

**Lin R. Rogers Electrical Contractors, Inc. and
International Brotherhood of Electrical Work-
ers, Local 850, AFL-CIO. Case 16-RC-9907**

June 13, 1997

DECISION, DIRECTION, AND ORDER

**BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS**

The National Labor Relations Board has considered determinative challenges in an election held November 21, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 3 for and 3 against the Petitioner, with 3 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Order.¹

At issue in this case are the Employer's challenges to the ballots of employees Feliciano Garcia and Raymond Quinones to vote in the election held on November 21, 1996. Garcia, a full-time paid organizer for the Petitioner, worked for the Employer as an electrician at its Lubbock, Texas Home Depot project from October 10-26, 1996,² when he ceased work and submitted to the Employer a written statement asserting that it had committed unfair labor practices.³ Garcia testified at the hearing that he was an unfair labor practice striker, and that he ceased work and commenced an unfair labor practice strike on October 26 to protest coercive acts on the part of the Employer. However, apart from submitting the statement, Garcia took no actions in furtherance of a strike. No unfair labor practice charges were filed against the Employer relating to conduct prior to Garcia's alleged unfair labor practice strike. As of the date of the hearing in this case, Garcia had not obtained other employment apart from his position as an organizer with the Petitioner.

Employee Raymond Quinones was hired by the Employer as an electrician at the Home Depot project in September. His last day of work for the Employer was October 14. On October 17, Quinones returned to the jobsite to pick up a paycheck and handed Supervisor Tappan a document stating that he was "officially on strike for better wages and benefits, until further notice." Quinones testified at the hearing that he ceased working for the Employer because the Employer refused to pay him the journeyman electrician's rate even though he was doing journeyman's work.

Quinones also testified that he prepared the document stating he was on strike on his own without consulting anyone from the Union. Shortly after his walkout, Quinones obtained employment with another electrical contractor.

The hearing officer found that Garcia was not an unfair labor practice striker, but was instead an economic striker. In so finding, the hearing officer reasoned that, in the absence of a charge alleging that the Employer has committed an unfair labor practice, the strike must be deemed economic in nature. Thus, the hearing officer noted that Garcia had submitted a written statement that he was commencing a strike and the Employer presented no evidence to contradict Garcia's claim of "striker status" apart from the fact that Garcia continued to work for the Petitioner, as he had before and during his employment with the Employer. The hearing officer found that Garcia's holding other employment did not establish that he had abandoned interest in the struck work, citing *Akron Engraving Co.*, 170 NLRB 232 (1968), overruled on other grounds *D. E. Butterfield, Inc.*, 319 NLRB 1004, 1005 (1995).

The hearing officer found that Quinones also was an economic striker in light of his submission of a document stating that he was on an economic strike and the Employer's failure to present credible evidence in rebuttal. The hearing officer rejected the Employer's claim that Quinones was not a legitimate striker because his wages and benefits were equivalent to those in the Petitioner's standard area collective-bargaining agreement, and found that even if the Employer were paying "union scale," Quinones was under no obligation to refrain from seeking higher wages. The hearing officer also found that Quinones was a legitimate striker notwithstanding that no other employee participated in the strike at its inception because he was arguably seeking to form, join, or assist a labor organization, citing *Manno Electric*, 321 NLRB 278 (1996). The hearing officer additionally found that Quinones was engaged in concerted activity in any event when Garcia subsequently withheld his services, as the strike then involved two employees.

In the absence of exceptions, we adopt the hearing officer's finding that Garcia was not an unfair labor practice striker. For the reasons that follow, we find, contrary to the hearing officer, that he was not an economic striker. With regard to Quinones we further find that because Quinones was not acting in concert with any other employee when he withheld his services from the Employer after October 14, his work stoppage did not accord him status under the Act as an economic striker.⁴ In the absence of evidence sufficient to establish that either of these two was engaged in an

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the Petitioner's challenge to the ballot cast by Tom Keggereis be overruled.

² All dates hereafter are in 1996.

³ The record does not include a copy of this statement.

⁴ There is no evidence or contention that Quinones was an unfair labor practice striker.

economic strike, we find that they were not eligible to vote in the election held on November 21.

Section 2(3) of the Act provides that an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment" retains his or her status as an employee. Section 9(c)(3) provides that "[e]mployees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike." See *Globe Molding Plastics*, 200 NLRB 377 (1972).

We find insufficient evidence in this case to indicate that Garcia was engaged in any concerted activities for the purpose of an economic strike. Thus, Garcia never claimed to be engaged in an economic strike, never presented the Employer with any demand or request for changes in wages, hours, or other terms and conditions of work, and never claimed, at the time of his walkout or at the hearing, that he was dissatisfied with any term or condition of his employment or that he was acting in concert with any other employee. There is no evidence of any nexus between the activities of Garcia and Quinones. Additionally, there is no evidence that Garcia or anyone connected with him picketed, leafleted, patrolled, or engaged in any overt act (aside from his written statement to the Employer claiming to be an unfair labor practice striker) to indicate the existence of a labor dispute with the Employer. Under all of the foregoing circumstances, we find that Garcia was not an economic striker. Accordingly, we find that he voluntarily quit his employment on October 26 and, as such, was not eligible to vote in the election held on November 21.⁵

In the absence of any evidence that Quinones acted in concert with another employee in withholding his services from the Employer after October 14, we find that he also was not an economic striker. Contrary to the hearing officer, *Manno Electric*, supra, is distin-

⁵In finding that Garcia was not an eligible voter, we do not rely on his status as a paid union organizer.

guishable and does not support a finding that Quinones was an economic striker. In *Manno Electric*, the Board found that employee Bonnette's "individual job action" in walking off a job to which he had been discriminatorily assigned was protected concerted activity based on evidence that Bonnette had previously acted in concert with other employees in protected union organizing activities (including informational picketing of the Employer). The Board found that Bonnette's individual walkout was protected as a continuation of his prior group activity and because it was in protest of the respondent's discriminatory response to those activities (e.g., assigning him to a remote worksite with no work to do)—which assignment the Board found had violated Section 8(a)(3) and (1).⁶

In this case, by contrast, there is no evidence that Quinones engaged in concerted activities prior to his individual walkout. Nor was that walkout in protest of any unfair labor practice on the part of the Employer.⁷ To the contrary, the stated and only reason given for Quinones' individual walkout was that he wanted to be paid at the journeyman rate. Under these circumstances, we find that Quinones was not an economic striker within the meaning of Section 2(3) and 9(c)(3) of the Act and thus was not eligible to vote in the election held November 21.

DIRECTION AND ORDER

IT IS DIRECTED that the Regional Director for Region 16 shall, within 14 days from the date of this Decision, open and count the challenged ballot of Tom Keggereis, serve on the parties a revised tally of ballots, and issue the appropriate certification.

IT IS FURTHER ORDERED that Case 16-RC-9907 is remanded to the Regional Director for Region 16 for further proceedings consistent with this Decision.

⁶We further note that the question presented in *Manno Electric* was whether Bonnette's walkout was protected. The Board there did not determine whether the walkout was a strike within the meaning of the Act, much less whether Bonnette would be an eligible voter—the issue before the Board in this case.

⁷As noted above with respect to employee Garcia, no unfair labor practice charge has been filed against the Employer, and there has, accordingly, been no finding by the Board that any unfair labor practice has been committed.