

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(San Francisco, California)

COVENANT AVIATION SECURITY, LLC

Employer

and

UNITED SCREENERS ASSOCIATION LOCAL 1

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 790, AFL-CIO, CLC 1

Intervenor

Case 20-RC-17896

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, 2/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 4/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 5/
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. 6/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 7/

All full-time and regular part-time airport screeners, airport lead screeners, baggage screeners, baggage lead screeners, baggage handlers and 9000 specialists employed by the Employer at San Francisco International Airport, San Francisco, California; and excluding all other employees, office clerical employees, managerial employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any 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 which 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.

OVER

Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED SCREENERS ASSOCIATION LOCAL 1.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before February 3, 2004. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001.** This request must be received by the Board in Washington by February 10, 2004.

Dated January 27, 2004.

at San Francisco, California

/s/ Joseph P. Norelli
Acting Regional Director, Region 20

- 1/ By motion dated September 8, 2003, Service Employees International Union, Local 790, AFL-CIO, CLC (the Intervenor), intervened in the instant proceeding to establish its status as Cross Petitioner/Intervenor, based on its representation of a unit that includes three of the five classifications of employees covered by the petition. In this regard, the parties stipulated that a collective-bargaining agreement (herein called the Agreement) existed between the Employer and the Intervenor with effective dates of November 1, 2002, through November 16, 2004, which covered employees at the San Francisco International Airport (SFO), including screeners, lead screeners and CTX operators. The record shows that the Agreement was the subject of an unfair labor practice charge in Case 20-CA-31155-1, which resulted in a settlement dated June 11, 2003, which *inter alia*, required that the Employer not enforce the Agreement with the Intervenor and to withdraw recognition from the Intervenor.
- 2/ As Board Exhibit 6, I am including in the record a print out of a Department of Transportation, Transportation Security Administration (TSA) website press release dated October 11, 2002, regarding the awarding of the TSA contract at San Francisco International Airport to the Employer.
- 3/ I have carefully considered the statements made by the Petitioner in its brief regarding the conduct of the hearing officer in this case and I do not find that the hearing officer engaged in any prejudicial conduct regarding the Petitioner.
- 4/ The parties stipulated that the Employer is engaged in commerce within the meaning of the Act. The record reflects that the Employer is an Illinois corporation, which provides security services primarily to the aviation industry, and that it has a contract with the Transportation Security Administration to provide security passenger and baggage screening services at Tupelo Airport in Tupelo, Mississippi, and at San Francisco International Airport (SFO) in San Francisco, California, which is the location of the instant case. I take administrative notice of the Department of Transportation (DOT) website press release dated October 11, 2002, showing that the contract between the Employer and the TSA for the SFO contract is valued at \$71 million. The Employer also has contracts with airlines to provide security services at O'Hare International Airport in Chicago, Illinois, and at John F. Kennedy International Airport in New York. Based on the parties' stipulation, and the facts disclosed in the record and from the DOT website, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter based on the fact that it derives substantial amounts of revenue from federal funds. See *Kingston Contractors*, 332 NLRB No. 161 (2000); *Mon Valley United Health Services*, 227 NLRB 728 (1977); *Community Services Planning Council*, 243 NLRB 798 (1979).
- 5/ With regard to the labor organization status of the Petitioner, the record shows that the Petitioner was formed by employees of the Employer seeking to form a labor organization to represent them for collective-bargaining purposes. Article 2 of the Petitioner's bylaws,

as amended, limits its membership to employees of the Employer. Further, the record shows that employees of the Employer participate in decision-making within Petitioner. Accordingly, I find that the Petitioner is a labor organization within the meaning of the Act.

With regard to the Intervenor's status as a labor organization, the record reflects that the Intervenor represented certain employees of the Employer under the Agreement described above in footnote 1, which contained terms and conditions of employment for those employees. While the Intervenor has historically represented primarily public sector employees, I take administrative notice that more recently it has been certified as the exclusive collective-bargaining representative of units of private sector employees. See *Chemical Dependency Center for Women*, Decision & Direction of Election, Case 20-RC-17635-1, January 12, 2001, in which the Certifications of Representative issued on February 20, 2001; *Madden v. City and County of San Francisco*, 1998 WL 19464, p.12 (N.D.Cal. 1998). Accordingly, I find that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

- 6/ The parties have stipulated, and I find, that there is no contract bar to this proceeding.
- 7/ The Petitioner and the Intervenor seek to represent a unit comprised of all full-time and regular part-time airport screeners, lead airport screeners, baggage screeners, lead baggage screeners, baggage handlers and "9000 specialists" employed by the Employer at the San Francisco airport (SFO); and excluding office clerical employees, confidential employees, managers and supervisors as defined in the Act. The unit is comprised of approximately 1046 employees, including 607 airport screeners, 112 lead airport screeners, 196 baggage screeners, 48 lead baggage screeners, 42 baggage handlers and 41 9000 specialists. The parties stipulated that all office clericals should be excluded from the unit and that there are no supervisory issues in this proceeding.

Several issues are presented in this case. Although the parties have not specifically raised the issue of whether the Board has statutory jurisdiction over the Employer, that issue is addressed herein, including whether the Employer is subject to the jurisdiction of the National Railway Act. In this regard, a TSA representative testified at the hearing and TSA filed a post-hearing brief in this case, which argued solely that TSA is not a joint employer with the Employer. Second, the Petitioner contends that all of the petitioned-for employees are guards within the meaning of the Act, and that while Petitioner is a guard union under Section 9(b)(3) of the Act, the Intervenor is not, and thus only the Petitioner can be certified as the representative of the Employer's guard employees. The Employer and the Intervenor take the position that none of the petitioned-for employees are statutory guards. In addition, while the Intervenor concedes that it is a union that admits non-guard employees to membership, it contends that the Petitioner also admits non-guard employees to membership because it admits baggage handlers. Finally, both the Petitioner and the Intervenor contend that the unit should include employees classified as "9000 specialists" and the Employer contends that the unit should not include this

classification because it is controlled by TSA and because it lacks a community of interest with the other petitioned-for employees.

Background. In response to the terrorist attack on the United States on September 11, 2001, Congress on November 19, 2001, passed the Aviation and Transportation Security Act (ATSA), Pub L. 107-71, 115 Stat. 597, 49 U.S.C. Section 114, making airport security a direct federal responsibility and creating the Transportation Security Administration (TSA) as an entity within the Department of Transportation. Congress provided that the head of the TSA, the Under Secretary of Transportation for Security, would be responsible for the security screening of all passengers and property carried aboard passenger aircraft, and the hiring, training and employment standards of security screening personnel. ATSA Section 101(a), 49 U.S.C. Sections 114 (b)(1), 114(e). Congress required the Under Secretary to establish the position of Federal Security Manager at each airport to oversee the screening of passengers and property. ATSA Section 103, 49 U.S.C. Section 44933. The actual work of screening passengers and property was to be done by employees of the Federal Government except that Congress provided in ATSA Section 110(b), 49 U.S.C. Section 44901(a), that the Under Secretary could contract with a “qualified private screening company” to perform screening operations upon application of an airport operator during a two-year pilot period at no more than five airports, or after three years following the enactment of the legislation at any airport, subject to the conditions set forth in the ATSA Section 108(a), 49 U.S.C. Sections 44919, 44920.

SFO is one of five airports chosen for the pilot program allowing the TSA to contract with private companies to perform passenger and baggage screening operations. The other four airports are located in Tupelo, Mississippi; Kansas City, Kansas; Rochester, New York; and Jackson Hole, Wyoming.

