

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLUB QUARTERS HOTEL
TIMES SQUARE-MIDTOWN
Employer

and

Case 02-RC-232157

BROTHERHOOD OF AMALGAMATED
TRADES, LOCAL 514
Petitioner

DECISION ON REVIEW AND ORDER REMANDING

On December 5, 2018, the Petitioner filed a petition to represent “[a]ll Full time and Regular Part Time Housekeepers, Housemen, Hostesses, Wait Staff and Cooks” at the Employer’s hotel, while excluding “[a]ll Front Desk Attendants, Clerical, Managers, Supervisors and Guards as defined by the Act.” A hearing was held on December 18, 2018, and on December 20, the Regional Director issued a Decision and Direction of Election, finding the petitioned-for unit appropriate, directing an election, and allowing for the Front Desk Attendants, whose eligibility was contested, to vote under challenge. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, as amended, the Employer filed a request for review. The election was held on January 2, 2018, but the ballots were impounded due to pending unfair labor practice charges.¹

The issue in this case is whether the Regional Director erred in directing an election without receiving evidence and making findings with respect to the eligibility of the Front Desk Attendants, as well as in refusing to receive evidence relevant to the

¹ Accordingly, we deny the Employer’s request for a stay of election as moot.

community of interest among the petitioned-for employees and the community of interest between the petitioned-for employees and the Front Desk Attendants.

The Board has delegated its authority in this proceeding to a three-member panel.

For the reasons stated below, the Employer's Request for Review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues warranting review. Upon review, we find that the Regional Director erred in failing to receive all relevant evidence with respect to both the eligibility and unit scope issues. We therefore remand the case to the Regional Director to conduct a hearing on those issues.

The relevant classifications at the Employer's hotel are broadly split into three departments: the housekeeping department, consisting of Housekeepers and Housemen; the restaurant department, consisting of Hostesses, Wait Staff, and Cooks; and the front desk department, which consists of the Front Desk Attendants. The Employer argued, in its Statement of Position, that the petitioned-for unit is inappropriate on two grounds: first, that the housekeeping department and restaurant department employees (the petitioned-for employees) do not share a sufficient community of interest among themselves to constitute an appropriate unit; and, second, that the Front Desk Attendants are statutory employees who share a sufficient community of interest with the housekeeping employees such that they must be included in any appropriate unit. The Petitioner, in contrast, contended that the Front Desk Attendants are statutory supervisors who are not eligible for inclusion in the unit, and took the further position that, even if they were statutory employees, they do not

share a community of interest with the petitioned-for employees sufficient to require their inclusion in the unit.

Considering the Petitioner's position that the Front Desk Attendants are statutory supervisors, and presumably relying on Section 102.64(a) of the Board's Rules and Regulations, the Regional Director ruled that the question of the Front Desk Attendants' eligibility should be deferred until after the election, and accordingly instructed the hearing officer not to allow the parties to present evidence regarding these employees at the pre-election hearing. With respect to the community of interest among the petitioned-for housekeeping and restaurant employees, the Regional Director requested that the Employer make an oral Offer of Proof at the hearing, in accordance with Section 102.66(c) of the Board's Rules and Regulations. The Employer made the Offer, which the Regional Director rejected as inadequate and therefore instructed the hearing officer not to receive evidence on this issue.² The Regional Director affirmed this ruling in the Decision and Direction of Election, explaining that the Petitioner had requested a presumptively appropriate "wall-to-wall" unit of all the Employer's statutory employees, and that the evidence proffered in the Employer's Offer of Proof would be insufficient to rebut this presumption if introduced at a hearing. See *Airco, Inc.*, 273 NLRB 348, 349 (1984) (observing that a plantwide or overall unit is presumptively appropriate and that the party contending that such a unit is inappropriate bears the burden of rebutting that presumption).

