

**L & B Cooling, Inc. and Fresh Fruit and Vegetable Workers, Local P-78-B of the United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 27-CA-7522**

5 August 1983

**DECISION AND ORDER**

BY CHAIRMAN DOTSON AND MEMBERS  
JENKINS AND ZIMMERMAN

On 1 October 1982 Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union after the Union won an informal election that the Union and Respondent agreed to conduct among Respondent's employees. The Administrative Law Judge dismissed the complaint, finding that extra seasonal employees employed by Respondent during the previous season were entitled to be included in the bargaining unit and, when so included, the Union had not been elected by a majority of the employees in the bargaining unit. We reject the Administrative Law Judge's finding that the extra seasonal employees from the previous season should be included in the unit. We find that those employees did not have a reasonable expectation of reemployment with Respondent.

The facts are set forth in the Administrative Law Judge's Decision and are undisputed. They can be briefly summarized together with a few additional, undisputed facts, as follows. Respondent is engaged in the business of cooling lettuce. Lettuce is packaged in the fields and shipped to Respondent. Respondent cools the lettuce by a vacuum process that removes water and cools the lettuce almost to the point of freezing. The lettuce is then loaded onto trucks and shipped.

Respondent commenced operations in the summer of 1979. Its facility is mobile, and is relocated as lettuce harvesting progresses through the Southwest, apparently essentially from Arizona to New Mexico to Colorado. From late July until early October 1980, Respondent operated in Center, Colorado, processing the lettuce as it was

harvested in the San Luis Valley. While in Center, Respondent employed a crew of approximately 14 employees who worked on a steady basis.<sup>1</sup> It also employed approximately 13 additional employees on an as-needed basis. Approximately six of the as-needed, or extra, employees were on Respondent's payroll in one pay period, and the balance of them were on the payroll in two to four pay periods.<sup>2</sup> The extra employees performed essentially the same work as the other employees, were under the same supervision, and were similarly compensated. All of the employees who worked for Respondent in Center were part of a labor pool that migrates through the Southwest, as does Respondent, as the lettuce crop is harvested.

In July 1981, Respondent was again operating in Center. On 23 July Jerry Breshears, the Union's executive secretary, requested that an election be conducted at Respondent's facility to determine whether Respondent's employees wished to be represented by the Union. Respondent agreed to the election. At that time, Respondent's work force was comprised of essentially the same group of regular employees who had worked for it in Center for the entire previous season. (Approximately 17 extra employees were subsequently hired when Respondent became particularly busy.) The Union won the secret-ballot election 10 to 4.<sup>3</sup> Respondent did not object to the way in which the election was conducted, or to the election results. Respondent thereafter refused to bargain with the Union, despite several requests by the Union that it do so. By letter dated 3 September 1981, Respondent explained to the Union that:

. . . it is L & B Cooling's position that the union does not represent the employees in a unit appropriate for bargaining. The meeting you held with the employees on L & B's premises cannot be thought of as a means of determining the employees['] true feelings. It appears . . . that both the company and the union may have violated the labor laws.

Initially, we note that this case is governed by some basic principles of labor law. An employer who voluntarily recognizes a union that has the support of the majority of the employees in a bar-

<sup>1</sup> Those employees worked in the following job classifications: loader, push-back, set-up man, set-off man, forklift driver, cooling tube operator, maintenance man, and clerical worker.

<sup>2</sup> A pay period is 1 week.

<sup>3</sup> Breshears and Respondent's co-owners, Gary Lofton and Robert Bower, were present during the voting. Breshears tore up pieces of paper to be used as ballots. He told the employees to write "yes" to vote for the Union, and "no" to vote against it. Each employee was then given a piece of paper. The employees marked the ballots and placed them into a hat. Finally, the hat was passed to employee Glen Grice, who removed the ballots, reading each one.

