

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

E.C. PHILLIPS & SONS, INC.

Employer

and

Case 19-RD-3614

WALTER M. HOFFMAN, an individual

Petitioner

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL
NO. 200 – UNIT 61

Union

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

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 record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

SUMMARY

On May 3, 2004, the Petitioner filed the instant petition seeking to decertify a unit of seafood production employees employed by the Employer at its seafood processing facility in Ketchikan, Alaska, and represented by the Union since at least 1963. The Union contends that directing an election in a unit that includes the seasonal employees (those hired for the summer salmon season, from June through early September each

¹ The Employer and the Petitioner filed timely briefs, which were duly considered. The Union timely filed a copy of its brief with its original arriving the day after the brief due date. I have exercised my discretion to accept the Union's brief under these circumstances.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 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. The labor organization involved claims to represent certain employees of the Employer and a 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.

year), who have not worked for the Employer during the previous year,³ is inappropriate in that those seasonal employees do not meet the Board's traditional voter eligibility standards, which require eligible voters to have a reasonable expectation of future employment. Contrary to the Union, the Employer and Petitioner assert that the seasonal employees⁴ should be included in the unit and permitted to vote because those seasonal employees have historically been included in the unit represented by the Union. The Employer further asserts that the seasonal employees have an expectation of future employment and should be eligible to vote.

Based on the record as a whole and the parties' respective briefs, I find that the Employer's seasonal employees are properly included within the scope of the unit appropriate for the decertification election that is directed below. I further find those eligible to vote in the decertification election are all Unit⁵ employees employed during the payroll period ending immediately preceding the date of my Decision and Direction of Election in this case. Also eligible to vote are the 66 employees who were sent letters by the Employer recalling them for this upcoming summer season and employees not working during the designated payroll period but who have worked for at least 300 hours within the past 12 months running to the end of the payroll period ending immediately preceding the date of my Decision and Direction of Election.

Below, I have set forth a section dealing with the evidence, as revealed by the record in this matter, relating to background information, the operations at the Ketchikan facility, scope of the bargaining unit under a predecessor employer (Wards Cove), and relating to employees' terms and conditions of employment under Wards Cove and now under the Employer. Following the Evidence section is a restatement of the parties' positions, my analysis of the applicable legal standards in this case and a section setting forth my decision and direction of election.

I.) EVIDENCE

A.) Background Information

The Employer is an Alaska corporation engaged in the processing and wholesale distribution of seafood and seafood products, with offices and a processing facility located in Ketchikan, Alaska. The Employer is a successor employer to Wards Cove Packing Company (Wards Cove) at the Ketchikan facility (hereinafter "Facility"), which is the only facility at issue in this proceeding. At the Facility, Wards Cove and the Union had a relatively long bargaining history, which is embodied in the parties' most recent collective-bargaining agreement (hereinafter "CBA") that by its terms was effective from January 1, 2001 to December 31, 2003. The recognition clause (Section I) in that CBA states that:

³ The Union proposes that those employees eligible to vote should be those on the payroll as of late July 2004 who received a 2003 summer completion bonus and/or had been on the "active list" from September 1, 2003 to the start of the 2004 summer salmon season.

⁴ The Employer does not use the label of "seasonal employees" to designate these workers, and, instead, insists that all employees hired are considered "on call" and employed until they become unavailable for work. For the purposes of identification, I shall refer to the employees at issue herein, as "seasonal employees."

⁵ The precise Unit description is set forth at the conclusion of the Analysis Section (III.) of this Decision and Direction of Election.

The Employer hereby recognizes the Union as the sole and exclusive bargaining agency for all employees who fall within the classification[s] described herein [with the usual exclusions].

The CBA's "jurisdiction" section [Section 5] states that:

The Employer recognizes the Union as having jurisdiction over all warehouse workers employed by the Company. For the purpose of this Agreement, warehouse workers shall be defined as those persons, including lead persons, performing all cold storage work in the handling of fresh and frozen seafood, milked and salt fish, all aspects of packing and handling of warehouse materials, handling equipment, and machinery when used in the above; ice delivery; the handling of seafood products; Longshoring; and general maintenance work.

