Growers Warehouse Company, Inc. *and* General Teamsters, Warehousemen and Helpers Union, Local 483, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] *Case No. 19–CA–1219. December 30, 1955*

DECISION AND ORDER

On October 18, 1955, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Growers Warehouse Company, Inc., Jerome, Idaho, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with General Teamsters, Warehousemen and Helpers Union, Local 483, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive representative of all warehouse employees of the Respondent, including truckdrivers, but excluding office clerical employees, fieldmen, guards, and professional and supervisory employees as defined in the Act.

(b) Engaging in any like or related acts or conduct interfering with the efforts of aforesaid Union, to negotiate for or represent the employees in the aforesaid unit found appropriate in the Intermediate Report as the exclusive bargaining agent.

[1] The AFL and CIO having merged, we are amending the identification of the Union's affiliation.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the aforestated appropriate unit, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant at Jerome, Idaho, copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after having been duly signed by authorized representatives of the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period not less than sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

[2] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with General Teamsters, Warehousemen and Helpers Union, Local 483, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive representative of all of our employees at our Jerome plant in the bargaining unit described below, or in any like or related manner interfere with the efforts of the aforesaid union to negotiate for or represent the employees in said bargaining unit.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive representative of all of our employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and if an understanding is reached, we will embody it in a signed agreement. The bargaining unit is:

All warehouse employees of the Company, including truck-drivers, but excluding office clerical employees, fieldmen, guards, and professional and supervisory employees as defined in the Act.

GROWERS WAREHOUSE COMPANY, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act (61 Stat. 136), against the Respondent, Growers Warehouse Company, Inc., Jerome, Idaho, upon charges filed by the Union, General Teamsters, Warehousemen and Helpers Union, Local 483, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, and upon complaint and answer, was heard, upon due notice, in Twin Falls, Idaho, on August 22 and 23, 1955. The allegations of the complaint, denied by the answer, are that the Respondent violated Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Act by refusing to recognize and bargain with the Union, the duly designated representative of its employees in an appropriate unit.

All parties were represented by counsel at the hearing, participated therein, and were afforded full opportunity to present and to meet material evidence, to engage in oral argument, and to file briefs. There was oral argument at the close of the taking of evidence and a brief has been submitted by the General Counsel's representative at the hearing.

Upon the entire record in this proceeding, and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is an Idaho corporation with principal office and place of business at Jerome, Idaho, where it is engaged in operating warehouses and in storing, processing, grading, distributing, and selling seeds, beans, and feeds. It was stipulated that in the 12-month period preceding July 1, 1955, Respondent made shipments from its Jerome warehouse to points outside the State of Idaho of commodities having a value in excess of $100,000. In view of this stipulation, it is my understanding that the Respondent admits that the Board's formula for direct out-of-State shipments is satisfied, and it accordingly is found that the Board has and will assert jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain*

1. The appropriate unit; the Union's majority; the refusal

The Respondent's business is seasonal and as is customary in this type of enterprise the number of employees fluctuates according to seasonal requirements. Beginning with the latter part of July when the first peas are received, and into August when the volume of peas and various grains increases, additional employees are hired and from a skeleton crew of some 5 or 6 employed the entire year, total employment may rise to a peak of 25 or more employees. The bean crop is normally received by early November and at that time a receiving crew is eliminated, but some

15 or 20 employees are continued regularly, operating on 2 shifts until early January. After that date presumably more employees are eliminated but according to Bryan Henry, Respondent's manager, some 8 employees are carried on Respondent's payroll for 7 or 8 months a year, and during June and July a skeleton crew of 5 or 6 employees is retained and is engaged during these 2 months chiefly in maintenance work. These 5 or 6 employees appear to be the only rank-and-file production and maintenance employees who have steady year-round jobs.

In July 1954 the Union's business agent, Cecil F. Jones, signed up certain of Respondent's employees and on August 9 the Union filed a representation petition with the Board's Regional Office at Seattle, Washington. Thereafter, the Respondent and the Union signed a consent election agreement and this agreement was approved by the Board's Regional Director on August 23. The agreement provided that the payroll for the period "immediately preceding date of election" should determine voter eligibility. An election was scheduled for August 26. At a preelection conference attended by representatives of the Respondent and the Union, and also a field examiner from the Board's Regional Office, the Respondent insisted that the payroll date of July 30 instead of that immediately preceding the election should form the basis for determining eligibility. The Union's representative, while willing to abide by the terms of the original agreement as to eligibility date acquiesced at Respondent's insistence on the choice of the earlier payroll date, and while it appears that the Board's field examiner was reluctant to vary the customary procedure of determining eligibility by the payroll date immediately preceding the election in view of the agreement of the parties on the earlier cutoff date, permitted the election to proceed on that basis. Under the July 30 payroll date only 5 employees were eligible to vote whereas had the later and customary payroll date been used, some 6 or 8 additional employees, hired since July 30, would also have been eligible to vote. All 5 of the eligible employees voted and 3 of them voted for representation by the Union. No objections were filed to the conduct of the election and on September 3 the Regional Director certified the Union as exclusive representative of all employees in the unit defined in the consent agreement. The description of the unit agreed on by the parties, and herein found to be appropriate, follows:

> All warehouse employees of the Company, including truckdrivers, but excluding office clerical employees, fieldmen, guards, and professional and supervisory employees as defined in the Act.

A few days following the certification, the Union's business agent, Jones, sought to arrange a meeting with the Respondent for purposes of negotiating a contract. Subsequently, Respondent retained Attorney Weston to represent it in negotiations with the Union and on October 4 the parties met in Weston's Boise, Idaho, office. The Union was represented by Jones and by Secretary-Treasurer Frank T. Baldwin; the Respondent by its attorney, Weston, its chief stockholder, Richard Freeman, and its plant manager, Henry. The Union presented a contract proposal and there was some discussion of its various clauses, but the evidence discloses that no actual progress was made in reaching an agreement because of the Respondent's objection to the inclusion of seasonal workers in the bargaining unit. The Union acquiesced in Respondent's position that certain women employees, whose jobs were temporary and whose duties appeared to raise some question as to whether they were properly termed "warehouse employees," should be excluded from the unit, but refused to acquiesce in Respondent's further position that the unit be restricted to the five employees who were eligible to vote in the August 26 election. Weston then asserted that he would seek "clarification" of the unit from the Board. It was Respondent's position at the end of this meeting that at least until it had obtained the desired unit clarification it would not recognize the Union's right to represent any of its employees other than the five who voted in the election and would not bargain with it on the basis of the broader unit claimed by the Union.[1]

The Respondent actually filed no motion with the Board for a clarification of the unit, though Weston did write to the Board's field examiner who was in charge of the consent election; stated the Respondent's position that the 5 "hold-over employees doing general labor and maintenance work" who voted in the election had "no community of interest in the seasonal operations," and, accordingly, this maintenance crew of 5 constituted the appropriate unit; and further stated that "the Company

[1] Excerpt from Henry's testimony on examination by Weston:

> Q. Did I say anything else about bargaining or future bargaining at that time?
> A. Well you stated after we got the unit clarified we would be in a position to bargain.

takes the position that they will not bargain for these seasonal employees under the presently selected unit."

In a reply to Weston's communication, the Board's field examiner explained that the July 30 cutoff date for determining voter eligibility was used at Respondent's insistance, and that at the preelection conference at which this date was agreed on he explained to Henry that the appropriateness of the unit was not determined by the eligibility date and that seasonal employees were not excluded from the bargaining unit. On November 16, Weston wrote Baldwin that the Respondent adhered to the position stated in his letter to the Board's field examiner and there was "no reason for meeting with the union until [the unit] question has been resolved by the Board." Nevertheless, outside of its letter previously referred to, the Respondent made no effort to obtain a clarification of the unit.

Upon consideration of the entire evidence I think it is clearly established that the Respondent has at all times material herein refused to bargain with the Union as representative of any employees other than the holdover maintenance crew, and when it contends, as it does, that it has at all times stood ready to bargain, I can only understand it to mean, at most, that it has never refused to bargain on a unit composed of holdover employees who were eligible to vote in the August 26 election [2] It is true that after charges had been filed in this case, and on July 12, 1955, Weston in a letter to Baldwin stated:

> I think we should have a meeting as soon as convenient to you to find out the present status as we understand it of the bargaining unit. There has been so much question raised as to the unit I think we should try to agree upon that first and then see what can be done on further negotiations

This letter, containing no actual qualification of Respondent's previously stated and adhered-to position on the appropriate unit, appears to have been nothing more or less than "window-dressing" and is properly viewed in connection with Weston's letter to counsel for the General Counsel, dated August 10, 1955, in which it is asserted that Respondent had demonstrated a willingness to bargain "once the proper unit had been determined," and Henry's admission as a witness at the August 23, 1955, hearing, that Respondent's position at all times had been that it would negotiate with the Union once the "unit question" had been clarified. In fact, in every substantial respect, Respondent's position at the hearing was that stated by Weston in his October 5, 1954, letter to the Board's field examiner, except that Respondent now advances as additional defense that the consent election of August 26, 1954, was attended by irregularities which, presumably, should now be held to have rendered it a nullity, thus releasing Respondent from any duty whatever to recognize and bargain with the Union