gaining unit is obligated to bargain in good faith with that union.<sup>4</sup> However, if the union does not represent a majority of the employees in the bargaining unit, it is an unfair labor practice for the employer to recognize that union as the exclusive representative of the employees in the unit, and for the union to accept that status.<sup>5</sup> The Administrative Law Judge, after noting these principles in his Decision, stated that the issue in this case is whether the extra seasonal employees who had been employed during the 1980 season in Center were entitled to be included in the bargaining unit. He found that those employees had a reasonable expectation of reemployment with Respondent in the future, reasoning that Respondent was completely dependent upon seasonal labor, former employees reapply, and those former employees have in fact been rehired.<sup>6</sup> When the extra seasonal employees are included in the unit, the Union did not receive votes from a majority of the employees.<sup>7</sup> The Administrative Law Judge thus concluded that Respondent could lawfully refuse to bargain with the Union, and dismissed the complaint.

We agree with the Administrative Law Judge that the issue in this case reduces to whether the employees who were employed by Respondent in Center in 1980 on an as-needed basis should be included in the unit. We also agree that resolution of this issue turns upon whether those employees had a reasonable expectation of reemployment with Respondent. Contrary to the Administrative Law Judge's finding, however, we find that those extra seasonal employees did not have such an expectation.

In assessing the expectation of future employment for seasonal employees for purposes of voting eligibility and unit placement, we consider factors such as the size of the labor force from which the seasonal employees are recruited, the stability of the employer's labor requirements and the extent to

which the employer is dependent upon seasonal labor, the actual season-to-season reemployment, and the employer's preference or recall policy regarding reemployment of seasonal employees.<sup>8</sup>

The labor force from which Respondent draws its employees appears to be large, although its size is essentially indeterminate because it consists of itinerants who travel throughout the Southwest as the lettuce is harvested. Respondent hires its extra employees from among the itinerants who happen to be available in Center during the harvest season in that area. Since those potential employees are migratory, we cannot infer that they will be in Center each season.<sup>9</sup> In contrast, when the Board has relied in part upon the size of the labor force in finding that seasonal employees had a reasonable expectation of reemployment, the labor force was fixed, with the potential employees apparently actually residing in the area.<sup>10</sup> Therefore, we find that the indefinable, migratory nature of the labor force from which Respondent draws its seasonal employees is a factor indicating that the extra seasonal employees had no reasonable expectation of reemployment with Respondent.<sup>11</sup>

Another consideration, the stability of Respondent's labor requirements and the extent of its dependence upon seasonal labor, cannot contribute to the creation of an expectation of future reemployment with Respondent. Although Respondent is entirely dependent upon seasonal labor, the extent of its dependence upon *extra* seasonal employees is unclear. Respondent began its operations in 1979. The record does not contain any reliable information regarding Respondent's work force at that time.<sup>12</sup> In 1980, Respondent hired approximately 13 extra seasonal employees, as noted above. At the time of the election, 23 July 1981, Respondent had not hired any extra employees for the 1981 season. Subsequent to the election, Respondent did

<sup>4</sup> See, e.g., *Jerr-Dan Corp.*, 237 NLRB 302 (1978), *enfd.* in an unpublished opinion 103 LRRM 2603 (3d Cir. 1979) (employer obligated to bargain with the union that it recognized when presented with authorization cards signed by majority of employees); *Nation-Wide Plastics Co. Inc.*, 197 NLRB 996 (1972) (employer obligated to bargain with the union when it learned, through poll of employees, that majority of employees endorsed the Union); cf. *Linden Lumber Division, Sumner & Co. v. N.L.R.B.*, 419 U.S. 301 (1974) (employer may insist upon Board election if it lacks knowledge of union majority and refrains from conduct that would tend to preclude fair election).

<sup>5</sup> *International Ladies' Garment Workers Union, AFL-CIO [Bernhard-Altman Texas Corp.] v. N.L.R.B.*, 366 U.S. 731 (1961).

<sup>6</sup> The former employees are those who worked for Respondent throughout the entire season in 1980. With respect to the extra seasonal employees, the Administrative Law Judge acknowledged that "the record is devoid of any evidence that preference is given to former extra employees."

