did not have any dependents, but while he is working at KAF, he continues to pay his mortgage, property taxes, and utility bills for his home in Las Vegas, Nevada. That employee confirmed he only paid United States income taxes for income he earned working for the Employer at KAF.

2. Unit Employees’ Benefits

Unit employees are eligible for Employer benefits effective on their dates of hire. Employees receive paid vacation depending upon their length of employment: two weeks paid vacation after one year of employment, three weeks paid vacation after five years, and four weeks paid vacation after 15 years of employment. Unit employees are entitled to sick leave in the amount of 2.77 hours per pay period, with a maximum accrual of 72 hours, and they receive 10 paid holidays, payable for eight hours of holiday pay.

Unit employees receive Health & Welfare (HW) benefit amounts ($4.13 per hour to a maximum of 80 hours biweekly) as required by the AF contract covered by the SCA Wage Determination (WD). If the cost of the Employer-provided benefits (such as Medical, Dental, Basic Life, Basic Accidental and Dismemberment (ADD), Employee Assistance Program (EAP) and Short-Term Disability (STD)), as well as costs for hours associated with jury duty, military or bereavement leave meet or exceed the cost specified in the WD, then the Employer has met its obligation in providing HW benefits. If the total company cost of HW benefits to Unit employees are less than the SCA required HW amounts, the remaining dollar amounts are deposited into Unit employees’ 401(k) accounts.

The Employer provides health benefits to the Unit employees and their dependents. Unit employees have the option of enrolling in the Employer’s health benefits. Unit employees are required to log into an Employer-provided website to indicate if they elect or decline to enroll in the Employer’s health benefits. If Unit employees fail to enroll in health benefits on the Employer provided website, then Unit employees will receive employee only health benefits. As noted above, a current Unit employee testified at the hearing that he opted for health benefits to cover his two dependents who reside in the United States.

The Employer pays the full cost of the Vision Service Plan (VSP), which provides Unit employees coverage for an annual exam covered at 100%. Unit employees may opt for a VSP Premier plan, which includes the same annual vision exam coverage plus an allowance for frames and other eye wear.

The Employer also provides its Unit employees with Flexible Spending Accounts (FSAs) in which Unit employees may contribute pre-tax dollars to reimbursement for health and/or dependent care expenses.

The Employer pays for Unit employees’ STD benefits and Long-Term Disability (LTD) benefits. Unit employees with qualified short-term disabilities may receive 66.67% of their base
wages during their first 180 days of STD, up to a $1,500 weekly maximum. Unit employees have two options for LTD: 1) 66.67% LTD benefit cost at $0.75 per $100 of covered salary; or 2) 60% LTD benefit, in which the Employer pays 50% of the cost of the LTD plan and, depending on the level of coverage, employees with non-war related disabilities receive 50%, 60%, or 66.67% of base wages up to a maximum monthly benefit of $15,000, with the LTD benefit beginning on the 181st day of disability.

Unit employees are eligible for workers’ compensation under the Defense Base Act (DBA), which provides coverage for total disability resulting from job-related (including war-related) injuries, calculated by the insurance carrier based on Department of Labor (DOL) requirements.

Unit employees have options for life and accidental insurance. Regarding life insurance, Unit employees may elect for Employer-paid basic life insurance at one-times the employee’s annual salary, rounded up to the next $1,000; and Unit employee purchased optional life insurance up to eight-times the employee’s base annual salary.

As far as accidental insurance, Unit employees may elect the following: Employer-paid basic accident insurance for one-times an employee’s salary, rounded up to the next $1,000; Unit employee purchased optional accident insurance for Unit employees and their dependents; and Unit employee purchased dependent life insurance in the amounts of $50,000 up to $250,000 for an employee’s spouse and $10,000 for children. The Employer also provides business travel accident insurance in the amount of four times the Unit employee’s base salary up to $1,000,000 (subject to an aggregate limit of $5,000,000.00 per accident).

The Employer provides Unit employees with a 401(k) retirement plan, in which the Employer matches 50 cents for every one dollar a Unit employee contributes, up to 6% of the Unit employee’s salary. Unit employees may contribute 1% to 75% of their gross pay, either before-tax, after-tax, or a Roth 401(k).