² See Section 102.66(c) of the Board's Rules and Regulations ("If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received"). Members Kaplan and Emanuel express no view with respect to whether they agree or disagree with revisions made by the Board's Election Rule, but agree that it applies in the instant dispute.

Based on the procedural posture of this case, we find that it was inappropriate for the Regional Director to defer a determination about the eligibility and inclusion of the Front Desk Attendants until after the election, and that the Regional Director should have received all relevant evidence pertaining to the eligibility issue and to the parties' disputes over unit scope at the pre-election hearing. Although Section 102.64(a) of the Board's Rules states that "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit *ordinarily* need not be litigated or resolved" (emphasis added) before an election, and accordingly grants Regional Directors discretion to defer questions of eligibility until after the election, a Regional Director must still determine whether a proposed unit is appropriate in order to find that a question concerning representation exists.³

Here, the Regional Director could not proceed in the manner he did without resolving the eligibility of the Front Desk Attendants. As indicated above, the Petitioner contended that Front Desk Attendants are statutory supervisors—an eligibility issue that could, under other circumstances, be deferred based on the Board's Rules.⁴ But the Petitioner also took the position that even if they are not supervisors, the Front Desk Attendants do not share a community of interest with the petitioned-for employees such that they must be included in the unit. Under these circumstances, the Regional Director could not characterize the petitioned-for unit as "wall-to-wall," and apply the attendant presumption, without first determining the Front Desk Attendants' supervisory

³ See 79 Fed. Reg. 74308, 74384 (Dec.15, 2014).

⁴ Based on our resolution of this case, we need not pass on the Regional Director's determination that the eligibility of the Front Desk Attendants could be deferred because they constitute only 22 percent of the unit.

status. Should the Front Desk Attendants be found to be statutory supervisors, then the petitioned-for unit would indeed seem to be a presumptively appropriate “wall-to-wall” unit. However, should the Front Desk Attendants be found not to be statutory employees, the Petitioner does not seek to represent them and the petitioned-for unit accordingly would not be a “wall-to-wall” unit. In that event, the presumption the Regional Director employed to preclude litigation of the inclusion of restaurant employees would be unavailable, and it would be necessary to litigate both the inclusion of the restaurant employees and the exclusion of the Front Desk Attendants to determine whether the petitioned-for unit is an appropriate unit within the meaning of Section 9(b) of the Act. Under these particular circumstances, a deferral of the question of the eligibility of the Front Desk Attendants is thus tantamount to a deferral of a question concerning representation, and is therefore inappropriate.

We recognize that the Regional Director, in summary fashion, also appeared to make an independent determination that the petitioned-for unit of housekeeping and restaurant employees was appropriate, separate and apart from his analysis regarding the supervisory status of the Front Desk Attendants and his related application of the wall-to-wall presumption. (Indeed, a supervisory determination regarding the Front Desk Attendants would not be necessary at all if the petitioned-for housekeeping and restaurant employees are already an appropriate unit, because the Union has not petitioned for their inclusion.) However, on this question the Employer’s offer of proof seeking to demonstrate that the petitioned-for restaurant employees do not share a sufficient community of interest with the petitioned-for housekeeping employees to

constitute an appropriate unit is relevant, and we find that the Regional Director erred in excluding it.

Accordingly, we remand this case to the Regional Director to conduct a hearing regarding the appropriateness of the petitioned-for unit, including, as necessary, the supervisory status of the Employer's Front Desk Attendants and whether the petitioned-for unit is appropriate with the inclusion of the restaurant employees and the exclusion of the Front Desk Attendants.⁵

ORDER

This proceeding is remanded to the Regional Director for Region 2 for further appropriate action consistent with this Decision on Review and Order Remanding.

LAUREN McFERRAN, MEMBER

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., February 12, 2019.

SEAL

⁵ Due to the impoundment of the ballots pursuant to the Board's blocking charge policy—an issue that is not before us—we recognize that any action taken by the Region pursuant to this decision and order will need to be taken consistent with the blocking charge policy.