It is undisputed by the parties in this proceeding that seasonal employees were included within the unit of employees represented by the Union at the Facility during the years prior to the Employer's succession to Wards Cove at the Facility.⁶

In 2003, Wards Cove announced that it would be terminating its salmon operations in Alaska and that it would be selling its salmon processing facilities, including the Ketchikan Facility, also known as the E.C. Phillips & Son plant. E.C. Phillips & Son started as a separate company in the seafood business in 1926. However, by at least 1995, Wards Cove acquired E.C. Phillips & Son and managed it until April 2003 when the Employer acquired the Ketchikan Facility from Wards Cove.⁷ The Employer now processes salmon, rockfish, halibut, geoduck clams, shrimp, herring, and sea cucumbers at the Facility.

Following the Employer's succession to Wards Cove, the Union filed with the Board an unfair labor practice charge alleging, among other things, that the Employer failed/refused to recognize and bargain with the Union. Eventually, the parties resolved their labor dispute, with the Employer recognizing the Union as the bargaining representative of the "production" employees employed at the Facility. However, the parties never elaborated in writing about the scope of the unit and never reached a collective-bargaining agreement.

Larry Elliott is the Employer's current Plant Manager and has been the Facility's Plant Manager since graduating from college in 1986. Michael Cusack is the Employer's Assistant Plant Manager and Corporate Secretary-Treasurer. Elliott and Cusack were the Employer's only witnesses.

⁶ The contract identifies the Employer as E.C. Phillips, although testimony reveals that the employer was, in fact, Wards Cove.

⁷ The Employer, as did Wards Cove, acquired the E.C. Phillips & Son Company name as a recognized brand name.

B.) Operations at the Ketchikan Facility

1.) The Seasonal Aspect of the Employer's Operations

Although the Employer operates its Facility year-round, it has several "seasonal" peaks throughout the year that require staffing its operations with 50 to 200 employees, depending on the season. Many of the Employer's seasons overlap. For example, the end of the Employer's bait herring season, in January, overlaps seasons covering, among others, rockfish, yellow eye quillback, geoduck, and winter salmon seasons. During January 2004, the Employer hired from 3 to 50 employees to cover these overlapping seasons. However, the Employer's largest employment season is its summer salmon season, which runs from the 3rd week of June to around September 5.⁸ During the 2003 summer salmon season, the Employer hired over 180 production employees. Historically, the summer season employed up to 200 production employees during Wards Cove's operation.

2.) Seasonal Employment History at the Ketchikan Facility

I note that the record is lacking in sufficient documentary evidence to establish the number and hours worked by summer seasonal employees over the years. In that regard, the Employer contends that Wards Cove removed all its records when the Employer succeeded Wards Cove at the Facility. Regardless, the Union contends that the Employer has the burden to affirmatively prove its employee recall/rehire/return (hereinafter "recall") rate and that the Union's dues records are not representative of the recall rate because "plenty" of employees "drop out of the picture completely before they ever even become subject to the dues paying."⁹ Thus, the Union did not introduce any dues records to establish the recall rate. As a result, both parties rely heavily on anecdotal evidence and the memories of their respective witnesses concerning the summer seasonal employment recall rate traditionally experienced during Wards Cove's ownership.

The Union, for its part, contends that outside the summer season, employees are year-round employees subject to "call" and primarily live in the Ketchikan area. Additionally, the Employer hires seasonal employees to work the summer season and those employees are predominantly non-resident employees who come from all over the continental United States, and to some extent, from foreign countries.

According to the Employer' witness, Larry Elliott, the Employer does not have a category of "summer seasonal employee." Rather, Elliot asserts that all employees are hired as "on call," i.e., all employees once hired, continue employment by making

⁸ Record testimony reveals employment numbers for the following months of 2003 and 2004: April 2003, 70+; May, a range of 16 to the 70s; June, 87 to 106; July, 125 to 179; August and September upwards of 180; October and November 100 to 150; December, 50 to 60; January 2004 is noted above; February 2004, 3 to 50; and in March, 62 employees.