The ATSA sets forth employment and training standards for security screeners employed by the Federal Government, and gives the head of TSA the authority to establish programs for the hiring and training of such personnel, as set forth in 49 U.S.C. Section 44935. Among the qualifications required under the statute are United States citizenship; having a satisfactory or better score on the Federal Security Screening Personnel Selection examination; having no impairment due to illegal drugs, sleep deprivation, medication or alcohol; not presenting a national security risk; having a high school diploma or its equivalent; and possessing the requisite mental and physical abilities necessary to screen and read monitors and x-ray machines. Included at Section 44935(i) of the ATSA is a prohibition of the right to strike by individuals employed in screening positions.

The ATSA applies these standards to private contractors hired under the pilot program. Thus, Section 44919(f) of the ATSA states:

Qualified Private Screening Company—A private screening company is qualified to provide screening services at an airport participating in

the pilot program under this section if the company will only employ individuals to provide such services who meet all the requirements of this chapter applicable to Federal Government personnel who perform screening services at airports under this chapter and will provide compensation and other benefits to such individuals that are not less than the level of compensation and other benefits provided to such Federal Government personnel in accordance with this chapter.

In this regard, Section 44919(h) also states as follows:

Termination of contracts.— The Under Secretary may terminate any contract entered into with a private screening company to provide screening services at an airport under the pilot program if the Under Secretary finds that the company has failed repeatedly to comply with any standard, regulation, directive, order, law, or contract applicable to the hiring or training of personnel to provide such services or to the provision of screening at the airport.

In November 2002, Congress passed the Homeland Security Act (HAS), 6 U.S.C. Section 111, creating the Department of Homeland Security as an Executive department and the TSA was transferred to this department.

The Employer's Operation. As indicated above, the Employer has contracted with TSA to provide passenger and baggage screening and baggage handling services at SFO. It provides such services on a twenty-four hour a day, seven day a week basis. The parties stipulated that the Employer was not created by the Federal Government and is not a department or administrative arm of the Federal Government. The record reflects that the Employer is a private Illinois corporation that provides security services primarily to airlines, including airlines at Chicago O'Hare International Airport and JFK International Airport. In addition to the contract at SFO, TSA also awarded the Employer a contract to provide security services at Tupelo Airport in Tupelo, Mississippi.

The Employer's Contract with TSA at SFO (the Contract) became effective October 10, 2002. The Contract requires that the Employer:

. . . shall furnish all labor, supervision, management, facilities, equipment, materials and services (except as may be expressly set forth in contract as furnished by the government) necessary to operate, manage, train and maintain a professional, uniformed, aviation Screening Force . . . under the TSA Security Screening Pilot Program. The Company shall provide gate screening, checkpoint screening, and checked baggage screening in accordance with the SOP for TSA Screeners. The screening services shall prevent the introduction of explosives, improvised explosive devices, and

prohibited articles into the sterile areas of each airport through the application of X-ray imaging technologies, explosive detection systems, explosive trace detection systems, metal detection systems, physical search, and other detection innovations as determined.

The Contract lists a number of operational objectives that the Employer must accomplish. These objectives include inspecting persons and property entering the airport's sterile area, including aircraft personnel; denying entry to any person who does not consent to a search of his or her person or physical property; inspecting baggage; operating all screening equipment in accordance with the TSA Checkpoint Security SOP; and ensuring that the TSA Checkpoint Entry SOP is kept updated, available, and conveyed through training to all personnel prior to being assigned to duty and as modifications or recurrent training dictate.

At the hearing, TSA's Contracting Officer's Technical Representative (COTAR) from Washington, D.C., James Adams, testified that the TSA is not a joint employer of the Employer's employees at SFO. According to Adams, the Employer controls the manner and means of the daily work of the petitioned-for employees at SFO; controls their supervision; and determines their wages and other working conditions, provided the minimum standards set forth in the Contract are met. Adams testified that TSA does not provide any employment benefits to the Employer's employees, such as annual leave, insurance coverage, retirement benefits or IRA contributions; does not evaluate employees or determine which employees receive awards or bonuses; does not determine who the Employer hires and fires; does not pay the social security taxes for the employees; does not establish the work schedules or work assignments for them; and does not provide them with break rooms. The record reflects that while TSA is responsible for the standard operating procedures (SOPs) that must be used by the Employer's employees, and owns the equipment they use, including their uniforms, TSA does not manage their day-to-day work or their terms and conditions of employment. In this regard, as discussed below, there is evidence that the TSA must approve the hire of the "9000 specialists." However, the record further establishes that TSA has never rejected a recommendation by the Employer to allow it to hire a "9000 specialist."

The Employer leases office space and break rooms at SFO from SFO, and the record contains certain regulations and directives of the City and County of San Francisco that regulate minimum wage and health standards affecting the Employer's employees, as well as certain SFO regulations regarding airport security. Thus, the record includes a document issued by SFO, entitled "Your Security Duties at SFO," which includes such duties as displaying an identification card and challenging persons who do not display a proper identification card, including checking the photograph against the person and checking the expiration date on the bottom of the identification card. The document states that if a person has no identification or the identification presented is faulty, a supervisor should be contacted. The document also states that if the person feels "intimidated or

unsafe” they should contact their supervisor or an airfield safety or police officer and also instructs persons not to tailgate or “piggyback” from the building to the airfield or from the airfield into the building through security doors. The document lists offenses and punishments, which can include rescinding identification cards necessary to enter restricted areas of the Airport. The record also includes a poster of an FBI suspect wanted for terrorist activity posted at the guard mount where the Employer’s employees clock in. The requirement for airport personnel to wear security badges and to post such rules and wanted posters is required by Federal regulation at all airports. See 49 CFR Section 1542.

The Employer’s Managerial Hierarchy at SFO. The Employer’s operation at SFO is headed by Tom Long, who is its executive vice-president/chief operating officer, general manager at SFO and the airport vice president for screening. Under Long is the Employer’s Director of Operations Glenn McLea and under McLea are an operations manager, three terminal security screening managers (for Terminals 1, 3 and the International Terminal), and CTX Manager Derek Shelton. The terminal managers report to the operations manager and Shelton reports directly to McLea. With the exception of the 9000 specialists, all of the petitioned-for employees are managed by both the terminal managers and Shelton. The 9000 specialists are supervised only by Shelton, unless they are working in another classification. Shelton has more authority over security matters than do the terminal managers. The airport screeners also have immediate supervisors in their own work areas to which they report. The baggage screeners and baggage handlers who work in two of the baggage inspection rooms report to the same supervisors as do the 9000 specialists and other baggage screeners. It is unclear from the record whether the baggage screeners and handlers at other locations in the Airport have ever had their own separate supervisors. In any event, no party seeks to include any of these supervisors or managers in the unit.

The Employees In the Petitioned-For Unit. As indicated above, the Petitioner and the Intervenor seek to represent the following classifications employed by the Employer at SFO: all full-time and regular part-time airport screeners, lead airport screeners, baggage screeners, lead baggage screeners, baggage handlers and 9000 specialists. The parties dispute, however, whether any or all of these classifications of employees are guards under the Act, and whether the Petitioner and/or the Intervenor can be certified to represent them under Section 9(b)(3) of the Act. The Employer also contends that the 9000 specialists should be excluded from the unit because they are controlled by TSA and they lack a community of interest with other unit employees.

Hiring, Training and Certification of Petitioned-For Employees. The record reflects that the 9000 specialist and baggage handler positions did not exist at the time the Employer obtained its Contract with TSA. The 9000 specialist position was first introduced in approximately November 2002, and the baggage handler position came under the Contract in April 2003, after the Agreement between the Employer and the Intervenor had been entered into. All employees initially hired by the Employer were hired into the airport

screeener position and given 40 hours of training by an outside contractor to TSA for that position. They were then tested for the airport screeener position and certified in that position and/or given the opportunity to train and certify as a baggage handler, which was a higher paying position. Specifically, those that tested well for the airport screeener position were also allowed to apply for the baggage screeener position. The applicants that were hired into the baggage screeener position were given an additional 40 hours of training and tested and certified as baggage handlers.

