

Empresas Inabon, Inc.,¹ Inabon Ready Mix, Inc., and Inabon Aggregates, Inc. and Union de la Construccion de Concreto Mixto y Equipo Pesado de Puerto Rico

Empresas Inabon, Inc., Inabon Ready Mix, Inc., and Inabon Aggregates, Inc. and Congreso de Uniones Industriales de Puerto Rico, Petitioner.
Cases 24-CA-6336 and 24-RC-7396

October 22, 1992

**DECISION, ORDER, AND CERTIFICATION
OF REPRESENTATIVE**

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On May 13, 1992, Administrative Law Judge Hubert E. Lott issued the attached decision. The Charging Party filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision with limited exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Empresas Inabon, Inc., Inabon Ready Mix, Inc., and Inabon Aggregates, Inc., Barrio Cotto Laurel, Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹The caption has been amended to reflect the correct spelling of the Respondent's name.

²We note the following inadvertent errors made by the judge which do not affect the outcome. The judge stated that the Petitioner had been certified to represent the employees at the Respondent's Salinas plant, when, in fact, the incumbent union, Sindicato de Empleados de Equipo Pesado, Construccion y Ramas Anexas de Puerto Rico, had been certified at that location. The case reported at 282 NLRB 482 (1986) is *Len Martin Corp.*

³Union de la Construccion de Concreto Mixto y Equipo Pesado de Puerto Rico is the Intervenor in this proceeding. In affirming the judge's recommendation that the Intervenor's objection to the election be overruled, we note that consenting to an election by the filing of a request to proceed while unfair labor practice charges are pending does not foreclose the filing of objections based on the same conduct. Consent to proceed to an election does not constitute waiver. However, we conclude that under all the circumstances of the present case, the Intervenor has not met its burden of showing that the Respondent's conduct affected the outcome of the election.

(a) Withdrawing from bargaining with an incumbent union, which is the exclusive bargaining representative of its employees in the bargaining unit based on the filing of a representation petition by an outside challenging union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Barrio Cotto Laurel, Ponce, Puerto Rico, copies of the attached notice marked "Appendix."⁴ Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Empresas Inabon, Inc., Inabon Ready Mix, Inc., and Inabon Aggregates, Inc., Barrio Cotto Laurel, Ponce, Puerto Rico, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Congreso de Uniones Industriales de Puerto Rico and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees employed by the Employer at its Ready Mix plant in Barrio Cotto Laurel, Ponce, Puerto Rico, including truck drivers, mechanics, helpers, greasers and laborers; but excluding all office clerical employees, salesmen, dispatchers, and supervisors and guards as defined in the Act.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with an incumbent union as the exclusive bargaining representative of our employees in the bargaining unit based on the filing of a representation petition by an outside challenging union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

EMPRESAS INABON, INC., INABON
READY MIX, INC., AND INABON AGGREGATES, INC.

Jorge A. Ramos, Esq., for the General Counsel.

Augustin Collozo, Esq., of Hato Rey, Puerto Rico, for the Respondent.

Pedro Salicrup, Esq., of Hato Rey, Puerto Rico, for the Charging Party.

Arturo Figueroa and Nicholas Delgado, Esqs., of Porta Nuevo, Puerto Rico, for the Petitioner.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was tried in Hato Rey, Puerto Rico, on September 20, 1991. The 8(a)(5) and (1) charge was filed on May 23, 1991. Timely objections were filed on June 18, 1991. Complaint and order consolidating cases issued June 28, 1991.

The issue is Respondent's refusal to bargain with the incumbent Union (the Union) in the face of a petition filed by Congreso de Uniones Industriales De Puerto Rico (Petitioner). The objection is the same as the complaint allegation.

FINDINGS OF FACT

Inabon Ready Mix Concrete, Inc. and Inabon Aggregates, Inc. are wholly owned subsidiaries of Empresas Inabon, Inc. which are Puerto Rico corporations. All three constitute a single-integrated business enterprise and a single or joint employer within the meaning of the Act.¹

Respondents are engaged in the processing and sale of Ready Mix concrete and aggregate products at its facility at Barrio Coto Laurel, Ponce, Puerto Rico. In the course and conduct of its business operations, Respondent, during the last 12-month period, purchased and received goods and

¹ Although this complaint allegation is denied by Respondent in its answer, it was found to be a single employer and/or a joint employer in the Decision and Direction of Elections dated May 14, 1991. No request for review was ever filed.

products valued in excess of \$50,000 from suppliers located within the Commonwealth of Puerto Rico, each of which, in turn, purchased these same goods and products directly from suppliers located outside the Commonwealth of Puerto Rico.

Respondent annually sells and ships goods and products valued in excess of \$50,000 to customers located within the Commonwealth of Puerto Rico, each of which, in turn, annually sells and ships goods and products valued in excess of \$50,000 directly to customers located outside the Commonwealth of Puerto Rico or purchases and receives goods and products valued in excess of \$50,000 directly from suppliers located outside the Commonwealth of Puerto Rico.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

Alleged Unfair Labor Practice and Objection

All evidence was admitted through stipulated documents.² Respondent and Charging Union have had a collective-bargaining relationship for 20 years. The latest collective-bargaining agreement between the parties was effective from June 30, 1985, to June 30, 1988. Through a stipulation signed by the parties on December 14, 1988, the contract was extended from July 1, 1988, to June 30, 1991.