⁹ In its brief, the Union cites witness testimony in the record to the effect that, in the salmon season (presumably the summer salmon season and not the winter salmon season), workers commonly work at the Facility only for a short time and frequently quit with little or no notice. The witness referred to by the Union, in this regard, actually testified that the summer seasonal employees usually finish out the entire summer season but that there are occasions where some summer seasonal employees quit during the season.

themselves available for work whenever the Employer needs production workers.¹⁰ Employees are considered terminated, other than for cause, only if they sign a termination notice stating that they will not be available for work¹¹ or they were not available for work when the Employer attempted to recall them. If a “terminated” employee eligible for recall successfully completed his or her probation period before leaving employment and later returns upon recall within a year, the employee need not complete a new probationary period or re-training, and will retain the wage rate level when they last worked for the Employer. Most of the Employer’s employees first started their employment with Wards Cove or the Employer during the summer season and some of those employees continue to work beyond September and either had been or became Ketchikan residents.

In 2004, the Employer added a herring roe season beginning in early April and ending by mid-May. The Employer employed 70 plus employees during the peak of that season. The record reveals that an unknown number of new employees were hired for that season. Also not proffered in the record is any evidence as to whether many of the roe herring season employees would be working during the 2004 summer season. In light of the above and the record evidence, it appears that any attempt to define “seasonal employees” should include these employees who may very well work seasons other than the summer season.

Regardless of whether an employee works for only one season or is available to the Employer throughout the year, as Elliott’s testimony reveals, all employees receive the same training, apply using the same application form, are hired, fired, and/or supervised by the same supervisors, have the same skills, and perform the same functions using the same equipment. They also use the same time clocks and have the same pay periods.

Whether designated a “summer seasonal,” “on-call,” and/or “year-round employee,” there is no dispute that many of the “summer seasonal employees” leave by September 5, which is the end of the summer salmon season. As for whether the Employer subsequently recalls any of these summer seasonal workers, Elliott estimated that when Wards Cove operated the facility, 40 percent to 60 percent of the summer seasonal employees returned to work the following summer season.¹² Similarly, the Employer relies heavily on returning employees to reach its desired employment level during the summer salmon season. With respect to this coming summer season, the Employer sent out 66 letters to some of its “unavailable” or “terminated” employees asking them to return for the summer salmon season.¹³ Elliott testified that the 66 letters

¹⁰ The Employer’s current handbook identifies 3 “classifications of employees:” (1) full-time employee or an employee who has worked more than 1000 hours in the prior calendar year and is currently available for work; (2) casual employee or an employee who is hired to work on an intermittent or as needed basis; and (3) regular employee or an employee who has successfully completed his or her “orientation” (probation) period. Union’s Ex. 6, which sets forth the Employer’s “Seasonal Bonus Program,” refers to a bonus program specifically applicable to “summer time season employees.”

¹¹ The notice also indicates whether an employee is eligible for rehire.

¹² The 2003 summer season is the Employer’s first since purchasing the facility. The Employer just began hiring for the 2004 summer season at the time the hearing was held in this matter on May 18 and 19.

¹³ From the record, it appears that the term “unavailable”, as it relates to “terminated employees” in the Employer’s parlance, refers to employees who had previously been recalled or asked to return

were sent to those employees who had completed last years' summer salmon season, who were excellent workers but had to leave before the season was over for one reason or another, or who started after June 2003. Elliott also asserts that returning employees are the Employer's most desired "hires." After that, the Employer looks to friends of its employees, then to responses to its job advertisements, and finally looks to job referral services.¹⁴