When the 9000 specialist classification was first introduced in November 2002, the Employer allowed the baggage screeners to fill out a survey and those surveys were turned over to TSA's subcontractor Invision, which had created the CTX 9000. The Employer was told by Invision and/or TSA who could be hired into the 9000 specialist position as a result of such surveys. The 9000 specialist applicants then received 40 hours of additional training for that position and were tested and those that passed the test were certified for the position. So all of the 9000 specialists were also originally certified as baggage screeners. As of the hearing date, the Employer had not hired any new employees into the 9000 specialist position since November 2002.

Employees in all but the baggage handler position are required to take annual recertification tests for their jobs and the first recertification process was completed in November 2003. Those who failed the test were pulled from their jobs and given four hours of re-training and tested again for their position. Those that failed the test again were terminated or offered a position as a baggage handler. The record reflects that the Employer offered four of the employees who failed the November 2003 test jobs positions as baggage handlers but the record does not show whether they actually accepted such jobs. The baggage handler position was included under the Contract by amendment at the request of the Employer in April 2003.

Wages and Terms and Conditions of Employment. All of the petitioned-for employees receive the same or similar fringe benefits. The airport screeners, airport lead screeners, baggage screeners and baggage lead screeners have been covered under the Agreement between the Employer and the Intervenor, which is no longer in effect pursuant to the settlement agreement in Case 20-CA-31155-1, and their benefits have been the same as reflected in that Agreement. The benefits provided by the Employer to the 9000 specialist and baggage handlers are the same or similar to those given the other petitioned-for employees that were covered under the Agreement. The wage rates of the petitioned-for employees are as follows: 9000 specialists receive \$22.23 an hour; airport screeners and baggage screeners receive \$16.88 an hour; airport lead screeners receive \$22.22 an hour; and baggage handlers receive \$9 an hour. All of the petitioned-for employees are subject to the same Employer personnel rules. A description of each classification in the petitioned-for unit and its security functions and other facts relevant to the community of interest among employees is addressed below.

Airport Screener Position. As indicated above, the Employer employs approximately 607 airport screeners at SFO. The Employer's Director of Business Services Audry Deane testified that the airport screeners were previously employed for many years by companies that had contracts with the airlines, but that the only contract covering them at the time of the hearing was the Contract between the Employer and TSA. The job description for the airport screener states that employees in this position are responsible for providing "front-line security and protection of air travelers, airports and airplanes." The functions of these employees include identifying dangerous objects in baggage, cargo and on passengers and preventing those objects from being transported onto the aircraft; providing "exceptional" customer service; using "diverse, cutting edge electronic detection and imaging equipment;" performing "wandering, pat down searches, operation of x-ray machines, baggage screening and ticket review as needed;" as well as performing other duties, as assigned. The qualifications/requirements of the job include being a U.S. citizen, having a high school degree, and being able to lift 10 to 40 pounds. In addition, having "at least one year of full-time work experience in security work or aviation screening work or x-ray technician work is preferred." The job description also requires that this classification be available to work various shifts, weekends and holidays.

Witness Jack Walker has been employed by the Employer for about a year as an airport screener. When Walker was hired by the Employer, he was given a thorough background investigation; an oath was administered to him by TSA's security director; and he signed a form agreeing not to disclose certain information obtained in his job. Walker does not possess a guard certification card and testified that it is not required for his job.

Walker clocks in at the same guard mount where all of the petitioned-for employees clock in and he must also read and sign amendments to the SOPs each day. Walker previously worked for the Los Angeles Police Department as a patrol officer. His uniform consists of a long-sleeved white shirt with a yellow TSA badge on it: "Team SFO" on the back; a patch with the words, "Team SFO," with the Employer's name on the right sleeve; and also the words "Private Security Services" and "Safe Skies" on it.

Walker works primarily at Terminal 3, where the Employer employs about thirty airport screeners who work at the entry checkpoint where passengers pass through a metal detector and have their carry-on bags x-rayed before entering the secured "sterile" area of the airport. Passengers utilize six lanes at this location and teams of between two and five airport screeners work in each of these lanes. The airport screeners perform several different functions at Terminal 3, including what Walker called the job of "loaders," who check passengers' tickets and ask them to divest themselves of all metal objects and to remove their shoes before walking through the metal detector. The loaders also check passenger tickets to determine if a passenger has been given a special designation by the airline ("selectee") that requires the loader to check the passenger's photo identification and to direct them into a special lane for check-through.

After passengers walk through the metal detector, an airport screener directs them to the area where they can pick up their baggage after it has passed through the x-ray machine. If a passenger sets off the alarm on the metal detector, the passenger must proceed to an area behind the x-ray machine where an airport screener uses a hand-held wand to check the passenger for metal objects. Airport screeners also pat down/frisk passengers in this area if they have set off the alarm or if they are in wheelchairs or unable for some reason to walk through the metal detector.

In the entry area, there is also an airport screener who works as an x-ray technician, ensuring that no prohibited items are allowed to pass through the checkpoint. If the x-ray technician observes something suspicious in a bag requiring further clearance, he gets the attention of another airport screener, called a bag checker, who takes the bag and searches for the item. Once a determination has been made by the airport screeners at the checkpoint that a passenger is free of prohibited or other dangerous items, the passenger is allowed to proceed to the boarding area. Walker testified that the above-described functions performed in the entry area by the airport screeners are rotated among the Employer's employees. Former Airport Screener Daniel Fitzgerald testified that another duty of the airport screeners is to search the secured/gate areas of the terminal for any suspicious items when the airport opens. It should also be noted that the duty of the airport screeners to screen persons and belongings at the entry checkpoints extends to everyone, including Airport employees and even the police who pass through their checkpoint.

Airport screeners are required to follow standard operating procedure (SOP) as established by TSA. This includes a designated procedure to follow if a person tries to breach a security checkpoint. In such a situation, Walker testified that his job is to yell "breach" and to notify his lead or his supervisor. There have been occasions when a person has breached a checkpoint and airport screeners have followed the person to keep them in sight until supervisors and/or the police arrive to handle the situation. When the police arrive, the airport screener identifies the person for the police. When a breach occurs, the entry area is shut down until notification by the Airport that it has been secured.

At each checkpoint area, there is an airport lead screener who performs one or more of the duties of the airport screeners and who also serves as a contact person for the airport screeners if something unusual occurs. The airport lead screener classification is included in the petitioned-for unit and no party contends that it is a supervisory position under the Act. Screener supervisors employed by the Employer are also present at or near the entry area. No party seeks their inclusion in the unit. In addition, TSA representatives also move throughout the terminal during the day and sometimes enter the area where the airport screeners work. There is no evidence that they supervise the airport screeners during such periods.

The airport screeners working at the entry checkpoints are given a list of prohibited items issued by TSA, which includes weapons, such as scissors or knives; drugs; child pornography; and large sums of money. If a prohibited item, which is not illegal (e.g., scissors), is found in a bag or on a passenger by an airport screener, the screener tells the passenger that they can have the item confiscated at the checkpoint; check the item at the carrier's ticket counter; or mail it to themselves. If the item found is not on the prohibited items list, but is of concern to the airport screeners, they contact their lead or a supervisor to handle the situation. If a passenger becomes belligerent, the airport screener and/or their lead or supervisor calls a TSA agent or the police to handle the situation. According to Walker, under the SOPs, the Employer's employees are not allowed to carry weapons or handcuffs and are not authorized to arrest or physically detain anyone. Nor are they supposed to physically touch a prohibited item if they discover it in a bag or on a passenger. However, Walker testified that touching an item is sometimes unavoidable during the course of a search.