2. Analysis; concluding findings

As to alleged improprieties in the conduct of the August 26, 1954, election, it appears that the Respondent relies on these factors: (a) The exclusion from the eligible list of employees hired after July 30 and on or prior to the payroll date immediately preceding the election; (b) the failure to correct the election notices posted in the plant to indicate the earlier cutoff date for determining eligibility; and (c) the fact that one employee, who was prevented from attending the polling place by illness, voted at his home

There is no merit in any of these contentions. The Respondent's representative at the polls signed the certification on conduct of the election attesting thereby that the "balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote." At no time, either before the certification of the Union or thereafter, did the Respondent file any objection to the conduct of the election And while at the time of the balloting and certification of the Union the Respondent was not represented by legal counsel, this was the second consent election conducted among Respondent's employees and Respondent therefore cannot be deemed to have been entirely ignorant of its rights in the matter. Aside from such considerations barring the Respondent from now contesting the conduct of the election, the failure to alter the election notices to correctly state the eligibility date did not prejudice anyone because every employee eligible to vote under the cutoff date agreed upon by the parties in the preelection conference, voted; balloting, by those unable to attend the polling place, at some other place, is entirely proper if at-

[2] In inferring that the Respondent would have been willing to negotiate on the basis of the smaller unit, I am merely giving the broadest possible interpretation to Respondent's expressed position.

tended by appropriate safeguards and here there is no evidence of any failure or negligence in this respect and the vote was taken without challenge; finally and admittedly, it was at Respondent's own insistence that employees hired after the July 30 payroll were excluded from the voting lists and for the Respondent to argue now that their exclusion invalidated the election, runs counter to familiar principles of estoppel and sets up a position completely inconsistent with its further position that these same employees and all others in their category are excluded from the appropriate unit.

Turning to the unit question, the description of the unit agreed upon by the parties and written into the consent election agreement is clear and unequivocal. It does not say all warehouse employees employed throughout the year or all warehouse employees who have maintenance jobs during the slack months. It says "all warehouse employees" and then lists specifically the exclusions, as follows. "office clerical employees, fieldmen, guards, and professional and supervisory employees as defined in the Act." But Respondent would now have us write in an entirely new category of exclusions, namely, "all employees who do not have regular employment throughout the year." Were such exclusions in the minds of the parties when they agreed on the appropriate unit? I think clearly they were not. Had they been they would almost certainly have been written into the agreement along with the exclusions that actually appeared there. My observation of Respondent's officers appearing at the hearing is that they are intelligent, alert businessmen who know what they are doing and how to do it While Respondent's insistence on the July 30 cutoff date on eligibility could indicate an intention to limit the appropriate unit to the five employees who voted, if such was Respondent's intent at the time, it did not express it; the Union in yielding to Respondent's insistence made no concessions with respect to the unit question, and Respondent's actual reason for requiring the earlier eligibility date, as so candidly admitted at the hearing by its plant manager, Henry, was that it believed the five employees with regular year-round jobs would be more likely to oppose union representation than employees newly hired after July 30. There is no evidence that in its meetings with the Union's business agent, Jones, following certification, that it questioned the Union's right to represent employees hired after July 30, and the issue appears to have been raised for the first time after it had retained legal counsel and at the October 4 meeting in its attorney's office In view of all these circumstances, I am convinced that at no time prior to the Union's certification did the Respondent entertain any doubt that the description of the appropriate unit agreed upon and written ino the consent agreement said what it meant and meant what it said.

It is a long-established Board policy to give weight to the agreement of parties on the composition of a bargaining unit as "an important factor in promoting collective bargaining and in stabilizing labor-management relations," and where a consent election agreement has been entered into, an election held, and a certification of representatives issued, only in exceptional circumstance would the Board review the composition of the unit agreed upon by the parties. See, *The Baker and Taylor Co.*, 109 NLRB 245; also. *American Finishing Company,* 90 NLRB 1786; *Clark Shoe Company,* 88 NLRB 989, *West Texas Utilities Company,* 106 NLRB 859. It is assumed, however, that where the unit in question did violence to some substantive right of employees under the Act, the Board would not, because of aforestated policy considerations, or the application of the estoppel principle, confirm what was clearly perceived to be destructive of employee rights. No such situation exists here. My own opinion is that it would have been preferable for voter eligibility to have rested on the payroll immediately preceding the election, as is customary, but I am convinced that employees voting under the earlier cutoff date constituted a representative group and no violence to representational rights is incurred in having their choice of union representation impressed upon the entire unit, which at the time the election occurred was composed of an additional 6 or 8 employees, and which at the seasonal peak may include as many as 25 or more. It is well established that certification of a bargaining representative is not invalidated by a numerical postelection increase in composition of the bargaining unit, where the voting group is representative of the interests of the entire unit. Had the 6 or 8 newly hired employees, excluded from the voting lists, been hired 1 hour or 1 day following the closing of the payroll immediately preceding the election, they would have had no choice in the matter of union representation but would have been bound by the certification Though they were hired shortly before that date, they were excluded from the voting lists and it does not appear to me to alter the situation sufficiently to warrant a reversal of the Board's customary policy of giving effect to consent election agreements, and, in any event, it is not those excluded employees who are now before us, complaining