The Employer provides Unit employees and their family members with Employee Assistance Program resources as well as confidential short-term counseling and referral services, accessible through a toll-free telephone number or the Employer’s website. Unit employees also have access to educational assistance to further their education at accredited institutions, subject to unspecified annual limitations. The Employer further provides Unit employees with unspecified discount programs accessible at an Employer-provided website.

C. Agreements Applicable to Employer’s Operations at KAF

The record contains two agreements applicable to the Employer’s operations at KAF, both of which contain similar provisions: 1) North Atlantic Treaty Organization (NATO) and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-led Activities in Afghanistan (NATO SOFA), dated
September 13, 2014, and 2) Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America (US SDCA), dated September 30, 2014. The record reflects that the NATO SOFA and US SDCA would still apply to the Employer and its Unit employees regardless of whether they were represented by any labor organization.

1. The NATO SOFA

The introduction to the NATO SOFA states that the parties have a “firm and shared commitment to a sovereign, secure, and democratic Afghanistan.” Article 4 further states that it is the duty of “NATO Member States” such as the United States “to respect the Constitution and the laws of Afghanistan and to abstain from any activity inconsistent with the spirit of [the NATO SOFA] and, in particular, from any political activity in the territory of Afghanistan.” Article 4 continues, “The Parties’ respective obligations under [the NATO SOFA], and any subsequent arrangements, are without prejudice to Afghan sovereignty over its territory, and the right of self-defense, consistent with international law. Article 5 declares, “NATO confirms its commitment to respect relevant Afghan environmental and health and safety laws, regulations, and standards in the execution of its policies.”

Article 9 acknowledges that NATO Member States such as the United States may enter into contracts for the acquisition of articles and services in the territory of Afghanistan and that Afghanistan recognizes that NATO Member States “are bound by the laws and/or regulations of NATO, NATO Member States or Operational Partners, as appropriate, in the solicitation, award, and administration of such contracts.” However, Article 11 concludes by stating that “Afghanistan maintains the right to exercise jurisdiction over NATO Contractors and NATO Contractor Employees” which would include the Employer.

Article 15 specifically states that NATO Contractors, such as the Employer, “shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan on their activities, and associated income, relating to or on behalf of NATO Forces under a contract or subcontract with or in support of NATO Forces.” Further, Article 15 indicates that “NATO Contractor Employees”, such as Unit employees, “who do not normally reside in Afghanistan and NATO Contractor Employees who are not Afghan nationals shall not be liable to pay any tax or similar or related charges assessed by the government of Afghanistan within the territory of Afghanistan on their activities, and associated income, relating to a contract or subcontract with or in support of NATO forces.”

2. The US SDCA

As noted above, the US SDCA is very similar to the NATO SOFA. The Preamble states that the Parties’ cooperation is “based on full respect to the sovereignty of each Party […] as well as respect for Afghan laws, customs, and traditions.” Under Article 1, Definitions, “United States contractors” would include the Employer, defined as “persons and legal entities who are supplying goods and services in Afghanistan to or on behalf of United States forces under a
contract or subcontract with or in support of United States forces.” Similarly, “United States contractor employees” would include Unit employees, meaning “the employees of United States contractors.”

Article 11 is entitled, “Contracting Procedures.” Article 11, Section 1, states the following, in relevant part:

United States forces, in accordance with United States laws, may enter into contracts for the acquisition of articles and services, including construction, in the territory of Afghanistan. Afghanistan recognizes that the United States forces are bound by the laws and regulations of the United States in the solicitation, award, and administration of such contracts.

Article 11, Section 2 states, “United States contractors” (such as the Employer) “are subject to registration in Afghanistan via an expedited process that shall include issuance of [an AISA license] valid for three years and payment of a reasonable, standard, one-time service charge to [AISA] as required by the laws and regulations of Afghanistan.” Further, Article 13, Section 6 states, “Afghanistan maintains the right to exercise jurisdiction over United States contractors and United States contractor employees.” As with the NATO SOFA, Article 17 makes clear that United States contractors, such as the Employer, and its employees who do not normally reside in Afghanistan and who are not Afghan nationals “shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan on their activities, and associated income, relating to a contract or subcontract with or in support of United States forces.”