As indicated above, airport screeners use several different types of equipment, including x-ray machines, hand-wands, metal detectors and explosive trace detection (ETD) devices. Each entry checkpoint is also equipped with two-way radios and a phone directly connected to the police, which can be used by airport screeners to contact the police without going through a supervisor in situations presenting an imminent danger.

Walker testified that he had been cross-trained to perform the job of baggage screener, and has been transferred by the Employer to assist at other check points when they were short-staffed. He has not been cross-trained to perform 9000 specialist work and has never been in the separate room where the 9000 specialists work. Nor has he ever worked as a baggage handler. In this regard, the Employer's Director of Operations, Glen McLea, testified that the Employer has cross-trained airport screeners and baggage screeners and the record reflects that there are approximately 47 baggage screeners who are also certified as airport screeners and one airport screener who is also certified as a baggage screener. McLea testified that the main reason for temporary transfers of other employees into baggage screener positions has been the breakdown of CTX 5500 machines. According to McLea, when the CTX 5500 breaks down, a higher level of staffing is required to physically search baggage. However, according to McLea, in November 2003, all of the petitioned-for employees, except the baggage handlers, were required to have completed testing for the annual recertification in their positions, and during that recertification, they were not allowed to recertify in more than one classification. As a result of this limitation, McLea testified that they would no longer be able to work in each other's jobs unless the Employer requested, and TSA approved, such dual certifications again. McLea explained that the baggage handlers were not required to be recertified because their position had never required certification as had the other classifications in the petitioned-for unit. The record does not disclose how the Employer has handled staffing shortages since the recertification testing occurred in November 2002. Nor does the record explain the incongruity between the refusal to allow dual

certifications and the requirement in the job description of the 9000 specialist that he or she “must be baggage screener certified.”

Airport Lead Screener. The Employer employs approximately 112 airport lead screeners at SFO. They are included in the petitioned-for unit and no party contends that they are statutory supervisors, nor does the record contain any evidence establishing that they are supervisors under the Act. The job description for the airport lead screener position states that this position is responsible for assisting “management with day to day operations as well as carrying out the duties of an airport screener.” The functions of the job include assisting with the training of new team members; screening passengers and/or baggage and cargo; interceding with supervisors on behalf of team members to inform supervisors of performance management issues; assisting management in tracking employee attendance; providing exceptional customer service; using diverse cutting edge electronic detection and imaging equipment; performing wand, pat down searches, operating x-ray machines; performing baggage screening and ticket review as needed; as well as other duties as assigned. The qualifications/requirements of the job include being a U.S. citizen; the ability to speak English; and having a high school degree. The job description reflects a preference for applicants to have at least one year of full-time experience in security or aviation screening or x-ray technician type work. The airport lead screener reports to the screening supervisor.

As indicated above, the airport lead screeners work in the checkpoint areas of Terminals 1, 3 and the International Terminal, and they perform the functions of the airport screeners as well as providing oversight in unusual situations and serving as the contact person with supervisors and police should the need arise. Airport Lead Screener Joel Dewitt testified that his primary function is to screen passengers and their belongings, but he is also responsible for checking the identification of everyone passing through the checkpoint, including police officers and the custodial staff of the Airport. According to Dewitt, he is also responsible for ensuring that the airport screeners working at his checkpoint rotate through the different positions described above and that equipment is returned to its secured area.

Baggage Screener. The Employer employs 196 baggage screeners at SFO who work both in baggage screening rooms and in the lobby near the ticketing counters where baggage screening machines are located. The job description for the baggage screener states that this position is responsible for coordinating “the removal and placement of baggage to and from the aircraft and assuring quick delivery to other aircraft or the baggage claim area.” The functions of the position include handling passenger luggage and other heavy items up to 75 pounds; screening passenger’s baggage and/or cargo as required; assuring baggage is taken to the aircraft and baggage claim areas in a timely manner; providing exceptional customer service; and using diverse cutting edge electronic detection and imaging equipment. The qualifications also require that the person be able to read and comprehend oral and written instructions in English. The job description

reflects that this position reports to the screening supervisor. However, until about a month prior to the hearing in this case, no supervisors were assigned to two of the baggage inspection rooms at SFO, and the baggage screeners and baggage handlers working in these rooms reported to the same supervisors as did the 9000 specialists. As indicated above, the baggage screeners and baggage handlers have the same CTX 9000 Manager, Derrick Shelton, but the baggage screeners and baggage handlers also report to the terminal manager of the terminal in which their work site is located.

The baggage screeners use two types of machines to screen baggage, the CTX 5500 and the CTX 9000. The baggage screeners have been certified to screen and clear baggage using the CTX 5500 machine and to operate the CTX 9000 machines. They ensure that baggage scanned by the CTX 5500 machines contains no dangerous items. McLea testified that clearing baggage through the CTX 5500 machine involves watching for a green, white or red light. If the light is green, the bag is cleared; if the light is white, the bag must be scanned by the machine again; and if it is red, the bag must be physically searched. Baggage screeners can also decide to open bags that do not set off an alarm or red light if they decide that there is reason to do so.

The baggage screeners also physically operate CTX 9000 machines, but they do not resolve alarms for baggage being scanned through those machines. The CTX 9000 machines were first introduced at SFO in 2000, and the Employer's employees first used them in approximately November 2002, after the Employer obtained its Contract with TSA. The 9000 machines are more technologically advanced than the CTX 5500 machines, allowing a greater ability to resolve alarms based on the pictures produced from the scanning of baggage. The baggage screeners physically run baggage through the 9000 machines, but the images from the CTX 9000 machine are relayed to a room at another location in the Airport, where 9000 specialists observe monitors showing the images from those machines. The 9000 specialists read these images and then communicate by phone with the baggage screeners regarding whether a physical search of the bag is required or whether it can be cleared based on the images that they are seeing. The 9000 specialists also inform the baggage screeners if baggage should not be opened because of a concern that it may contain an explosive device. In addition to screening baggage, baggage screeners also patrol their work areas at the beginning and at the end of their shifts to search for suspicious items.

Baggage screeners wear uniforms that consist of a blue jumpsuit with an Employer logo and the words "Team SFO" on the back. Their uniforms do not have the TSA patch on them.

Baggage Lead Screener. The record reflects that the Employer employs approximately 48 baggage lead screeners who work in baggage rooms and also in the lobby where the CTX 5500 and CTX 9000 machines are located. Nolan Apostle, a baggage lead screener, works at the Delta pod at SFO, where both CTX 5500 and CTX 9000 machines are

located. About 6 to 8 baggage screeners and one or two baggage handlers work on Apostle's shift at Delta pod. Apostle testified that the difference between the job of a lead and a regular baggage screener is that the lead handles more paperwork; can resolve first level alarms; deals with the airlines on a regular basis; assigns lunch and break rotations; and is responsible for inspections of the baggage screening areas. Apostle carries a two-way radio to keep in contact with supervisors, other leads, and the Airport's control center, which contains a bank of monitors that show images from cameras located throughout the Airport. According to Apostle, he is responsible for challenging anyone suspicious anywhere in the airport, including in his own work area. Challenging a person involves asking if the person has a badge and what their business is in the area. Apostle testified that baggage screeners can break into locked bags in order to inspect them if the owner of the bag cannot be located to open it. Apostle also confiscates dangerous items and hazardous materials from baggage, which he usually turns over to the airlines for disposal. Apostle also logs information concerning any baggage that causes a CTX machine to alarm.