<sup>7</sup> The Administrative Law Judge found that 1 of the 27 employees on Respondent's payroll for the 1980 season was not eligible for rehire. Therefore, the Union received 10 votes from the 26 employees that the Administrative Law Judge found should be included in the unit.

<sup>8</sup> *Maine Apple Growers, Inc.*, 254 NLRB 501 (1981); *United Telecontrol Electronics, Inc., et al.*, 239 NLRB 1057 (1978).

<sup>9</sup> In *United Telecontrol Electronics, Inc.*, *supra*, the employer hired its complement of seasonal employees from New Jersey's "unemployment rolls." In concluding that the seasonal employees did not have a reasonable expectation of reemployment, the Board found that "a statewide group of unemployed people is so vast and everchanging as to preclude it from being classified as an identifiable labor market area." 239 NLRB at 1058, fn. 3. The labor market area in the instant case is perhaps even vaster and more amorphous than the one at issue in *United Telecontrol*.

<sup>10</sup> *Maine Apple Growers, Inc.*, *supra*; *Baumer Foods, Inc.*, 190 NLRB 690 (1971).

<sup>11</sup> In this connection, we note that Respondent's operations are mobile, and thus in the future Respondent could be operating in other locations when lettuce is harvested in the San Luis Valley region. Respondent's mobility is another factor contributing to our conclusion that the labor force upon which Respondent depends is very amorphous.

<sup>12</sup> David Carlson, an employee who worked regularly for Respondent in Center for the 1980 season, testified that Respondent had six people on the payroll in 1979. Carlson further testified, however, that he did not work for Respondent in 1979, and had no direct knowledge of how many employees Respondent had in that year.

hire extra seasonal employees. (Only one of those employees had worked for Respondent in Center during the 1980 season.) However, since the focus of our analysis is upon whether the 1980 extra seasonal employees should have been included in the unit *at the time of the election*,<sup>13</sup> evidence pertaining to employment subsequent to the election is not relevant, and we do not rely upon it. Since Respondent has hired a complement of extra seasonal employees for only one season (1980), there is no pattern of seasonal employment from which we could extrapolate Respondent's labor requirements with respect to extra seasonal employees. Therefore, we cannot conclude that Respondent's labor requirements indicate that the extra seasonal employees employed in 1980 could expect to be reemployed with Respondent in the future.

As mentioned above, there is no evidence regarding actual season-to-season reemployment of the extra seasonal employees because Respondent has been in existence for such a short time.<sup>14</sup> Clearly, the lack of this evidence undercuts any finding that the extra seasonal employees had a reasonable expectation of reemployment with Respondent.

Finally, although Respondent seems to have a preference for reemploying employees who work for it for the entire season in Center, it has no such preference regarding the extra seasonal employees. Respondent recruits its extra seasonal employees from the itinerants who happen to be in the Center area looking for work. David Carlson, an employee who worked regularly for Respondent throughout the 1980 season, explained that people "come up and they're looking to work and they're union members and they just happen to be there at the right time, right spot at the right time." Robert Bower, one of Respondent's co-owners, similarly testified that people "show up and they come to you and ask for a job, you say, yeah, if we got something, we'll use you. And we use them if we can." Therefore, it is clear that Respondent simply hires whoever is available; there is no evidence that Respondent encourages the extra seasonal employees to reapply for employment.

The factors discussed above compel us to conclude that the extra seasonal employees hired in the 1980 season in Center had no reasonable expectation of being reemployed by Respondent. The 23 July 1981 election was therefore conducted among all employees entitled to vote. By virtue of the

<sup>13</sup> Such focus is obvious when voting eligibility is at issue in connection with a Board-conducted election. E.g., *Nordam, Inc.*, 173 NLRB 1153 (1968).

<sup>14</sup> Although, as noted previously, there is some evidence regarding the extra seasonal employees who were hired in 1981, we do not rely upon that evidence because it postdates the date of the election.