D. Afghan Labor Laws

At the hearing, the Petitioner referenced an Afghan law entitled “The Law on Gatherings, Strikes and Demonstrations” (dated March 13, 2003), but the record contains no evidence as to whether this law has any application to the Employer and the Unit employed at KAF. Chapter One, Article 2 of that law states, “The citizens of Afghanistan, in order to ensure their legal and peaceful goals which don’t contradict the national solidarity and the provisions of the Constitution, without carrying weapons and in accordance with this law, have the rights to organize gatherings, strikes, and demonstrations.” Notably, Chapter One, Article 2 only applies to Afghan citizens; none of the Unit employees are Afghan citizens. Therefore, Chapter One, Article 2 does not apply to Unit employees. The law defines “gathering” as a regular and public assembly of more than 30 persons at a public place to attract public opinion, in order to support or oppose specific goals which people can participate voluntarily. A “strike” is to refuse performing work or performing legal obligations and duties to achieve specific goals. A “demonstration” is a regular and public gathering to demonstrate specific goals on determined routes in a marching status.

Article 6 of “The Law on Gatherings, Strikes and Demonstrations” states, “The government shall ensure the security and safety of gatherings, strikes, and demonstrators.”
Article 8 restricts gatherings, strikes, and demonstrations in the “vicinity of military compounds,” without defining “military compounds.” Article 15 states, “Organizing demonstrations and gatherings in order to ensure the political, economic and social goals of foreign countries and their citizens is not allowed if they contradict the national interest and national unity of Afghanistan.” Finally, Article 16 states, “The citizens of foreign countries shall not participate in demonstrations.” Because all of the Unit employees are United States citizens, Article 16 would appear to prohibit them from participating in demonstrations at KAF.

II. ANALYSIS

A. The Board has Statutory Jurisdiction over this Petition

1. Relevant Legal Standards

Contrary to the Employer’s position, Supreme Court precedent does not deprive the Board of extraterritorial jurisdiction. The first two Supreme Court cases that the Board has cited in the context of its extraterritorial jurisdiction, Benz v. Compania Naviera Hidalgo, S.A.6 and McCulloch v. Sociedad Nacional de Marineros de Honduras,7 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”),8 relied on by the Employer, is not binding to the Board with respect to the extraterritoriality of the Act. Indeed, more recent Supreme Court decisions discussed below confirm the limited reach of these cases.

2. The Supreme Court’s interpretation of the Board’s jurisdiction over labor disputes on foreign-flag vessels does not apply to this petition.

The first of the relevant Supreme Court 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 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.9

9 353 U.S. at 141-42.
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.\(^10\) 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.”\(^11\) The Court emphasized that both the employer and the sailors involved in the underlying labor dispute were foreign nationals, unlike the Unit employees here who are all United States citizens, 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.”\(^12\) 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.)*,\(^13\) 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.”\(^14\)

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 waters and that had only minimal contacts with the United States.\(^15\) 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, again, unlike here, where the Unit employees are all American citizens. 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”

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\(^10\) 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.

\(^11\) *Benz*, 353 U.S. at 142.

\(^12\) *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).

\(^13\) 92 NLRB 547 (1950).

\(^14\) *Benz*, 353 U.S. at 143, n.5.

\(^15\) *See West India Fruit & Steamship Co.*, 130 NLRB at 361-63, and accompanying discussion, *infra.*
regardless of the vessel’s American contacts.\textsuperscript{16} 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.”\textsuperscript{17} 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 \textit{Incres Steamship Co. v. International Maritime Workers Union} (1963),\textsuperscript{18} 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].”\textsuperscript{19} In \textit{International Longshoremen’s Local 1416 v. Ariadne Shipping Co.} (1970),\textsuperscript{20} 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 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.\textsuperscript{21} Likewise, in \textit{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

\begin{itemize}
\item \textit{McCulloch}, 372 U.S. at 19.
\item Id. at 19, n.9.
\item 372 U.S. 24 (1963).
\item Id. at 27 (emphasis added).
\item 397 U.S. 195 (1970).
\item 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. \textit{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), \textit{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), \textit{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).
\end{itemize}
Benz and McCulloch on the grounds that the union’s conduct “in no way affected the maritime operations of foreign ships.”