Lead baggage screeners wear a uniform that is similar to that worn by the airport screeners.

Baggage Handlers. At the time of the hearing, the Employer employed about 42 baggage handlers at SFO. The baggage handler position did not exist at the time the Employer began its operation at SFO. The Employer proposed the position as a new classification to TSA and it was covered under the TSA-Employer Contract by amendment in April 2003. The baggage handlers' job does not require a certification as does that of the airport screener, lead airport screener, baggage screener, lead baggage screener and 9000 specialist classification.

The job description for the baggage handler states that this position "aids and assists" all CTX screeners with baggage handling before and after an inspection is completed by either a CTX or ETD machine or an open baggage inspection. The primary function of the job is to assist baggage screeners once the inspection is completed in order to relieve the baggage screeners of baggage handling duties. The qualifications and requirements of the job include U.S. citizenship; the ability to communicate in English; not having a felony record; and the ability to lift up to 70 pounds and stand for 90-100% of the time.

The baggage handlers work in the same locations where the baggage screeners and baggage lead screeners work, that is, in the baggage rooms at the Airport and in roped off areas near the ticket counters in the lobby at SFO. Director of Operations Glen McLea testified that the baggage handlers working in the lobby area receive baggage from passengers at roped off areas where the scanning machines are located, and they question passengers about whether the baggage is unlocked and whether it contains any film. Then the baggage handlers put baggage into the screening machine. According to

McLea, in the baggage rooms, the baggage handlers take the bags on and off the belts and move them to search tables where they are searched by the baggage screeners.

Witness Joel Balderama has been working as a baggage handler for the Employer since approximately June 1, 2003, at Delta pod at SFO, where both CTX 5500 and CTX 9000 machines are located. Balderama received an extensive background investigation prior to being hired. After he was hired, he received training, which included a class on airfield operations access. Balderama attends morning briefings with other petitioned-for employees, and he clocks in at the same guard mount where all of the other petitioned-for employees clock in. Balderama was formerly an IDS and US Air employee and he possesses a guard card/certification because it was required in his previous employment.

Balderama testified that when he began working for the Employer, he was informed that he was not allowed to clear baggage, which involves placing stickers on baggage to signify that it has been screened and cleared for loading onto an aircraft. However, after a few days on the job, Balderama was instructed by TSA representatives that he could clear baggage in this manner. Balderama testified that he was given only a five-minute briefing on how to perform this function, which consisted of his being informed about what the different lights on the CTX 5500 machine meant and what procedure he should follow depending on which light came on. According to Balderama, from about June to September 2003, he screened bags through the machines; put stickers on them to signify that they were cleared; and placed them on the carousel once they had been given a green light by the machine. According to Balderama, when the CTX 5500 machine's white light came on, he ran the bag through the machine again. When the CTX 9000 machine alarmed, he waited for the phone to ring and the 9000 specialist would notify him if the bag was "suspect." Then he would wait for a printout, which would determine whether the bag was cleared or had to be physically searched. At no time since his hire had Balderama physically searched any baggage. Balderama testified that at the time the petition was filed in the instant case, part of his job was to take the printout and hand it to the baggage screener and to put stickers on the bags showing that they were cleared. However, between September 2003, and the hearing in this case in November/December 2003, Balderama was instructed by his supervisors not to screen bags. According to Balderama, currently he only loads the bags onto the conveyor belt and does not screen them. Baggage Lead Screener Apostle, who also works at Delta Pod, similarly testified that the job of the baggage handler is to put bags on belts, answer the phones, and, prior to the hearing in this case, to put stickers on baggage to show that it had been cleared for loading onto aircraft.

In addition to the foregoing functions, Balderama further testified that at times he asks questions of passengers in performing his work. In this regard, McLea testified that the baggage handlers ask passengers if they have any film in their bags and if the bags are unlocked. Balderama is also required to challenge anyone who enters a secured area and to notify a supervisor and/or the police if the person is hostile and to take notes regarding

any incidents, including a description of the person's appearance. Baggage Handler Brook Phillips testified that he was trained on the breach procedure for both checkpoint and CTX 5500 locations. According to Phillips, the area where he works is equipped with a two-way radio used to contact the supervisor and a phone directly connected to the police.

Baggage handlers do not substitute for petitioned-for employees in other classifications. They do not possess the necessary certifications to fill in for other employees. However, other employees have been given the opportunity to transfer into baggage handler positions. Thus, McLea testified that four employees in other petitioned-for classifications who failed their recertification test in November 2003, were offered jobs as baggage handlers.

The baggage handlers wear a uniform that is similar to that worn by the baggage screeners, consisting of a blue jumpsuit with an Employer logo and the words "Team SFO" on the back. This uniform does not have a TSA patch on it.

9000 Specialist. The Employer employs approximately forty-one 9000 specialists at SFO. The position of 9000 specialist was not included in the Agreement between the Intervenor and the Employer because it did not exist and/or the Union was unaware of its existence at the time the Agreement was negotiated, and when it came into existence, its inclusion in the unit was disputed by the parties until the issuance of the settlement agreement in Case 20-CA-31155-1, requiring the Intervenor and the Employer not to give effect to the Agreement. As indicated above, both the Petitioner and the Intervenor seek to have the 9000 specialists included in the unit.

The job description for the 9000 specialist states that this position is responsible for screening passenger baggage and cargo using remote viewing technology; detecting signs of tampering; resolving alarms on-screen; and making determinations whether to clear items. The functions of the position include screening passenger baggage and/or cargo as required; using diverse cutting edge electronic detection and imaging equipment; maintaining a high level of alertness in monitoring screens and recognizing on-screen electronic images with a high degree of accuracy; exercising independent judgment in determining if baggage and cargo is clear of prohibited items; assuring that all suspect bags are handled according to TSA checked baggage procedures; and carrying out their duties in a professional manner. The qualifications and requirements are the same as those of the baggage screener except that the 9000 specialist must also be certified as a baggage screener and be able to meet TSA qualifications for 9000 specialists. The Employer's Director of Operations Glen McLea testified that whereas the Employer can hire applicants who take the training and pass the tests for other petitioned-for classifications, the 9000 specialists cannot be hired by the Employer without TSA's direct approval of its hiring recommendation. In this regard, McLea testified that TSA has never disapproved any 9000 specialist that the Employer has recommended for hire.

As indicated above, the 9000 specialists are managed by Derrick Shelton and immediately supervised by four 9000 specialist supervisors. No TSA representative is regularly in the room where the 9000 specialist work.

Witness Florencio Hernandez, a 9000 specialist who has worked for the Employer for about a year, testified that all of the 9000 specialists were originally hired by the Employer as security passenger screeners, and given 40 hours of training by a subcontractor of TSA. According to Hernandez, becoming a CTX 5500 operator required another 40 hours of training. Hernandez took this training and worked as a CTX 5500 operator for about six months prior to being promoted to the position of 9000 specialist. In order to become a 9000 specialist, Hernandez was required to answer a questionnaire, and based on his image recognition skills, he was selected to take the 9000 specialist training. A subcontractor of TSA provided the additional 40 hours of training for the 9000 specialist position. After taking the training, Hernandez was required to pass a test for the job and then he was monitored while working on the job for a couple of days. In addition to the training from the TSA subcontractor, Hernandez testified he has also been given training on new protocols for using the 9000 machine.