of their exclusion from the voting lists, but the Respondent whose insistence on the earlier cutoff date resulted in their exclusion.

That the five who voted constituted a representative group is established by the fact that except for some 2 months when production is at a standstill, they are intermingled with the so-called seasonal workers, performing certain identical functions, and subject to the same supervision and overall working conditions. That they have a substantial community of interests with all other warehouse employees, can hardly be doubted. That seasonal employees together with year-round employees with similar duties, skills, and interests constitute an appropriate unit, is well established. *Oregon Frozen Foods,* 108 NLRB 1668; *J. S. Boswell Company,* 107 NLRB 360; *Stokely-Van Camp, Inc.,* 102 NLRB 1259; *Utah Canning Company,* 100 NLRB 606. There is, in short, no reason that I can perceive why the agreement of the parties on the appropriate unit should not be confirmed and the certification of the Union be held binding on them.

Believing as I do, and for reasons previously expressed, that the Respondent entertained no doubt of the inclusion of its seasonal workers in the unit agreed upon, at the time of the election and the Union's certification, I can only conclude, as I do, that its refusal to recognize the Union and bargain with it as the representative of *all* its warehouse employees except those specifically excluded under the consent agreement, was prompted not by a bona fide doubt and desire to have the matter of the unit "clarified," but by a desire and intent to evade the bargaining obligations imposed on it by law. Accordingly, I find its refusal violative of Section 8 (a) (1) and (5) of the Act.[3]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the Respondent, upon request, bargain collectively with the Union for the employees in the appropriate unit, and that, if an understanding is reached, such understanding be embodied in a signed agreement.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union, General Teamsters, Warehousemen and Helpers Union, Local 483, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.
2. All warehouse employees of the Company, including truckdrivers, but excluding office clerical employees, fieldmen, guards, and professional and supervisory employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.
3. At all times since August 26, 1954, the Union has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.
4. By refusing to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit on October 4, 1954, and at all times thereafter, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

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[3] Respondent's proposal at the October 4 bargaining conference to exclude certain female employees from the bargaining unit, acquiesced in by the Union, does not constitute an issue in this proceeding, inasmuch as the refusal to bargain herein alleged is nowise, and could not be, predicated upon such agreement of the parties This is not to gainsay that *all* employees in the unit have a *right* to representation and that their improper exclusion, whether or not by agreement of the parties, would find redress upon an appropriate presentation of such an issue As such an issue falls outside the purview of these proceedings, I make no findings on the propriety or impropriety of the agreement to exclude these certain employees from the unit

5. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

[Recommendations omitted from publication]

Union County Newsdealers Supply Co. *and* Elmer Berends

Newspaper & Mail Deliverers' Union of New York and Vicinity *and* Elmer Berends. *Cases Nos. 2–CA–4403 and 2–CB–1528. December 30, 1955*

DECISION AND ORDER

On October 6, 1955, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent Company filed exceptions to the Intermediate Report, a supporting brief, and a request for oral argument.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent Company's exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations contained in the Intermediate Report.[2]

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondent Union County Newsdealers Supply Co., Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall:

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[1] The Respondent Company's request for oral argument is hereby denied as the record, including the exceptions and brief, adequately presents the issues

[2] We find without merit, as did the Trial Examiner, the Respondent Company's assertion that, as it would not have laid Berends off but for the extreme pressure exerted upon it by the Respondent Union, to which it yielded only when faced with the economic disaster it is not guilty of having violated the Act See *H Milton Newman*, 85 NLRB 725, at footnote 15, and cases cited therein Furthermore, the Board has held that when an employer yields to union pressure, both the employer and the union are responsible for the resulting discrimination and that the appropriate remedy in such cases is to assess back pay jointly and severally against all responsible parties. *Bull Insular Lines, Inc*, 108 NLRB 433, 434 See also, *Home Mattress Company, Inc*, 91 NLRB 1010, 1014-1017; *H Milton Newman, supra*. Accordingly, we find without merit the Company's contention that the back pay should be borne solely by the Respondent Union