3. The Aramco Court’s reference to McCulloch involving extraterritoriality does not deprive the Board of jurisdiction over this petition.

Almost three decades after McCulloch, in EEOC v. Arabian American Oil Co. (“Aramco”) (1991), cited by the Employer, 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.

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.” 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.

4. The Court’s later decisions confirmed that Benz and McCulloch were limited to the narrow context of foreign-flag vessels and therefore inapplicable to the instant petition.

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

22 456 U.S. 212, 221-22 (1982). Although not controlling, the Board’s 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).

23 499 U.S. at 251. The Court’s holding regarding the strong interpretive presumption against extraterritoriality 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.

24 499 U.S. at 251-52.
The welfare of American citizens.” The Court emphasized that in those earlier cases it had found the Act 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. 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 Act’s non-maritime extraterritorial reach, because the Court has simultaneously disclaimed a clear statement rule in the context of determining extraterritorial jurisdiction.

B. The Supreme Court’s Holdings Do Not Preclude Extraterritorial Jurisdiction under the Act.

As argued by the Employer, the Board has stated in a handful of representation cases that it lacks general extraterritorial jurisdiction. 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 summarily concluded that the issue was foreclosed by a number of Supreme Court opinions, therefore precluding further analysis by the Board. Thus, there is a lack of Board precedent fully considering and articulating whether and under what circumstances Congress intended the Act to apply to American employees working outside of the United States.

In RCA OMS, Inc., cited by the Employer, 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., the Board granted an employer’s unit clarification petition designed to exclude from the collective-bargaining unit telephone-equipment installers

26 Id. at 131.
27 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).
29 202 NLRB at 228 & n.1.
30 226 NLRB at 1223 & n.1.
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, relied upon by the Employer, 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 summarily stated that “[t]he Supreme Court has already decided the first part of the test so far as the Act we administer is concerned.” 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. The Board articulated no analysis regarding the appropriateness of asserting the Act’s extraterritorial jurisdiction, and simply stated that it was precluded from doing so.

Likewise, in Range Systems Engineering Support, also relied upon by the Employer, 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.

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.

31 318 NLRB at 968.
32 Id.
33 Id.
34 326 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.
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.

In *West India Fruit & Steamship Co.*, 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. *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.

Upon full consideration of the jurisdictional 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. 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. Moreover, the Board found that “a general grant of power over foreign commerce, such as in the 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.” The Board concluded that the Act requires “an extraterritorial impact if the statutory policy is to be made effective.”

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*. In ultimately finding that it possessed

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35 130 NLRB 343 (1961).
36 *Id.* at 352.
37 *Id.* at 349-53.
38 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)).
39 *West India Fruit*, 130 NLRB at 351 (emphasis added).
40 *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.
41 *Id.* at 353-64.
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 balancing test was clearly distinct from the Board’s initial interpretation of the Act’s statutory language and its reasoning regarding the Board’s 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. 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.

Although West India Fruit appears to be a clear expression of the Board’s interpretation that the Act 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 for its holding regarding extraterritoriality since 1970.

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 relied upon by the Employer, the Board has subsequently demonstrated a willingness to assert jurisdiction over unlawful conduct occurring abroad. In 2001, in Asplundh Tree Expert Co., 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.” The Board reasoned that, despite Aramco, intervening

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42 See McCulloch, 372 U.S. at 14, 17.
43 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”).
44 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 also cited West India Fruit in its 2018 Hy-Brand Industrial Contractors, Ltd. case, but only as an example of the Board addressing a Member-disqualification motion, irrelevant to the jurisdictional issue here. 366 NLRB No. 93 n.4 (June 6, 2018).
45 336 NLRB 1106 (2001), enforcement denied, 365 F.3d 168 (3d Cir. 2004).
46 336 NLRB at 1107.
Court precedent had established the validity of an effects-based test for determining jurisdiction even when general extraterritorial jurisdiction was lacking.