Hernandez and the other 9000 operators work in a secured room in the International Terminal at SFO. According to Director of Operations McLea, a special security card is required to gain access to this room. Persons without the card must obtain approval to enter the room and employees in other petitioned-for classifications do not have regular access to it. The 9000 operation runs 24 hours a day, seven days a week. Hernandez works from 8 a.m. to 4 p.m., with about a dozen other 9000 specialists. The 9000 specialists have their own break room and do not have lockers. They are permitted to use break rooms nearby that are used by other petitioned-for employees but, according to McLea, they do not do so. The 9000 specialists are required to clock in and pick up guard notes at the same guard mount where all of the other petitioned-for employees must clock in and pick up notes. The 9000 specialists wear the same uniform as the airport security screeners.

Director of Operations McLea testified that TSA sets the protocols for operation of the CTX 9000 and also makes changes in the protocols as needed. The procedure involving the 9000 machine and specialists is as follows: When baggage is checked in, it is put on a conveyor belt which loads it onto either a CTX 9000 or a CTX 5500 machine, depending which machine is being used in a particular area. The baggage screeners are the employees who physically use the CTX 9000 and CTX 5500 machines. The 9000 specialists sit in a separate, secured room and view images conveyed from the CTX 9000 machines, which are located throughout the terminals. The CTX 9000 machine has an alarm that goes off if there is an item detected in the baggage that may be dangerous. The job of the 9000 specialist is to monitor the images coming from the CTX 9000 machines and, if the alarm sounds and/or if an item is observed that appears dangerous or possibly

harmful to the person who will be inspecting the baggage, such as an explosive device, the 9000 specialist calls the baggage inspection room where the baggage is being sent to alert the baggage screener at the CTX 9000 machine. The 9000 specialist also sends a printout and the baggage handler matches the image on the printout with the bag and the bag is taken to an inspection table for search. The 9000 specialist can decide independently if a bag is cleared through security or if it must be searched in such circumstances. According to Hernandez, the 9000 specialists are constantly telephoning the baggage room to notify the baggage screeners that they see a “suspect” bag.”

According to Hernandez, she has not worked overtime as a CTX 5500 operator but other CTX 9000 specialists have done so. In this regard, McLea testified that the 9000 specialists sometimes perform the work of the other petitioned-for classifications and the record contains an exhibit created by the Employer showing the overtime hours worked by 9000 specialists in other classifications between August 15 to October 15, 2003. There are approximately 30 employees listed, 19 of whom performed no overtime work other than 9000 type work during this two month period. Of the remaining 11 employees who performed overtime work in the other classifications during this two-month period, the number of overtime hours worked ranged from four hours to 219 hours in other classifications, and the average number of overtime hours spent performing the work of other classifications for these 11 employees was about 43 hours for the two-month period between August 15 and October 15, 2003. According to McLea, the 9000 operators generally work as baggage screeners and work in the presence of baggage handlers when they work overtime in such jobs. He further testified that 9000 operators may sometimes work in other classifications during their regular work hours in addition to doing so as overtime. The record does not disclose the frequency of such work performed by the 9000 specialists during regular work time.

Whether the Board Has Jurisdiction Over the Employer. Although no party has raised the issue of whether the Board has jurisdiction of this matter, and indeed the parties have stipulated to the Board’s jurisdiction, I address this issue under *Management Training Corporation*, 317 NLRB 1355 (1995), with regard to whether the Employer is exempt from Board jurisdiction as a political subdivision, and with regard to whether the Employer is exempt from the Board’s jurisdiction because it is subject to the Railway Labor Act.

Under *Management Training Corporation*, *supra* the only issues relevant to whether the Board has jurisdiction over the Employer are whether the Employer meets the definition of an employer under Section 2(2) of the Act and whether it meets the Board’s applicable monetary jurisdictional standard. As indicated above, the parties have stipulated that the Employer meets the applicable monetary standard.

Section 2(2) of the Act states in relevant part:

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. Sec. 151 et seq.], as amended from time to time, or any labor organization”

With regard to whether the employer is an employer under the Act, the applicable precedent is *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604-605(1971). In *Hawkins County*, 402 U.S. at 604-605, the Supreme Court set forth a two-part test of what constitutes a political subdivision under the Act. Political subdivisions are defined as: entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. The analysis in *Hawkins* is in the disjunctive. Thus, an entity is a political subdivision if it meets either prong of this test.

The plain language of Section 2(2) “exempts only government entities or wholly owned government corporations from its coverage and not private entities acting as contractors for the government.” *Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999), citing *Teledyne Economic Development v. NLRB*, 108 F.3d 56, 59 (4th Cir. 1997). Thus, the Board has repeatedly asserted jurisdiction over private contractors that provide security services for the Federal Government. See *Central Security Services*, 315 NLRB 239,242 (1994); *Champlain Security Services*, 243 NLRB 755 (1979); *Atlas Guard Service*, 237 NLRB 1067 (1978); *Federal Services*, 115 NLRB 1729 (1956); see also *U.S. Corrections Corp.*, 304 NLRB 934, 937 (1991) (at fn. 32 and accompanying text.)

In the instant case, the parties have stipulated that the Board has jurisdiction over this employer and that it is not a creation of the government or a department or arm of the government. The evidence in the record supports this stipulation. The Employer is a private corporation that has contracted with a governmental agency, TSA, to provide security services at SFO. Accordingly, I find that it is not a political subdivision under the first prong of the *Hawkins* test. See *Research Foundation of the City University of New York*, 337 NLRB No. 152 (July 31, 2002); *Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570 (8th Cir. 1981); *Jefferson County Community Center for Developmental Disabilities v. NLRB*, 737 F.2d 122 (10th Cir. 1984), cert. denied, 469 U.S. 1086 (1984).

Nor is there any evidence that the Employer is a political subdivision because it is “administered by individuals who are responsible to public officials or to the general electorate.” In the instant case, the parties have stipulated that the Employer’s relationship with the Federal Government, namely TSA, is a contractual one and that TSA is not a joint employer in this case. There is no evidence that any person involved in the administration of the Employer is responsible to a public official or the general electorate. While TSA

ultimately has control over the security operation at SFO under the ATSA, there is no showing that it administers the Employer. The Contract between the Employer and TSA shows that it is the Employer's responsibility to handle the training and supervision of its employees. There is nothing prohibiting collective bargaining in the Contract. The prohibition in the statute on the right to strike applicable to the Employer does not eliminate its obligation to bargain under a negotiated labor agreement. In this regard, I note that the Board has jurisdiction over postal employees who have collective bargaining rights, even though they are not allowed to strike pursuant to the Postal Reorganization Act. 39 U.S.C. Sections 410 (b) and 1209.

Nor is there anything in the Contract or the ATSA that prohibits the Employer from substituting negotiated wage rates and benefits for those set forth in the Contract, so long as those wages and benefits are equal to or higher than those in the Contract. The Board has held on numerous occasions that the type of restrictions set forth in government service contracts like those in the instant case do not preclude the Board's assertion of jurisdiction over a private contractor to the Federal Government. See *Central Security Services, supra*; *FKW, Inc.*, 308 NLRB 598 (1992); *Old Dominion Security*, 289 NLRB 81, 83 (1998); *Dynalectron Corp.*, 286 NLRB 302, 304 (1987). And, as indicated above, the Board has repeatedly asserted jurisdiction over private security contractors to the Federal Government. *Central Security Services, supra*; *Champlain Security Services, supra*; *Atlas Guard Service, supra*; *Federal Services, supra*; see also *U.S. Corrections Corp., supra*.

And while the Employer leases office and break room space from SFO, and SFO's regulations dealing with airport safety apply to the Employer's operation, there is no showing that SFO is involved in administering the Employer. Nor do the minimum wage and health regulations of the City and County of San Francisco that apply to the Employer establish that that a governmental entity administers the Employer.

