

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TITO CONTRACTORS, INC.
Employer

and

Case 05-CA-149046

INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES, DISTRICT
COUNCIL 51, AFL-CIO
Petitioner

ORDER

On December 13, 2013, the Acting Regional Director issued a Decision and Direction of Election finding that the petitioned-for unit of all the Employer's employees is an appropriate unit. This multi-location, employer-wide petitioned-for unit includes mechanics, a warehouse employee, laborers, and employees who work at three recycling facilities. During the representation case proceeding, the Employer argued that the petitioned-for unit was inappropriate because its members did not share a sufficient community of interest. The hearing officer directed the Employer to submit an offer of proof. The Acting Regional Director concluded that the record evidence, including the Employer's offer of proof, did not "overcome the presumption of appropriateness of an employer-wide unit." On November 17, 2014, the Board denied the Employer's Request for Review, agreeing with the Acting Regional Director that the Employer had failed to overcome the presumptive appropriateness of the petitioned-for unit.¹

Following a mail ballot election held between February 28 and March 14, 2014, the Union was certified on February 25, 2015, as the exclusive collective-bargaining representative of the employees in the unit. On June 18, 2015, the Board granted the General Counsel's motion for summary judgment and found that the Employer violated Section 8(a)(5) and(1) of the Act by failing and refusing to recognize and bargain with the Petitioner as the exclusive representative of all employees employed by the Employer in the appropriate unit. *Tito Contractors, Inc.*, 362 NLRB No. 119 (2015).² The Employer refused to comply with the Board's Order and filed a

¹ Then-Member Miscimarra dissented and would have "grant[ed] review ...[to] evaluate the record evidence regarding the appropriateness of the petitioned-for unit."

² While then-Member Miscimarra adhered to his view that review should have been granted in the underlying representation case, he agreed that the Employer had not presented any new matters that were properly litigable in that unfair labor practice case and, therefore, he agreed with the decision to grant the motion for summary judgment.

petition for review with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement.

On February 3, 2017, the court granted the Employer’s petition for review, denied the Board’s cross-application for enforcement, and remanded this proceeding to the Board. *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724 (D.C. Cir. 2017).³ The court found that the Board failed to adequately consider “at least” three categories of evidence included in the Employer’s offer of proof: the “unchallenged assertion that Tito’s business comprised two discrete halves—a labor side and a recycling services side,” the “lack of interchange among the different types of Tito employees,” and the “significant differences among Tito’s employees’ ‘wages, hours and other working conditions.’”⁴

On April 19, 2017, the Board advised the parties that it had accepted the court’s remand and invited the parties to file statements of position. Thereafter, the Employer submitted a statement of position requesting that this case be dismissed or, alternatively, remanded to the Regional Director for further proceedings because circumstances at the Employer had changed significantly, such that the record developed at the December 2013 representation-case hearing no longer accurately reflects the Employer’s operations or workforce.

Having accepted and considered the court’s opinion as the law of the case, as well as the Employer’s statement of position, we find that the issues raised by the court can best be resolved by remanding this proceeding to the Regional Director for further analysis in light of the court’s opinion. Because the court’s opinion was based on the Employer’s offer of proof, the Regional Director shall reopen the record to receive evidence from all parties regarding the categories of evidence identified by the court as to whether the petitioned-for employer-wide unit is appropriate, as well as any additional evidence the Regional Director deems relevant in determining the appropriateness of that unit.

Accordingly, this case is remanded to the Regional Director for further appropriate action consistent with this Order, including reopening the record and the issuance of a Supplemental Decision.

PHILIP A. MISCIMARRA, CHAIRMAN

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., September 26, 2017.

³ The Court upheld the hearing officer’s use of the offer-of-proof procedure against the Employer’s regulation-based and statutory-based challenges. 847 F.3d at 729-732.

⁴ Id. at 733-734.