With regard to past recall percentages, one Union witness, David Nine, testified to knowing of only 10 to 15 Wards Cove employees returning summer to summer. Another Union witness, Diane Orr, testified to knowing 60 summer employees during her 11-year tenure with the facility, of which she knew that about 30 of these employees were returning employees. Robert Orr, another Union witness who averaged 900 work hours last year, stated that possibly 30 to 60 employees return summer to summer. He also states that from a list of employees from 1999, only 25 percent (including year-round employees) had returned to work in 2003. The knowledge of all three Union witnesses was admittedly limited to their own contact with employees during their respective shifts and/or in their respective departments. Further complicating any reliance on the informed guesses or estimates of the witnesses about the rate of return of the summer seasonal employees, is that all such estimates are based solely upon Wards Cove's actions rather than this Employer, which has not completed hiring for its second summer season. Thus, any reliance on Wards Cove's experience is speculative at this point.

C.) Scope of the Unit under Wards Cove

The Union and the Employer currently do not operate under a collective bargaining agreement. However, past bargaining history is a relevant consideration in determining the scope of a unit appropriate for a decertification election. Here, the parties do not dispute that seasonal employees fall within the unit represented by the Union during Wards Cove's operation of the Facility. There also appears to be no dispute that the Employer, eventually upon its succession to Wards Cove, recognized the Union as the representative of its production employees, including the seasonal employees.

but who were not available at the time of that prior recall. The Employer's use of the term "terminated" in the record apparently also refers to employees who were not terminated for cause but who voluntarily quit and who were marked by the Employer as "eligible" for recall. Employees who are terminated for cause or who quit and are marked as ineligible for recall were apparently not sent letters for the upcoming 2004 summer season. Additionally, the record lacks any mention as to whether the Employer sends out such letters for any seasons other than the summer salmon season.

¹⁴ The Union, in its brief, contends that the Employer's main method of recruitment for the summer is to post openings on an Internet site run by the State of Alaska's "job service" and the Union cites certain testimony in support of this contention. However, the record testimony in this regard does not refer to the Internet as the Employer's main method of recruitment. Rather, the testimony simply notes the State of Alaska's job service changed from mainly relying on walk-ins to mainly relying on posting openings on the Internet.

D.) Employees' Terms and Conditions of Employment under Wards Cove and the Employer¹⁵

The Wards Cove-Union CBA provided rights and benefits to unit employees, including the seasonal employees. Similarly, the Employer provides rights and benefits, detailed in large part in its handbook, to all its employees, including the seasonal employees. As with the Wards Cove CBA, the Employer's handbook provides for a probationary or "orientation" period, seniority, wages and benefits covering all employees regardless of the seasonal nature of their work. Rights and benefits under both the CBA and handbook are based, in significant part, on the number of hours worked. Here are just some of provisions set forth in the CBA and/or handbook:

1.) Probation

Under the Wards Cove CBA, all employees were subject to a probationary period of 500 hours, after which employees received a number of rights and economic benefits. Upon its acquisition of the Facility, the Employer lowered the probation ("orientation") period in its handbook to 300 hours. The handbook states that after successful completion of the orientation period, an employee is considered a regular employee.

2.) Bonuses

Under the Union and Wards Cove's CBA, employees could receive either a longevity bonus or a seasonal bonus. The Employer's handbook, as well as testimony, reveals that the Employer changed the bonus plans offered to employees under the Wards Cove-Union CBA to require 1000 hours, rather than the CBA's 500 hours, for eligibility under the longevity bonus. A summer seasonal bonus is mentioned in the handbook only to the extent that those who receive a longevity bonus are not eligible for the summer seasonal bonus. However, the Employer's "Seasonal Bonus Program" document (Union Ex. 11) provides that a completion bonus will be paid to all summer seasonal employees who work mid-June through September 1 of each year and an additional performance bonus, to entice employees who are eligible for the seasonal completion bonus, "as an incentive to reward those employees who perform above average as compared to other employees working at a similar wage level." The seasonal completion bonus, however, is unavailable to any employee who received airfare to Alaska from the Employer.

3.) Holidays

The Wards Cove-Union CBA provided unit employees with holiday and overtime pay. The Employer's handbook similarly provides for holiday and overtime pay for all its employees.