In 2006, in *California Gas Transport, Inc.*,\(^{47}\) cited by the Petitioner, 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.\(^{48}\) 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.\(^{49}\) 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,\(^{50}\) as well as an unlawful secondary boycott occurring in Japan but initiated by a union within the United States.\(^{51}\)

In the instant case, the vast majority of the Unit employees’ employment for the Employer is abroad at KAF, rather than temporary work abroad as in *Asplundh Tree* and *California Gas*. Nonetheless, both of 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.

\(^{47}\) 347 NLRB 1314 (2006), enforced on other grounds, 507 F.3d 847 (5th Cir. 2007).

\(^{48}\) In a third such case, an ALJ applied *Asplundh Tree* and *California Gas* and 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 Board’s 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. However, in *Durham School Services*, the Board affirmed the judge's findings, but found “it unnecessary to pass” on whether the Respondent violated Sec. 8(a)(1) by interrogating an employees in London, England, “as any such findings would not affect the remedy.” 364 NLRB No. 107, n.2 (Aug. 26, 2016).

\(^{49}\) 347 NLRB at 1316.

\(^{50}\) *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).

\(^{51}\) *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 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).
III. The Board Possesses Extraterritorial Jurisdiction of this Petition under the Act.

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.52 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.”53 Based on the Court’s framework there appears to be sufficient language in the Act and evidence of congressional intent underlying the Act to rebut the presumption against extraterritoriality and assert jurisdiction over the instant petition.

A. The Text of the Act Supports Its Extraterritorial Application over this Petition.

First, the text of the Act creates an express grant of jurisdiction over foreign conduct affecting commerce within the United States, such as the Employer’s operations at KAF at issue in this petition. 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. Here, the AF contract governing the Employer’s operations at KAF is between the AF, a branch of the United States military, and the Employer, United States company operating at KAF, located in Afghanistan. These services the Employer provide constitute “commerce” between the United States and Afghanistan. Further, the Employer’s services are performed by its Unit of American citizens at KAF in Afghanistan, constituting “commerce” as well.

Nonetheless, I acknowledge that 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

52 See Morrison, 561 U.S. at 255; Aramco, 499 U.S. at 248.
53 Morrison, 561 U.S. at 265.
to “foreign commerce” is insufficient by itself to overcome the presumption against extraterritoriality.\footnote{See \textit{Morrison}, 561 U.S. at 261; \textit{Aramco}, 499 U.S. at 251. \textit{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”).} In \textit{Aramco}, the Court referred to “boilerplate ‘commerce’ language” as being an inadequate expression of congressional intent.\footnote{499 U.S. at 252.} However, the Act is 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.\footnote{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). \textit{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 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.” \textit{See} 29 U.S.C. § 142 (defining “industry affecting commerce”).} Indeed, the title of the Act as signed into law in 1935 was: “An act to diminish the cause of labor disputes burdening or obstructing interstate \textit{and foreign} commerce, to create a National Labor Relations Board, and for other purposes.”\footnote{49 Stat. 449 (July 5, 1935), \textit{reprinted in} 2 Leg. Hist. 3270 (NLRA 1935) (emphasis added).}

The Board discussed the textual issue in \textit{West India Fruit}, while acknowledging the interpretive presumption against extraterritoriality and distinguishing the Supreme Court’s opinion in \textit{Foley Bros., Inc. v. Filardo}.\footnote{336 U.S. 281 (1949).} The \textit{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 \textit{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.\footnote{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.’’).}

Likewise, more recent Court opinions finding that other federal statutes did not grant extraterritorial jurisdiction are distinguishable. \textit{Aramco} involved Title VII, which defined
“commerce” as including trade “between a State and any place outside thereof.” 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 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 Act) also conspicuously omitted “foreign” commerce from its definitions, despite familiar references to “interstate and foreign commerce” elsewhere in the statute. 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 to include this Petition.**

Second, 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, including the Employer’s operations at KAF at issue in the instant petition.

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 such as the Employer in the instant petition are subject to a patchwork of varying labor regulations, or no regulation at all in certain geographical bounds, such as at KAF. The issue involved in this petition, whether the Board should exercise its statutory jurisdiction over this petition involving work performed by American citizens for a United States company at

60 499 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 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).

61 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.

62 *See* *Morrison*, 561 U.S. at 265 (“Assuredly context can be consulted as well.”).
KAF in Afghanistan certainly implicates the “current of commerce” contemplated by the express legislative purpose of the Act.