Union's victory in the election, Respondent is obligated to recognize and bargain with the Union as the exclusive representative of its employees. Accordingly, we find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

#### THE REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Fresh Fruit and Vegetable Workers, Local P-78-B of the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of its employees in an appropriate unit, we shall order that Respondent cease and desist therefrom and, upon request, bargain collectively with the Union concerning wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

#### CONCLUSIONS OF LAW

1. L & B Cooling, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Fresh Fruit and Vegetable Workers, Local P-78-B of the United Food and Commercial Workers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. The unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of employees of Respondent employed in the following job classifications: loader, push-back, set-up man, set-off man, forklift driver, cooling tube operator, maintenance man, and clerical worker.<sup>15</sup>
4. At all times since 23 July 1981 Fresh Fruit and Vegetable Workers, Local P-78-B of the United Food and Commercial Workers International Union, AFL-CIO, CLC, has been the exclusive representative of all of the employees within the above appropriate unit for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment within the meaning of Section 9(a) of the Act.
5. By refusing to bargain collectively with the Union as the exclusive representative of all the employees in the above-described appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

<sup>15</sup> These job classifications were read into the record, without objection or contradiction.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, L & B Cooling, Inc., Center, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Fresh Fruit and Vegetable Workers, Local P-78-B of the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of its employees in the following appropriate unit with respect to wages, hours, and other terms and conditions of employment:

All employees of Respondent employed in the following job classifications: loader, push-back, set-up man, set-off man, forklift driver, cooling tube operator, maintenance man, and clerical worker.

(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) Upon request, bargain collectively in good faith with the above-named labor organization as the exclusive representative of its employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody same in a written signed agreement.

(b) Post at its mobile lettuce cooling facility during the next lettuce growing season in Colorado copies of the attached notice marked "Appendix."<sup>16</sup> Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

<sup>16</sup> In the event that 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."

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

### APPENDIX

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

WE WILL NOT refuse to recognize and bargain collectively with Fresh Fruit and Vegetable Workers, Local P-78-B of the United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of our employees in the following appropriate unit with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment:

All of our employees employed in the following job classifications: loader, push-back, set-up man, set-off man, forklift driver, cooling tube operator, maintenance man, and clerical workers.

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

WE WILL, upon request, bargain collectively in good faith with the above-named labor organization as the exclusive representative of our employees in the aforesaid appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody same in a written signed agreement.

L & B COOLING, INC.

### DECISION

#### STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: I heard this case at Alamosa, Colorado, on July 20, 1982. Pursuant to a charge filed against L & B Cooling, Inc. (Respondent), on September 17, 1981,<sup>1</sup> by Fresh Fruit and Vegetable Workers, Local P-78-B of the United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union), the Regional Director for Region 27 of the National Labor Relations Board issued a complaint and notice of hearing on October 28. The complaint, as amended, alleges in substance that Respondent reneged on an agreement to recognize and bar-

<sup>1</sup> Unless otherwise stated, all dates hereafter refer to the year 1981.

gain with the Union pursuant to a voluntary jointly conducted election and thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (the Act).

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Based upon the entire record and upon my observation of the demeanor of the witnesses, I make the following:

## FINDINGS OF FACT AND CONCLUSIONS

### I. JURISDICTION

Respondent is a corporation duly organized under and existing by virtue of the laws of the State of Colorado. It is engaged in the nonretail business of cooling lettuce at its facility in Center, Colorado. Respondent annually sells and ships goods valued in excess of \$50,000 directly to points and places outside the State of Colorado. Accordingly, Respondent admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

As discussed above, Respondent is engaged in the lettuce cooling business. Lettuce is packaged in the fields and shipped by growers to Respondent's vacuum cooler. The lettuce is cooled by a vacuum process which removes the water and cools the lettuce to just above freezing. The lettuce is then loaded on trucks and shipped to all parts of the country. The lettuce is shipped the same day it is cut. Respondent's operations are dependent on the lettuce crop in the San Luis Valley of Colorado. Accordingly, its Center, Colorado, operations are seasonal in nature and function for only approximately 3 months each summer.

