

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

AMERICAN PAINTING, INC.<sup>1</sup>

Employer

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL  
NO. 30

Petitioner

Case 13-RC-20547

**DECISION AND ORDER**

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<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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.<sup>3</sup>

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. No 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 for the following reasons:

**FACTS**

The petitioned-for unit includes all full-time painters employed by the Employer at its facility currently located at 895 Industrial Drive, West Chicago, Illinois. On the amended petition, the Petitioner listed the number of employees in this unit as seven. However, during the course of the hearing, after an off-the-record discussion, the

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<sup>1</sup> The names of the parties appear as amended at the hearing.

<sup>2</sup> The positions of the parties as stated at the hearing and in their briefs have been carefully considered.

<sup>3</sup> The Employer is a corporation primarily engaged in the business of a painting broker in the construction industry within the greater Chicago area.

Petitioner, having agreed with the Employer that some of the painters were independent contractors, contended that there were two full-time employees performing painting work which constitute an appropriate unit.

The Employer at the hearing and in its brief contends that the two individuals sought by the Union, Miguel Guerrero and Carlos Lopez, are not painters as petitioned for by the Union, but at most are painters' helpers; that they are, like the painters, independent contractors, not employees; and, even *assuming arguendo*, that they are employees within the meaning of the Act, that they are casual, temporary employees who have no reasonable expectation of continued employment. Further, the Employer contends that, if it is found to be in the construction industry, the two individuals have not worked a sufficient amount of days to meet the eligibility requirements as set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified 167 NLRB 1078 (1967).

The Employer is a painting contractor performing, decorating and painting services for residential and commercial properties. At the hearing, Gary Bens, the Employer's President, testified that the Employer only has two regular full-time employees: an office clerical and himself. The painting services provided by the Company breaks down roughly into a ratio of fifty-percent residential decorating and fifty-percent commercial painting. The record shows that the Employer performs more interior than exterior work, and the vast majority of the work performed is the repainting of existing structures as opposed to new construction work. It is undisputed that the Employer operates as a broker, acquiring jobs and contracting them out to a core group of independent contractors that perform all the painting work. The record does not reflect that the Employer has any historical pattern or practice of employing painter-helpers.

According to the testimony at the hearing, Miguel Guerrero and Carlos Lopez were hired by the Employer as painter-helpers. Their duties include clean up and preparation of the surfaces to be painted, including the plasticing (covering) of windows cleaning up floors, laying plastic down on floors, and general clean-up of the job site. Miguel Guerrero and Carlos Lopez are paid a flat rate of \$10.00 an hour by the Employer. Guerrero and Lopez are paid on an irregular schedule, typically after the painting contract they are working under is completed. They are responsible for keeping track of the number of hours they worked and are paid according to those records. The Employer maintains no personnel or payroll records on the two individuals. They do not receive any benefits, such as paid vacations, holidays, or any other fringe benefits. The Employer does not pay any social security, unemployment, or withholding taxes on behalf of the men. There is no evidence in the record that the two individuals' work is subject to any over-sight by the Employer or that Guerrero and Lopez are subject to any type of disciplinary action or other personnel policies of the Employer. They do not wear a uniform, but wear the white clothes typically worn by painters and helpers. All arrangements for work assignments and transportation to and from the work-site, as well as the use and supply of trade tools and materials, are between Guerrero and Lopez and the contract painters to whom the Employer has contracted out the job. Moreover, while there is no direct evidence as to whether Guerrero and Lopez worked for other entities during the relevant period, Bens testified that if they wanted to take on work for other employers they could do so, while still obtaining work through the Employer.