¹⁵ The Employer does not appear to provide any of the employees represented by the Union with health and welfare or a retirement plan. However, it does require, in its handbook, that all employees adhere to the Employer's safety and disciplinary rules and procedures.

II.) POSITIONS OF THE PARTIES

The Employer contends that its seasonal employees are within the scope of the unit appropriate for purposes of a decertification election in this case and, “[t]herefore, the Employer proposes that employees eligible to vote be those employed on the date of the election who were also employed in the appropriate bargaining unit during the payroll period ending July 15, 2004.”¹⁶

The Union does not appear to dispute that the seasonal employees are properly included in the Unit it has represented at all times relevant herein. The Union, however, maintains that the summer seasonal employees have no reasonable expectation of future employment and, thus, suggests that only those employees eligible to vote should be those who were on the payroll as of late July 2003 and who had received a 2003 summer completion bonus¹⁷ and/or had been on the “active list” from September 1, 2003 to the start of the 2004 summer salmon season.¹⁸

III.) ANALYSIS

While the parties focus their disputed positions in this matter on the issue of an eligibility formula, initially, I must address the proper scope of the unit. It is well-established Board law that the scope of the appropriate unit in a decertification election is coextensive with the existing recognized or certified unit. *West Virginia Newspaper*, 265 NLRB 446 (1982). This is the rule even where a certain class of employees would not have been included in the unit had it been an original representation proceeding. *See’s Candy Shops*, 231 NLRB 156 (1977).

In the present case, while there has been no prior Board certification covering the employees in dispute, the record evidence clearly establishes that seasonal employees have long been included in the unit recognized by Wards Cove and, following the Employer’s acquisition, the Employer apparently recognized the Union as the representative of the same employees. Indeed, the parties do not dispute that seasonal employees are included in the unit represented by the Union.

The record further reveals that the Employer’s seasonal employees, as do all other employees, receive many of the same benefits (holiday pay, bonuses, etc.) and they are all subject to the same safety and disciplinary rules and procedures. Seasonal employees also perform the same duties under the same supervision, work some of the same shifts, and are eligible for the same overtime pay as the other employees represented by the Union.

¹⁶ With regard to the Petitioner’s brief, it consists of one sentence that states: “All employees at E.C. Phillips start out as seasonal and everybody need to have a right to have a say in their lives.”

¹⁷ As noted above, the Employer maintains a rule that any employee, for whom the Employer paid his or her airline ticket to Alaska, is ineligible for the completion bonus under its seasonal bonus program. Thus, the Union’s eligibility formula, as stated, would disenfranchise those employees who have received airfare, and thus no completion bonus, and no performance bonus under the Employer’s seasonal bonus program.

¹⁸ The term “active list” is a new term raised by the Union in its brief and apparently refers to employees who are available for recall and who have not indicated within the past year or so that they are “not available” for recall.

In light of the above and the record as a whole, I find that the seasonal (or on-call employees, as the Employer appears to refer to them) share a substantial community of interest with regular full-time and regular part-time employees in their terms and conditions of employment. Because seasonal employees are included in the unit recognized by the Employer, and previously recognized by Wards Cove, they should be included in the appropriate Unit for purposes of a decertification election. See *See's Candy Shops, Inc.*, 231 NLRB at 157.

Moving next to the parties' contentions surrounding an eligibility formula, ordinarily, the Board uses a standard formula to determine who is eligible to vote in a representation election; that is, employees in the bargaining unit are eligible to vote if they were employed on the date of the election and during the payroll period ending immediately preceding the date of a Decision and Direction of Election. *Sitka Sound Seafoods, Inc.*, 206 F.3d 1175, 1181 (D.C. Cir. 2000), quoting *Saltwater, Inc.*, 324 NLRB 343, 343 fn.1 (1997). When employees are temporary or seasonal, however, the Board has devised alternative formulas appropriate to the industry involved and tailored to the particular facts of the case. *American Zoetrope Productions, Inc.*, 207 NLRB 621, 623 (1973). See also *West Virginia Newspaper*, 265 NLRB 446 (1982) and *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), *enfd.* 238 F.3d 434 (D.C. Cir. 2001).