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 individual injuries could likely have been remedied within the jurisdiction of the foreign country.

In this respect, the Act more closely resembles the regulatory scheme of federal antitrust law.63 Despite comparatively generic statutory language (for example, 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.64 For example, in an early antitrust case, United States v. Pacific & Arctic Railway & Navigation Co.,65 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.”66 Similarly, the Board cannot effectively regulate the “free flow of commerce” if extraterritorial portions of an American employer’s operations, such as the Employer’s operations at KAF, 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 over this Petition.

Third, 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

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63 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 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”).


65 228 U.S. 87, 105-06 (1913).

66 228 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.”).
when it determines that the policies of the Act would not be effectuated. This feature is not necessarily shared by other statutes. 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.”

The Board’s ability to discretionarily decline jurisdiction substantially undercuts many of the concerns that underlie the presumption against extraterritoriality in the first place. Contrary to the Employer’s assertion that the Employer’s operations at KAF warrant the Board to exercise its discretion to decline jurisdiction based on the national security functions it is performing in Afghanistan, the record evidence weakens this argument, as it contains two current contracts for similar services that the Petitioner has entered into with other employers at Creech Air Force Base in Nevada containing no strike no lockout provisions. The fact that the Petitioner has agreed to such no strike no lockout language in these other contracts for similar services undermines the Employer’s argument that the Board should decline to exercise jurisdiction due to the potential for such strikes and work stoppages at KAF.

D. The Board has Jurisdiction over this Petition for the Employer’s Unit employees at KAF in Afghanistan.

In sum, for all the reasons discussed above, based on the record as a whole, mindful of my obligation to apply current Board case law, I find this petition presents compelling reasons for the Board to exercise statutory jurisdiction over this petition involving the Employer’s operations at KAF in Afghanistan.

First, beyond the broad jurisdictional language contained in the Act, as discussed above, the Employer-Unit relationship is exclusively American. The Employer’s PMO office that generally reviews prospective Unit employees’ applications, conducts their interviews, extends pre-hire offers, and hires its Unit employees and administers all of their wages and benefits is based in the United States, in Las Vegas, Nevada. The Employer posts its Unit positions online using the American company, Indeed, Inc.

Unit employees perform services governed by a contract between the AF, a branch of the United States military, and the Employer, a United States company. All of the Unit employees


68 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).

69 318 NLRB at 968, n.6.

70 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)).
are United States citizens and are required under the Employer’s AF contract to obtain United States security clearances and undergo extensive background checks, including completing a Federal government SF 86 security form, credit releases, and criminal checks. Unit employees’ security clearance requirements are within the sole discretion of the AF and the Employer. To be deployed to work at KAF, Unit employees must obtain LOAs from the AF, which designate them as CAAF entitled to, among other benefits, military air transport, military issued equipment, military banking, DFAC, GFM, APO/FPO/Postal Services, MWR facilities, military exchange, military banking, and transportation other than military air. The Employer has a United States travel agent to book commercial airline tickets for Unit employees, purchasing approximately 30 to 40 such international flight tickets at approximately $1,500 to $2,000 per commercial international flight ticket.

The Unit employees are paid by the Employer in United States dollars and are only subject to United States income taxes. The Unit employees are eligible for benefits because they provide services to the AF as detailed in the AF contract, including paid United States holidays, and SCA HW benefits required by a SCA WD. Unit employees also receive workers’ compensation coverage under the DBA based on DOL requirements. When Unit employees perform work for the Employer within CONUS, they are compensated pursuant to the SCA WD. When Unit employees perform OCONUS work for the Employer, their compensation is based on DOS allowances. The Employer’s PMO office in the United States, in Las Vegas, Nevada pays Unit employees biweekly and if claimed, provides them weekly reimbursement for eligible out-of-pocket expenses.