Respondent is owned by Gary Lofton and Bobby Bower. It commenced operation in the summer of 1979. Prior to opening Respondent's cooling operations, Bower and Lofton worked as forklift operators in the industry. In the summer of 1980, Respondent hired a regular crew of employees to work for its season. The crew of approximately 14 employees included the following employee-classifications: loader, push-back, set-up man, set-off man (the loading crew), and forklift driver, cooling tube operator, maintenance man and clerical worker. This crew followed the lettuce crop and worked for various employers in New Mexico, Texas, California, and Arizona. They came into Colorado in July and worked for Respondent until the first week in October.<sup>2</sup> Numer-

<sup>2</sup> Respondent's cooling operations also follow the lettuce crop to the various States. However, most of its employees have arrangements with

ous other employees come into the San Luis Valley in July looking for such work. Respondent hires some of these people as needed depending on the volume of the lettuce crop. For the 1980 season Respondent had 27 employees on its payroll.

#### B. The Election

As stated earlier, prior to starting Respondent's cooling operation, Bower and Lofton worked in the industry. Bower and Lofton were both members of the Union. On July 23, 1981, Bower met Jerry Breshears, then the executive secretary of the Union,<sup>3</sup> at a restaurant in Center, Colorado. Breshears told Bower that he (Breshears) wanted to have an election at Respondent's cooler. Bower asked why and Breshears answered that some of his members working for Respondent had requested that an election be held. Bower said, "Okay," and went with Breshears to Respondent's loading dock. There were 14 employees working that day. Breshears asked the employees if they wanted to vote and the employees indicated their consent to a vote. Bower asked that Breshears wait until Lofton arrived and Breshears agreed. When Lofton arrived, Lofton said that the vote should be by secret ballot and not by a show of hands. Breshears agreed and tore up pieces of paper to be used as ballots. The employees were told to mark "yes" for the Union and "no" if they did not want the Union. Each employee was given a piece of paper, marked his or her ballot, and placed it in a hat. The secrecy of the ballot depended on the care taken by the individual employee to mark his or her vote in private. All 14 employees, Breshears, Lofton, Bower, and Bower's 11-year old son were present during the balloting.<sup>4</sup> The votes were placed in a hat and then given to employee Glen Grice, a set-off, for counting. Grice then read off each vote and the final tally was 10 "yes" and 4 "no" votes. Rich Grice and Glen Grice then asked Breshears questions about their seniority rights if Respondent decided on a second shift.<sup>5</sup> Breshears answered that the Grices would have seniority rights under the Union's collective-bargaining agreement. Neither Lofton nor Bower raised any objection to the election or voiced disagreement with any of Breshears' statements about the union agreement.

On or about August 17, Lee Watkins, a union representative, went to Respondent's cooler in an attempt to bargain with Lofton and Bower. Lofton told Watkins that he would bargain the next day. However, when Watkins returned on August 18, he was told by Bower that Lofton was not available. On August 19, Watkins returned to his office in California. On August 17, John Caton, a loader, was told by Lofton that Lofton would

other companies in other locations and do not work for Respondent in other locations.

<sup>3</sup> Breshears died in an automobile accident in September 1981.

<sup>4</sup> One of the regular employees was not working that day and did not vote in the election. The extra employee filling in for the day did vote in the election.

<sup>5</sup> When the volume of lettuce delivered for cooling is high, Respondent puts on an additional crew. In 1981, the second shift worked for a little over a week. The Grices' questions concerned their desire to transfer to the second shift in higher paid positions during the operation of a second shift.

not bargain with Watkins and that Lofton was willing to bargain only with Breshears. A day or two later, at Caton's house, Caton presented Bower and Lofton with a copy of the Union's standard bargaining agreement.<sup>6</sup> Lofton and Bower said that they would not bargain with one of their employees and that they would not bargain with anyone other than Breshears.

On or about August 21, 1981, Respondent received a letter purportedly from Breshears expressing the desire to meet in early September to commence bargaining. On September 4, Michael Trujillo, Respondent's attorney, wrote Breshears stating that it was Respondent's position that the Union did not represent the employees in an appropriate unit, that the election was not valid, and that Respondent and the Union "may have violated the labor laws."