Bens testified that he hired Miguel Guerrero in December 2000 to perform work on a large residential contract. During the week of December 11, 2000, Guerrero worked a total of thirty hours during a four-day span on the contract. Thereafter, until around the week of January 22, 2001, Guerrero did not perform any services for the Employer. From around the week of January 20 until February 19, 2001, the record shows that Guerrero performed services totalling around 121 hours. All told, between December 11, 2000 until around February 16, 2001, Miguel Guerrero worked about 19 days. Bens further testified that Miguel Guerrero was scheduled to start work on a limited four or five-day job in Bartlet, Illinois on February 20, 2001. However, according to Bens, Guerrero did not arrive at the job site that day, so he was unclear as to the status of Guerrero. Bens further testified that after the completion of the short-lived Bartlett job, he had no expectation of supplying further work to Guerrero.

With respect to Carlos Lopez, the record shows that the Employer used his services as a painter's helper between January 22 and February 19, 2001. The record shows that the Employer paid Lopez for providing the same type of services under the same conditions as Guerrero did. On the February 19, 2001, Lopez was informed that his services were no longer needed because the Employer finished the subcontract under which Lopez worked. Bens testified at the hearing that the Employer had no expectation of utilizing the services of Lopez at any foreseeable time in the future. All told, between the stated dates, Lopez was paid for about 108 total hours of services covering 13 days.

### ANALYSIS

Without deciding whether Miguel Guerrero and Carlos Lopez are employees of the Employer involved herein,<sup>4</sup> the record shows that they have been employed on a casual, sporadic, and short-lived basis without any reasonable expectancy of continued employment and are not eligible to vote in the voting unit regardless of whether the Employer is considered to be in the construction industry or not; *see, Owens-Corning Fiberglas Corp.*, 140 NLRB 1323 (1963), regarding the voter eligibility of temporary employees in a non-construction industry setting. Fluid, temporary, and sporadic employment relationships are typical of many employment relationships in the construction industry, and to account for such the Board developed what has become known as *Daniel* formula for determining the eligibility of employees working in the construction industry, "who may experience intermittent employment, be employed for short periods on different projects and work for several different employers during the course of a year." *Sreiny and Company, Inc.*, 308 NLRB 1323, 1324 (1992). Under the

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<sup>4</sup> The record tends to show that that the Employer named herein does not by itself exercise the right to control the manner in which Guerrero and Lopez perform their jobs such that they might, on this limited view, be considered independent contractors. *Gold Medal Baking Co.*, 199 NLRB 895 (1972). There is insufficient evidence in the record to determine whether the Employer and the contractor to whom Guerrero and Lopez were assigned to assist might constitute joint employers with sufficient control over the manner and means by which Guerrero and Lopez perform their work such that they could be employees of joint employers. However, in view of my findings herein that they are not eligible to be in the voter unit with regard to employment with the Employer name in the instant petition under any eligibility formula that might be applicable to them, I do not have reach the issues of whether the Employer herein is a joint Employer with the contractors it uses and whether Guerrero and Lopez would be employees in the context of such a relationship.

*Daniel* formula, eligible voters include all employees on the payroll for the payroll period immediately preceding the issuance of a Decision directing an election, or who have been employed for a total of 30 days during the preceding 12 months, or who have some employment in the preceding 12 months and have been employed for 45 days or more during the preceding 24 month period. Even under the *Daniel* formula neither Miguel Guerrero nor Carlos Lopez meet the eligibility requirements. The record indicates neither were on the payroll of the Employer at the time or the hearing or will be at the time a decision issues herein, and neither have a sufficient number of days of work on either the 12-month or 24-month basis as set forth in *Daniel*. Furthermore, based on the record, there is no evidence that the Employer has any current or laid off employees that satisfy the Daniel eligibility formula in any appropriate unit. Accordingly, as there is no showing that there are any eligible voters in the unit sought by the Petitioner, I shall dismiss the petition.

**ORDER**

IT IS HEREBY ORDERED that the petition in the above matter be, and it hereby is, dismissed.

**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, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by March 27, 2001.

**DATED** this 13<sup>th</sup> day of March, 2001, at Chicago, Illinois.

/s/ Elizabeth Kinney  
Elizabeth Kinney, Regional Director  
National Labor Relations Board  
Region 13  
200 West Adams Street, Suite 800  
Chicago, Illinois

460-5067-7000; 362-3350-6000