Second, the Employer here has a substantial and direct impact on American commerce. As set forth in the terms of the AF contract, the Employer currently provides O&M services to the AF amounting, by the Employer’s own estimate as of the hearing in mid-October 2019, of approximately 53% of the total combat lines in Afghanistan. Again, the Employer’s services are based on an AF contract it has been awarded by the AF, a branch of the United States military, to provide specified O&M services at multiple OCONUS and CONUS locations, including at KAF in Afghanistan. Certainly, the Employer’s services at KAF are “commerce” as defined in the Act “between any foreign country and any State” and “through” any foreign country, namely between the United States military, the Employer, a United States company, and Afghanistan. Further, the Employer’s services at KAF “affects commerce” within the meaning of the Act, involving the free flow of commerce between the AF, the Employer, and Afghanistan, at KAF.

Third, the wages and benefits the Employer provides for its Unit employees employed at KAF both “affect commerce” and have “effects” within the United States. Unit employees are eligible for SCA WD medical benefits for their dependents who are primarily located in the United States.

Under the “effects” test, it is presumed that Congress does not intend to regulate extraterritorial conduct, but “extraterritorial conduct” is defined as conduct that both occurs outside the United States and causes not effects within the United States. In other words, conduct with effects in the United States is not necessarily deemed extraterritorial. California Gas Transport, Inc., 347 NLRB 1314, 1316 (2006), enforced on other grounds, 507 F.3d 847 (5th Cir. 2007).
United States for medical services primarily performed within the United States. The wages Unit employees earn are paid in United States dollars that are typically deposited in United States bank accounts and typically spent in the United States for Unit employees’ family and household expenses such as for childcare, mortgages and rental payments, property taxes, and utility payments for Unit employees’ families and homes located in the United States. Unit employees are not permitted to leave KAF absent express permission and the AF contract provides Unit employees with GFM and lodging at KAF. Since the AF provides Unit employees meals and lodging at KAF, there is little need for Unit employees to purchase items at KAF and little ability to purchase items outside of KAF in Afghanistan. Further, the record reflects that at KAF, Unit employees may order items from Amazon, an American company. Unit employees’ Amazon orders at KAF provide another example of “commerce” by an American company delivering items to American citizens while they are in Afghanistan, with “effects” to Amazon’s revenues within the United States.

Fourth, contrary to the Employer’s contentions, there are no conflicting foreign interests or comity considerations that might counsel against the Board’s assertion of jurisdiction over this petition. The record reflects that Unit employees would be subject to the same AF contract requirements as well as the Standards, Order 1, DoDI 3020.41, NATO SOFA, and US SDCA regardless of whether or not they are represented by Petitioner or any other labor organization. With respect to the one purported Afghan labor law in the record, the record contains no evidence as to whether this apparent Afghan law has any application to the Employer and the Unit employed at KAF. Therefore, I do not find that there are any conflicting foreign interests or comity considerations implicated in this petition that weigh against the Board exercising jurisdiction over this petition.

Fifth, assuming arguendo that the Aramco test relied upon by the Board in Computer Sciences Raytheon applies to the instant petition, I find that it is appropriate to assert jurisdiction to the instant petition. With respect to the first part of the Aramco test, for the reasons I detailed above in Sections III A. and B., supra, I find that the language in the Act does indicate Congressional purpose to extend beyond the geographical boundaries of the United States.

As for the second part of the Aramco test, I acknowledge that there is no record evidence containing any explicit legislative control conferred to the United States concerning application of United States Federal labor laws at KAF, as there are no explicit references to United States Federal labor laws in the NATO SOFA or the US SDCA. However, Article 11, Section 1 of the US SDCA does state that “Afghanistan recognizes that the United States forces are bound by the

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72 The Employer acknowledges the dissent in Firstline Transportation Security, 347 NLRB 447 (2006), that it is not appropriate to create a general “national security exemption” that applies to all contractor activities but urges the Board to refrain from exercising jurisdiction over this petition because in the Employer’s view, the continued performance of the Unit work is incompatible with the Act. As noted by Petitioner, Firstline Transportation Security is distinguishable as it involves the Aviation and Transportation Security Act and the Act. Further, in Firstline Transportation Security, the Board noted it “has not asserted national security or defense as a reason to deny employees their Section 7 rights to organize and bargain collectively.” Id. at 455.

73 318 NLRB at 968.
laws and regulations of the United States in the solicitation, award, and administration of such contracts” such as the AF contract applicable to the Unit employees at KAF.