On April 2, 1991,³ Petitioner filed a petition for election among Respondent's production and maintenance employees. On April 4, the Charging Union sent a letter to Respondent requesting negotiations for a new collective-bargaining agreement. On April 15, Respondent's attorney responded to this request by stating that Respondent was available to negotiate on specific dates. On May 1, Respondent's attorney, by letter to Charging Union, refused to meet and negotiate because of the pending petition which had been filed on April 2. In a letter dated May 8, the Charging Union insisted on negotiations for a new agreement. A hearing was held in the "R" case and a Decision and Direction of Election issued on May 14, finding, inter alia, no contract bar and single employer status. No request for review was ever filed. On May 20, Respondent in a letter to Charging Union stated that its final position was that it would not negotiate until the Board makes a final determination as to which union represents the employees. On May 23 the Charging Union filed 8(a)(5) and (1) charges against Respondent alleging refusal to bargain. On that same date, Charging Union's president signed a request to proceed. On June 12, an election was held for:

All production and maintenance employees employed by the employer at its Ready Mix plant in Barrio Coto Laurel, Ponce, Puerto Rico, including truck drivers, mechanics, helpers, greasers and laborers; but excluding all office clerical employees, salesmen, dispatchers and supervisors and guards as defined in the Act.

The election results are as follows:

² Respondent in its answer denied that its attorney is an agent of Respondent. Augustin Collozo admitted on the record that he has been the Respondent's attorney of record from the inception of these proceedings. Therefore I find that he is the agent of Respondent.

³ All dates refer to 1991 unless otherwise indicated.

Eligible voters—37
 Votes cast for Petitioner—30
 Votes cast for Intervenor (Charging Union)—6
 Total votes cast—36

Timely objections were filed on June 18 alleging Respondent's refusal to bargain as a grounds for setting aside the election.

Analysis and Conclusions

It is clear from the stipulated facts that Respondent violated Section 8(a)(5) and (1) of the Act when it refused to bargain because of the mere filing of a petition by a challenging Union. *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982).

The other issue deals with the objection to the election based on the 8(a)(5) violation. The Intervenor (incumbent) argues, in brief, that when the 8(a)(5) charge was filed, the Region should have held the "R" case in abeyance until the charge was resolved. By not doing so, Intervenor argues that laboratory conditions were destroyed. It further asserts that the charge should have blocked the election notwithstanding the signing of a request to proceed because of the nature of the allegation which precluded the existence of a question concerning representation.

Where the pending charge alleges violations of Section 8(a)(5) of the Act, the agency has a general policy of holding a petition in abeyance since the violation and remedy may condition or preclude the existence of a QCR unless a request to proceed is filed by the Charging Party. Requests to proceed in 8(a)(5) cases will not normally be honored where the allegation, if proven, would preclude the existence of a QCR, unless specific authorization by the Board is given. Under these circumstances, the Regional Director may proceed on the "R" case if he/she believes that the employees can exercise their free choice in an election.

In the case at issue, the evidence shows that when the Intervenor (incumbent) union filed an 8(a)(5) charge on May 23, it also filed a request to proceed. I assume the Region followed agency policy because it processed the "R" case through to election. I also have to conclude that the Region decided a free choice election could be held in the face of a meritorious 8(a)(5) allegation.⁴

⁴Petitioner was certified to represent the employees at Respondent's Salinas plant.

With respect to the Intervenor's arguments the evidence is undisputed that it not only filed a request to proceed but also participated in the "R" case hearing and election without objection and never filed a request for review.

The Intervenor's actions had to be known to the employees prior to the election. With that knowledge, the employees still voted overwhelmingly for Petitioner which is a strong indication that the 8(a)(5) violation had little, if any, impact on the election.

If there is an inconsistency between a meritorious 8(a)(5) violation precluding a QCR and the overwhelming mandate given to Petitioner, so be it. After all, it is not what the two contending Union's want, but what the employees voted for that counts.

Accordingly, I recommend overruling the objection and certifying the Petitioner. *Lynn Martin Corp.*, 282 NLRB 482 (1986).

CONCLUSIONS OF LAW

1. Empresas Inabon, Inc., Inabon Ready Mix, Inc. and Inabon Aggregates, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the employer at its Ready Mix plant in Barrio Cato Laurel, Ponce, Puerto Rico, including truck drivers, mechanics, helpers, greasers and laborers; but excluding all office clerical employees, salesmen, dispatchers, supervisors and guards as defined in the Act constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Respondent, by refusing to meet and bargain with the incumbent Union since May 1, 1991, engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. Incumbent Union's objection to the election has no merit.

REMEDY

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act, I recommend that it cease and desist therefrom. Since the incumbent Union is no longer the exclusive bargaining representative of the unit employees, the remedy shall not include an affirmative bargaining order.

[Recommended Order omitted from publication.]