In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks 1.) "to permit optimum employee enfranchisement and free choice [2] without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *DIC Entertainment*, 328 NLRB at 660, citing *Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992), *enfd.* 2 F.3d 35 (3d Cir. 1993).

Addressing the first interest (to permit optimum employee enfranchisement and free choice), as it relates to seasonal employees, the Board has looked to such factors as the size of the area labor force, the stability of an employer's labor requirements, the extent to which the employer is dependent upon seasonal labor, the actual season-to-season recall of the worker complement, and the employer's recall or preference policy regarding seasonal employees. *Maine Apple Growers*, 254 NLRB 501, 502 (1981).

Applying the *Maine Apple Growers'* factors, the record reveals that the Employer draws its employees on a nationwide and, to an extent, on an international basis. Further, the parties do not dispute the Employer's annual need for summer seasonal employees nor do they dispute the need for the Employer to look beyond the local labor market for employees to meet its summer seasonal needs.¹⁹

As for actual season-to-season reemployment, the Employer has only been in business a year and no relevant records were left behind by Wards Cove. However, the

¹⁹ The Union, in its brief, asserts that in order for seasonal employees to be eligible to vote, there must be evidence of actual season-to-season reemployment in the record, citing *L&B Cooling, Inc.*, 267 NLRB 1 (1983). The Union's reliance on *L&B Cooling* for this proposition is inapposite. Rather, the employer in *L&B Cooling* was, as the Union states, in business for only one year, but unlike the Employer here, was not a successor employer with a demonstrable reemployment record established by its predecessor. Similarly, the Union's references to *Maine Sugar Industries*, 169 NLRB 186 (1968) and *Seneca Foods Corp.*, 248 NLRB 1119 (1980) for the same proposition are likewise inapposite.

Employer's current Plant Manager was also the predecessor's Plant Manager from 1995 until the Employer's acquisition of the Facility. His testimony asserts that the annual recall rate of seasonal employees over the years is between 40 and 60 percent.²⁰ In any event, where other factors are favorable, as they are here, the record need establish only that the seasonal employees are permitted to reapply the next season and that some of them are in fact rehired. *Maine Apple Growers*, 254 NLRB at 503. See also, *N. Somergrade & Sons*, 122 NLRB 1597 (1959) (seasonal employees eligible to vote where 15 percent of the seasonal employees had previously worked for the employer).²¹

Regarding the last *Maine Apple Growers* factor noted above, the Employer's handbook and/or policies give preference to former seasonal employees. In particular, the Employer recently sent letters asking 66 (of approximately 130) former seasonal employees to return this coming summer.

In view of the above and the record as a whole, I find that these 66 individuals who received a letter of recall from the Employer have a real continuing interest in the terms and conditions of employment offered by the Employer. Consequently, they shall be permitted to vote in the election.

With regard to the second competing interest (refraining from enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer), the Union contends that recent new hires by the Employer do not have a real continuing interest in the terms and conditions of employment offered by the Employer. However, that argument ignores the reality that most regular employees of the Employer began as seasonal employees in 2003 or in prior years with Wards Cove. Moreover, I have noted above that these employees are currently included in the historical unit represented by the Union and recognized by the Employer. Accordingly, I find that the current new hires are also eligible to vote in the decertification election.

The record suggests that the Employer also employs individuals who may very well work seasons other than the summer seasons. These employees similarly have a real continuing interest in the terms and conditions of employment offered by the Employer. In particular, the record reveals that employees who pass the Employer's orientation (probationary) period of 300 hours, gain critical rights and benefits with the Employer. In particular, employees who pass the orientation period become "regular employees" in the Employer's operations. Under these circumstances, I find that the competing interests expressed in *Maine Apple Growers*, supra, can be well served by extending eligibility to those employees who have worked 300 hours in the past 12 months, concluding in the payroll period ending immediately preceding the date of issuance of this Decision and Direction of Election.