Similarly, Enclosure 2, Section 1(c) of DoDI 3020.41 states, in relevant part, “CAAF, with some exceptions, are subject to U.S. laws and Government regulations.” As noted above, the Employer’s Unit employees are classified as CAAF while employed under the AF contract at KAF, and therefore “U.S. laws and Government regulations,” including United States Federal labor laws, appear to apply to the Employer’s Unit employees while employed under the AF contract at KAF. Accordingly, I find that Article 11, Section 1 of the US SDCA, combined with Enclosure 2, Section 1(c) of DoDI 3020.41, provide the United States with sufficient legislative control at KAF to support a finding that the Act applies to the Unit employees while employed under the AF contract at KAF. Based on the foregoing and the record as a whole, I find that the Board has statutory jurisdiction over this petition.

IV. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.74

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.75

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

74 I find, based on the stipulations of the parties and the record evidence, that the Employer, AECOM Management Services, Inc. f/k/a URS Federal Services, Inc., a Delaware corporation with an office and place of business at Creech Air Force Base in Las Vegas, Nevada, is engaged in providing aviation maintenance services to the United States Government. In conducting its operations during the 12-month period ending October 3, 2019, the Employer has been engaged in providing aviation maintenance services to the United States valued in excess of $50,000. Based on its operations described above, the Employer has a substantial impact on the national defense of the United States. In conducting its operations during the 12-month period ending October 3, 2019, the Employer performed services valued in excess of $5,000 in States other than the State of Nevada.

75 The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time Avionics Technicians; Aircraft Mechanics; AGE Mechanics; Quality Assurance; Munitions Technicians; Aircraft Scheduling & Document; Supply Technicians; Avionics/Com Technicians in the deployment pool employed by the Employer at Kandahar Airfield, in Kandahar, Afghanistan.

**Excluded:** All other employees, office and clerical employees, guards and supervisors as defined in the National Labor Relations Act.76

There are approximately 84 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Association of Machinists and Aerospace Workers, Local Lodge SC711, AFL-CIO.

A. Election Details

Since the record reflects that the Unit employees have staggered OCONUS tours with limited ability to predict when and where Unit employees may be physically present at any particular location(s) within the United States for the Board to hold a manual ballot election on any particular date(s) and time(s), I have determined that a mail ballot election will be held.77

The ballots will be mailed to the employees employed in the appropriate collective-bargaining unit, based on the employees’ home addresses set forth in the voter list provided to the Regional Director and parties named in this decision. **By 3:00 p.m. on Tuesday, March 24, 2020,** ballots will be mailed to voters from the National Labor Relations Board, Region 28, Las Vegas Resident Office, 300 Las Vegas Boulevard South, Suite 2-901, Las Vegas, Nevada 89101, telephone number (702) 820-7467 or (702) 388-6416. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

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76 The unit found appropriate conforms substantially with the unit sought by Petitioner, as amended.

77 During the hearing, the Employer moved to amend its Statement of Position to request a mixed manual mail ballot election. I grant the Employer’s motion to amend its Statement of Position with respect to stating its preference for a mixed manual mail ballot election and have fully considered both parties’ arguments regarding the mechanics of the election. Based on the record as a whole, I find that a mail ballot election is appropriate for the reasons set forth above.
Those employees who believe that they are eligible to vote and did not receive a ballot in the mail to their home addresses by **Tuesday, April 7, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 28 Las Vegas Resident Office at telephone number (702) 820-7467 or (702) 388-6416, or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Region 28 Las Vegas Resident Office on **Tuesday, August 25, 2020**, at 3:00 p.m. In order to be valid and counted, the returned ballots must be received in the Region 28 Las Vegas Resident Office prior to the counting of the ballots.

**B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **March 6, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by email at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**C. Voter List**

As required by Section 102.67(l) of the Board’s Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, work email addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Tuesday, March 10, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must
begin with each employee’s last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency’s website at www.nlrb.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board’s Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees, to all of the email addresses contained on the voter list, including their work emails and all of their available personal email addresses. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

**RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board’s Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not
precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board’s Rules and Regulations.

A request for review may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board’s granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Phoenix, Arizona, this 6th day of March 2020.

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director