### C. Respondent's Defense

Respondent's major defense is that the election is invalid because all of the seasonal employees were not given notice or an opportunity to vote in the election.<sup>7</sup>

As stated above, Respondent's regular crew of approximately 14 employees worked in 1980 and 1981. These employees had been rehired again at the time of the instant hearing. Respondent used an additional 13 employees in 1980 on an as-needed basis. In 1981, Respondent hired a second crew for approximately 1 week and employed a total of 33 employees for the season. At the time of the election in 1981, Respondent had a regular crew of 14 and a total of 17 employees on its payroll. In addition, numerous other employees, including its former employees from the previous season, were in town seeking work. Bower testified that these employees had been told that Respondent would hire them if work became available.

The employees hired for the second shift or on an as-needed basis perform the same work as Respondent's regular crew. The loading crew are all paid on a piece-rate basis and the extra employees, when they work, received the same piece-rate as the regulars. The forklift operators and other employees are paid on an hourly basis and any extra employee that performs such work receives the same hourly rate. None of the employees receive fringe benefits. The facility is situated on an open lot where the loading dock and cooling tubes are located. Thus, the employees work in the same general vicinity without physical separation.

### D. Analysis and Conclusions

It is well established that an employer's duty to bargain is not dependent upon an election and Board certification but may be established by other agreed-upon means. *Idaho Pacific Steel Warehouse Co., Inc.*, 227 NLRB 326, 329 (1976). Voluntary recognition is a favored element of national labor policy. See, e.g., *N.L.R.B. v. Broadmoor Lumber Company*, 578 F.2d 238

(9th Cir. 1978); *N.L.R.B. v. Broad Street Hospital and Medical Center*, 452 F.2d 302, 305 (3d Cir. 1971). Thus, an employer that agrees to determine representative status by means other than a Board-conducted election may not thereafter breach its agreement and refuse to bargain. *Jerr-Dan Corp.*, 237 NLRB 302 (1978); *Lyon & Ryan Ford, Inc.*, 246 NLRB 1 (1979), *enfd.* 647 F.2d 645 (7th Cir. 1981); *Phelps Cement Products, Inc.*, 257 NLRB 19 (1981). An employer cannot disclaim the results simply because it finds them distasteful. *Nation-Wide Plastics Co., Inc.*, 197 NLRB 996 (1972).

However, recognition of a minority union will always be an unfair labor practice by both the union and the employer, even though no other union has been recognized or commands a majority. *International Ladies' Garment Workers' Union, AFL-CIO v. N.L.R.B.*, 366 U.S. 731 (1961). Thus, in order to create a bargaining obligation, voluntary recognition must be bona fide; i.e., the union must represent a majority of the employees in an appropriate unit.<sup>8</sup> In all of the cases cited above where the Board ordered bargaining based on voluntary recognition, the union did, in fact, enjoy majority status in an appropriate unit.

In the instant case, in order to determine whether the Union had majority status in the bargaining unit, it is necessary to determine whether the extra seasonal employees from the 1980 season were entitled to inclusion in the bargaining unit. A review of some principles regarding representation matters is necessary to resolve this issue.

Seasonal employees who are out of work because of a decline in their employer's business but who have a reasonable expectation of reemployment in the future are considered "temporarily laid off" and eligible to vote in a representation election. *Knapp-Sherrill Co. v. N.L.R.B.*, 488 F.2d 655, 659-660 (5th Cir. 1974); *United Telecontrol Electronics, Inc., et al.*, 239 NLRB 1057 (1978). In assessing the expectation of future employment among seasonal employees for purposes of unit placement and voting eligibility,<sup>9</sup> the Board considers such factors as the size of the area labor force, the stability of the employer's labor requirements, and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the roster complement, and the employer's recall or preference policy regarding seasonal employees. *Maine Apple Growers, Inc.*, 254 NLRB 501, 502 (1981); *Baumer Foods, Inc.*, 190 NLRB 690 (1971).