The Union contends that eligibility formulas of the sort that I have devised and tailored in this case would essentially permit employees who do not have a continuing

²⁰ Although the Union's witnesses proffer a lower percentage, their estimates were admittedly based on their knowledge of only a portion of the summer seasonal workforce with whom they had worked. However, I note that this Employer has no experience, yet, with a rate of recall from the 2003 summer season.

²¹ See *DIC Entertainment, L.P.*, supra, where the Board devised an eligibility formula based on 1 year of employment experience.

interest in working for the Employer to vote. However, as the Board stated in *Saltwater, Inc.*, 324 NLRB at 348:

[T]here is no assurance under any method of determining eligibility that the employees found eligible to vote will continue to work for the Employer for any significant period of time. That eligible workers who may not have a continuing interest in working for the Employer may vote to determine the representation rights of future employees does not require a rejection of the Acting Regional Director's formula. [Case cite omitted.]

Here, with the admittedly limited record before me (and without the benefit of any recall experience with this Employer), I have devised and tailored an eligibility formula that reasonably balances the competing interests of permitting optimum employee enfranchisement and free choice with the need to avoid enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer. Accordingly, I find Union's contentions, in this regard, are neither supported by the instant record nor by Board law.

On the basis of the foregoing and the record evidence, I shall direct an election in the following appropriate Unit:

All full-time, regular part-time, seasonal and/or on-call employees employed by the Employer at its Ketchikan, Alaska Facility, including all production, lead persons, and warehouse employees, the latter of which further includes warehouse employees performing all cold storage work in the handling of fresh and frozen seafood, milcured and salt fish, all aspects of packing and handling of warehouse materials, the handling of equipment and machinery when used in the above, ice delivery, the handling of seafood products, longshoring, and performing all general maintenance work; excluding confidential employees, guards, and supervisors as defined by the Act.²²

IV.) DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit described above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by ILWU, Local No. 200 - Unit 61. The date, time, place, and method of election will be specified in the notice of election that the Board's Region 19 Office will issue subsequent to this Decision and Direction of Election.²³

²² In light of the time components involved in the eligibility formula that I have devised and tailored in this case, I am unable to reasonably approximate the number of Unit employees at this time.

²³ In determining whether to postpone an election where an employer maintains its operation on a year-round basis with peaks and valleys in its employment complement, the Board weighs the following: the advantage of an early election; the possibility that more employees may vote at a higher peak of employment; and the relative interest of those employed during the various peaks as determined by their rate of return or recall. In such an industry as that here, where operations are year-round while employment is cyclical, the Board has directed immediate elections where employees permanently employed by an employer constitute a substantial and

A.) Voter Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are the 66 employees who currently are not working for the Employer, but to whom the Employer recently and respectively sent a letter recalling and/or requesting that those employees return to work the 2004 summer season for the Employer. Additionally, eligible to vote are those individuals who have worked 300 hours during the past 12 months concluding at the end of the payroll period ending immediately preceding the date of this Decision and Direction Election. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

B.) List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before June 16, 2004. No extension of time to file this list may be granted except in extraordinary circumstances,

representative segment of the workforce. My direction of an immediate election in this case will balance the goals of a prompt election while also enfranchising the greatest number of eligible employees, particularly given my use of an alternative eligibility formula. See *The Baugh Chemical Company*, 150 NLRB 1034 (1965); *Elsa Canning Company*, 154 NLRB 1810 (1965); *Mark Farm Company, Inc.* 184 NLRB 785 (1970); *Saltwater, Inc.*, 324 NLRB 343 (1997); and *Sitka Sound Seafoods, v. NLRB* 206 F.3d 1175 (D.C. Cir. 2000); Thus, I shall, in consultation with the parties, administratively determine the appropriate date, time, place and method of conducting the election directed in this case.

nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

C.) Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

D.) 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, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by 5 p.m., EST on June 23, 2004. The request may **not** be filed by facsimile.

DATED at Seattle, Washington this 9th day of June 2004.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174