Accordingly, based on the parties' stipulation and the record evidence, I find that the Employer is not a political subdivision under *Hawkins County, supra*.

Whether the Employer is Subject to the Railway Labor Act. No party has asserted that the Board lacks jurisdiction because the Employer is subject to the Railway Labor Act but I address the issue herein. Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 152(3). The Railway Labor Act was extended to air carriers by amendments enacted in 1936. While the Board's general policy is to defer to the National Mediation Board (the NMB) in determining its jurisdiction over an employer when the jurisdictional issue is disputed or in doubt, I see no reason to do so in the instant case where there is no

allegation that the NMB has jurisdiction over this matter and where the facts clearly support the assertion of jurisdiction by the Board.

Thus, the NMB applies a two-part test for resolution of jurisdictional issues. First, the NMB determines whether the nature of the work performed is that traditionally performed by employees of railroads or air carriers. Second, the NMB determines whether a common carrier or carriers exercise direct or indirect ownership or control of the Employer. Both parts of the test must be satisfied for the NMB to assert jurisdiction. See *United Parcel Service, Inc.*, 318 NLRB 778, 779-780 n. 7 (1995), citing *TNT Skypack, Inc.*, 20 NMB 153, 158 (1993).

In the instant case, while the NMB has found in several cases that pre-departure screening and check-point security services are activities traditionally performed by airline employees (See *Stanley Smith Security*, 16 NMB 379 (1989); *Olympic Security Services, Inc.*, 16 NMB 277 (1989); *Globe Security Systems Company*, 16 NMB 208 (1989)), in this case, there is no evidence that the Employer is owned by a railroad or common carrier or that any railroad or common carrier exercises control over the Employer. While, prior to ATSA, the security screening services at SFO were apparently handled for many years by private contractors to airlines, the record shows that since the passage of the ATSA, the Employer's contract to provide such services has only been with TSA. Lastly, the Employer's Director of Operations, Glen McLea, testified that the Employer has *no* contracts with any airlines at SFO. Under such circumstances, and given that no party has argued that the NMB has jurisdiction over this matter, I find that the Board may assert jurisdiction and need not defer to the NMB to make a determination in this case.

Whether the Petitioned-For Employees Are Guards Under the Act. As indicated above, the Employer and the Intervenor contend that none of the petitioned-for employees are guards and the Petitioner takes the position that all of the employees in the unit are guards under the Act. In addition, while the Intervenor concedes that it is a union that admits employees other than guards, and thus cannot be certified by the Board in a guard unit, it contends that the Petitioner also admits non-guards to membership and cannot be certified in a guard unit.

Section 9(b)(3) provides, in relevant part, that:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act[subchapter], the unit appropriate for collective bargaining shall be the employer unit, craft unit, plant unit or a subdivision thereof: Provided, that the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against

employees or other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Thus, in order to be a guard within the meaning of the Act, an employee must enforce against employees or other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises. Employees cannot be considered as non-guards simply because the employer applies a different job title to them; they are not authorized to carry weapons; they are not deputized or certified as guards; they have no authority to arrest or detain anyone; or because they cannot issue citations. Nor does the fact that alleged guards perform other non-guard duties necessarily establish that they are non-guard employees. Rather, under Section 9(b)(3), it is sufficient if they possess and exercise responsibility to observe and report infractions in enforcing rules to protect property of an employer or the safety of persons on the employer's premises. See *Supreme Sugar Co., Inc.*, 258 NLRB 243, 244 (1981); *United Technologies Corporation, Chemical Systems Division*, 245 NLRB 932, fn. 4 (1979); *The Wackenhut Corporation*, 196 NLRB 278 (1972).

Nor must the property or persons being protected by the alleged guards be that of their employer or even that of a statutory employer. Thus, in *Wackenhut*, supra, which is an analogous case to the instant case, the union filed a petition to represent a unit of toll booth operators employed by Wackenhut to work on freeways in Puerto Rico, pursuant to Wackenhut's contract with the Puerto Rico Highway Authority (the Authority). The Authority had contracted with Wackenhut because it was too expensive to have the toll booths/barrier manned by state policemen. The services that Wackenhut employees provided, as set forth in the contract between Wackenhut and the Authority, were "to give the physical security to the barrier," and "to enforce the regulations that have been incorporated into the toll road." *Id.* at 278. The duties of the employees involved 1) classifying vehicles approaching the barrier in order to determine the amount of toll to be paid; 2) making change for drivers as necessary; 3) keeping records relating to the collection and accounting of tolls and vehicles processed; and (4) cleaning and policing the toll booth and immediate area. The operators were also required to visually check cars as they approached to determine if they should be denied access to the freeway due to physical hazards such as worn tires, defective lights, broken windshields or missing fenders. The operators also scrutinized drivers to determine if they were drunk and were also required to watch out for acts of sabotage. If any of these matters were observed, the operators were required to notify the plaza supervisor or a policeman stationed near the barrier who would make the final disposition of the matter. The operators were also required to deny access to the freeway to pedestrians, bicycle, motorcycle and horseback riders. The Board stated that the security toll operators were:

. . . employed as guards to enforce against persons seeking to use the expressway rules to protect property and the safety of persons on the expressways premises. It is immaterial that the operators do not themselves have the power of police to ultimately determine and compel compliance by violators of the expressway rules. Rather, it is sufficient that they possess and exercise responsibility to observe and report infractions, as this is an essential step in the procedure for enforcement of the highway rules. [Footnote omitted] Likewise, it is not determinative that this is not their only function. Although the record does not reveal the frequency or the amount of time devoted to this aspect of their duties as compared to the exercise of functions more closely related to the actual collection of tolls, it is apparent that enforcement of the turnpike authority rules is a continual part of their responsibility and is a significant portion of the requirements of their job. In these circumstances, we find that they are guards within the meaning of Section 9(b)(3).

In the instant case, it is plain from both the job descriptions and the testimony of witnesses, that the job duties of the airport screeners, airport lead screeners, baggage screeners and baggage lead screeners involve providing front-line security and protection to air travelers, the property of air travelers, airport property and personnel, and airline property and personnel. These employees must directly deal with passengers and baggage, which may pose a security hazard to SFO, the airlines and the flying public. They can physically wand and/or pat down passengers if they deem it necessary. If a person or their belongings raise an issue, these employees must request the person to wait while they locate a supervisor or the police to handle the situation. Thus, while they may not be required or authorized to compel compliance by persons with whom they deal or to detain or arrest a suspect, they are the first persons to confront problems that arise and they possess and exercise responsibility to observe and report any security breaches that they encounter and to attempt to gain voluntary compliance by passengers to the rules and regulations they are implementing. This includes keeping an eye out for known terrorists whose pictures are posted at their guard mount. They also follow persons who breach secured areas until their supervisor and/or the police arrive to handle the situation and they identify suspects to the police. They are expected to search the secured areas of the Airport for any unidentified objects. They also control baggage and the security of baggage being loaded aboard airplanes and they break open locked baggage to search for suspicious items. They are authorized to confiscate illegal or dangerous items or items on the prohibited list and, in some cases, to turn such items over to the police. This includes such items as drugs and child pornography. Their duty to prevent unauthorized persons or baggage from entering the secured area of the Airport extends not only to passengers but also to employees of the Airport, the airlines, other private companies working at the Airport, and even to the police.