The record in this case establishes that Respondent is completely dependent on seasonal labor. Respondent's business and all of its employees are seasonal in nature. Respondent employs a labor pool which follows the let-

<sup>8</sup> The only exception to majority rule, not applicable herein, is the imposition of a bargaining order in "exceptional cases" where the employer's "outrageous" and "pervasive" unfair labor practices eliminate any reasonable possibility of holding a free and uncoerced election. See *Conair Corporation*, 261 NLRB 1189 (1982), and *United Supermarkets, Inc.*, 261 NLRB 1291 (1982).

<sup>9</sup> It is Board policy that unit placement and voting eligibility are inseparable issues; any employee who may be represented as the result of an election has the right to vote in the election. *Post Houses, Inc.*, 161 NLRB 1159, 1172-73 (1966); *Sears, Roebuck and Co.*, 112 NLRB 559, 569 at fn. 28 (1955).

<sup>6</sup> The proposed bargaining agreement covered a bargaining unit of all production employees, including plant clericals, but excluding office clericals, professionals, and supervisors.

<sup>7</sup> Respondent raises other defenses which need not be addressed, in light of my findings and conclusions herein.

tuces crop. Although the record is devoid of any evidence that preference is given to former extra employees, former employees reapply, are told that they will be hired if the volume of lettuce necessitates additional employees, and, in fact, former employees have been rehired.<sup>10</sup> The extra seasonal employees perform the same work as the regular seasonal employees, under the same supervision and are paid on the same basis. The only discernible difference is tenure of employment. Based upon the applicable law above, at the time of the election, the extra seasonal employees had a reasonable expectation of future employment and, therefore, were entitled to inclusion in the unit for purposes of eligibility to vote in an election and for determination of the Union's majority in the agreed-upon bargaining unit.

Counsel for the General Counsel argues that the employment of the extra employees is sporadic and casual and that such employees should not be included in the bargaining unit. I find that the General Counsel's argument ignores the seasonal nature of Respondent's business. The cases cited by the General Counsel<sup>11</sup> involve nonseasonal casual employees and I, therefore, find such cases to be inapposite.

The record reveals that of the 27 employees in Respondent's payroll for the 1980 season, only one employee was not eligible for rehire.<sup>12</sup> At the election, the Union received 10 out of a possible 14 votes. Thus, it has only been established that 10 out of 26 unit employees designated the Union as their bargaining representative.

<sup>10</sup> See *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82 (1962); *Maine Apple Growers, supra*.

<sup>11</sup> *Piggly Wiggly El Dorado Co.*, 154 NLRB 445 (1965); *Indiana Bottled Gas Company*, 128 NLRB 1441 (1960).

<sup>12</sup> The fact that Respondent eventually employed 33 employees in the 1981 season is irrelevant. It is the composition of the unit at the time of the election that is determinative.

Accordingly, it has not been established that a majority of the employees in the agreed-upon unit designated the Union as their representative.<sup>13</sup> For this reason, a bargaining order cannot issue. It not having been established that Respondent engaged in any other unfair labor practices, Respondent could lawfully refuse to bargain with the Union. See *Linden Lumber Division, Sumner & Co. v. N.L.R.B.*, 419 U.S. 301, 309-310 (1974). Accordingly, the complaint herein must be dismissed. Finally, I note that no impediment exists for the holding of a Board election so that all eligible employees may vote by secret ballot for or against the Union.

#### CONCLUSIONS OF LAW

1. Respondent L & B Cooling, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove by a preponderance of the evidence that the Union has been designated the exclusive collective-bargaining representative by a majority of Respondent's employees in an appropriate bargaining unit.

4. The General Counsel has failed to prove by a preponderance of the evidence that Respondent has failed to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

[Recommended Order for dismissal omitted from publication.]

<sup>13</sup> Based on the apparent agreement that all employees were eligible to vote in the election, I infer that Respondent and the Union agreed that the bargaining unit would include all of Respondent's employees. Where the parties have reached such an agreement as to the bargaining unit, the Board has approved the agreement. See *Lyon & Ryan Ford, supra*, 246 NLRB at 3.