I find that the 9000 specialists are guards even though they primarily work in a separate room where they monitor the images relayed by the CTX 9000 machines. Thus, the 9000

specialists' job is an integral and critical part of the Employer's security operation. The 9000 specialists are constantly notifying the baggage screeners of dangerous items in baggage, and they work with the baggage screeners and baggage handlers to resolve alarms based on the images that they have been trained and certified to read. The 9000 specialists are also required by their job description to be certified as CTX 5500 operators, and the Employer has utilized them to fill in for baggage screeners who operate the CTX 5500 machines when there is a staffing shortage. While it is unclear whether and to what extent this interchange will continue in the future, the record shows that it has occurred in the months preceding the hearing. In these circumstances, I find that the 9000 specialists are guards within the meaning of the Act. See *MGM Grand Hotel, Las Vegas*, 274 NLRB 139 (1985); see also *Rhode Island Hospital*, 313 NLRB 343, 347 (1993).

Finally, I find that the baggage handlers are guards. Thus, their job description states that their function is to "aid and assist all CTX screeners with baggage handling before and after an inspection is completed by either a CTX or ETD machine or was subject to an open baggage inspection." Thus, while physically their job may involve handling baggage before and after inspection, their job is inextricably intertwined with the security screening function being performed by the airport screeners and baggage screeners. Further, the testimony of Baggage Handler Joe Balderama and Baggage Lead Screener Apostle shows that baggage handlers have also been entrusted for certain periods with the actual clearing of baggage during the screening procedure. Based on their job description and all the evidence in the record, I find that the baggage handlers in this case are guards under Section 9(b)(3) of the Act.

Whether the Petitioner and/or the Intervenor May Be Certified In a Guard Unit. Given my finding that all of the petitioned-for employees are guards, a determination must be made as to whether Petitioner and/or the Intervenor can be certified in a guard unit by the Board. The parties have stipulated, and I find, that the Intervenor is a labor organization that admits non-guards to membership. Accordingly, it cannot be certified to represent guards under the Act and cannot participate in any election before the Board in which it could be certified as a representative of guards.

With regard to the Petitioner, the record does not show that it has represented employees of any other employer or that it is anything more than basically an organization of employees of this Employer formed to represent employees of this Employer. Petitioner's Constitution and Bylaws and Amendment to its Bylaws show that it seeks to represent guards and admits guards to membership. Thus, on September 26, 2003, Petitioner amended its bylaws to read as follows:

Membership is open to the following classifications if each group is certified as an officer/guard under 9(b)(3) of the act and pursuant to a ruling from the NLRB's Regional Director. If all classifications within the proposed bargaining unit fail to meet the requirements set by 9(b)(3)

then all groups are eligible for membership under these bylaws as amended. The classifications that the United Screeners Association Local #1 seeks to represent as officers/guards, pursuant to a ruling from the NLRB include:

1. Passenger Security Officer
2. Lead Passenger Security Officer
3. CTX Baggage Security Officer
4. Lead Baggage Security Officer
5. Assistant Baggage Security Officer
6. Screening Monitor Specialist

I interpret this amendment to Petitioner's bylaws as meaning that the Petitioner will represent only those employees that the Board determines to be guards in this case, unless and until the Board finds that none of these employees are guards, and then the Petitioner desires to represent such employees as non-guards. I do not find that this makes the Petitioner a union that admits non-guards to membership as it shows only a prospective intent to allow non-guards to become members if I find that none of the petitioned-for employees are guards. Thus, it does not represent a statement as to the status of Petitioner's current membership or its intent to admit non-guards given my finding that all of the petitioned-for employees *are* guards. Nor do I find any other evidence in the record showing that non-guards are admitted to membership in the Petitioner or that Petitioner is affiliated with any union that admits non-guards. In these circumstances, and as I have found that all the petitioned-for employees, including baggage handlers, are guards under the Act, I find that the Petitioner is a guard union that does not admit employees other than guards to membership.

Accordingly, as the Petitioner is a labor organization that does not admit to membership, and is not affiliated directly or indirectly with an organization which admits to membership, employees other than guards, I find that Petitioner may appear on the ballot in the instant case. However, because the Intervenor admits employees other than guards to membership and cannot be certified by the Board, I find that the Intervenor may not participate in the election ordered herein.

The Appropriateness of the Unit. For the reasons discussed below, I find the petitioned-for unit of guards, as modified herein, is an appropriate unit. The Board's policy with regard to guard units is to include all guards of an employer in a single unit unless there is a subgroup with a separate community of interest that warrants separate representation. *University of Tulsa*, 304 NLRB 773, 774 (1991). In deciding whether a petitioned-for unit is an appropriate unit, the Board focuses on whether the employees share a community of

interest. *Id.* at 724. Factors considered by the Board in determining community of interest among employees include:

[A] difference in method of wages or compensation; different hours of work; different employee benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs. . .the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and history of bargaining.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

The record shows that all of the petitioned-for employees are an integral part of the Employer's security operation at SFO. Their job functions all involve the security screening of passengers and/or baggage and cargo or, in the case of the baggage handlers, assisting in this function. They all work at SFO. Although their wages differ, they all receive the same or similar fringe benefits. Indeed the terms and conditions for the airport screeners, airport lead screeners, baggage screeners and baggage lead screeners have been covered under the same collective bargaining agreement prior to the settlement agreement in Case 20-CA-31155-1. All of the petitioned-for employees have common supervision by CTX Manager Shelton and there is overlapping supervision by the 9000 supervisors of the baggage screeners, baggage handlers and the 9000 specialists. The qualifications of these classifications overlap. Thus, the 9000 specialists are required to be certified as baggage screeners and the baggage screeners and 9000 specialists were originally hired as airport screeners. All of the petitioned-for employees, except the baggage handlers, are certified in their positions. There is also evidence that employees interchange with each other at the Airport and even the 9000 specialists have worked as baggage handlers when there is a shortage of personnel to fill those positions. In addition, the 9000 specialists communicate on a daily basis with both the baggage screeners and baggage handlers in resolving alarms on the CTX 9000 machines. All employees clock in at the same location and use the same parking lot. All employees, except the 9000 specialists, use the same break rooms and bathrooms. Under such circumstances, and given my finding that they are all guard employees under the Act, I find that the petitioned-for unit as modified herein with the job titles used by the Employer, constitutes an appropriate unit for collective bargaining purposes within the meaning of the Act.

In directing the election herein, I have considered the decision of the Federal Labor Relations Authority (FLRA) in *United States Department of Homeland Security v. AFGE, AFL-CIO*, 59 FLRA No. 63 (2003). In that decision, the FLRA dismissed petitions by the AFGE, AFL-CIO, to represent Federal employees working as passenger and baggage screeners in the nation's airports. In doing so, the FLRA reasoned that it had no authority to hold elections because the ATSA had conferred plenary authority on the Under

Secretary to determine the terms and conditions of employment of Federal employees employed as screening personnel pursuant to ATSA, 49 U.S.C. Section 44935, and the Under Secretary had issued a memorandum on January 8, 2003, ruling that security screeners under 49 U.S.C Section 44901 had no right to engage in collective bargaining. I do not find that the reasoning in that case is applicable to the decision in the instant case, which involves a different statute covering private employers and their employees. Section 44935, relied upon by the FLRA, refers to employment in the “Federal service” and not in the private sector. In this regard, I further observe that the TSA had a representative present in the hearing who testified in the instant case and TSA filed a post-hearing memorandum and to date has not taken the position that the employees herein have no right to engage in collective bargaining or that the Board lacks jurisdiction over them. Indeed, no party to this case has raised the argument that this Agency lacks authority to order an election in this case.

Accordingly, and for all the foregoing reasons, I hereby direct an election in the unit petitioned-for, as modified herein, to reflect the job classification titles used by the Employer, to determine whether or not the employees in the unit desire to be represented for collective bargaining purposes by the Petitioner.

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177-1683-5000-0000
177-1683-8700-0000
339-7575-7550-0000
280-4500-0000-0000
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