10. 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 in this volume.]

AL MASSERA, INC.; J. J. CROSETTI AND WARREN E. SCARBOROUGH, COPARTNERS, D/B/A J. J. CROSETTI CO.; E. J. RUSSELL, AN INDIVIDUAL, D/B/A INDEPENDENT GROWERS CO.; WALTER M. CHRISTENSEN, HAROLD S. CHRISTENSEN, AND ANDREW H. CHRISTENSEN, JR., COPARTNERS, D/B/A CHRISTENSEN BROS.; PETER A. STOLICH, AN INDIVIDUAL, D/B/A PETER A. STOLICH CO.; R. T. ENGLUND, AN INDIVIDUAL, D/B/A R. T. ENGLUND CO.; AND H. E. CREAN, AN INDIVIDUAL, D/B/A GROWERS PRODUCE DISPATCH *and* LOCAL INDUSTRIAL UNION NO. 78, CIO

K. R. NUTTING, AN INDIVIDUAL, D/B/A K. R. NUTTING CO. *and* LORETTA HIGUERA

FRESH FRUIT & VEGETABLE WORKERS' LOCAL NO. 78 *and* LOCAL INDUSTRIAL UNION NO. 78, CIO

FRESH FRUIT & VEGETABLE WORKERS' LOCAL NO. 78 *and* GROWERS-SHIPPER VEGETABLE ASSOCIATION OF CENTRAL CALIFORNIA. *Cases Nos. 20–CA–436, 456, 461, 467, 490, 491, 495, 20–CA–496, 20–CB–150, 158, and 20–CB–161. December 8, 1952*

Amended Decision and Order

On May 28, 1951, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceedings, finding that Respondents Local 78, Christensen, Stolich, and Englund 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 Intermediate Report. The Trial Examiner further found that Respondents Massera, Crosetti, Independent, Growers, and Nutting had not engaged in any unfair labor practices, and recommended that the complaint be dismissed with respect to them. Thereafter, Christensen, Stolich, Englund, and the General Counsel filed exceptions to the Intermediate Report and supporting briefs. Respondent Local 78 filed no exceptions.

On December 28, 1951, the Board issued its Decision and Order, to which a copy of the Intermediate Report was attached, in which it found that each Respondent had engaged in and was engaging in certain unfair labor practices.[1]

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[1] 97 NLRB 712.

On September 22, 1952, the Board issued a notice to show cause, returnable October 13, 1952, why it should not reopen the case, set aside the finding in its Decision and Order that the Act does not sanction the union-security provisions of the contract between the Association and Respondent Local 78, and reconsider the case on the Intermediate Report, the exceptions and briefs, and the entire record. Thereafter, Local Industrial Union No. 78, CIO, one of the charging parties herein, filed its "Response to Notice to Show Cause." We have considered the contentions set forth in this response and find that they are without merit.[2]

1. We now find unanimously,[3] in agreement with the Trial Examiner, that the union-security provision of the 1950 contract is valid. The provision, set forth in full in the Intermediate Report, requires that employees "shall, within 30 days after commencing work," apply for union membership or be subject to discharge. The contract was signed on April 8, 1950, before the opening of the 1950 season, and the provision became effective at that time.[4] A reasonable construction of the provision is that 30 days are to be given to employees from the date they are to begin work for the new season.

2. We also agree with the Trial Examiner, for the reasons stated in the Intermediate Report, that the discharges of Beatrice and Christine Gordon, Floyd Kimbriel, Margaret Sims, Loretta Higuera, and Grace Thurman were made in accordance with the union-security provision, and that the Respondent Union in requesting them, and the respective Employers in effectuating them, did not violate the Act.[5]

3. We agree with the Trial Examiner, for the reasons stated in his Intermediate Report, that Respondent Local 78, by requesting the

[2] Local No. 78, CIO, bases its response solely on the alleged untimeliness of the Board's action. Section 10 (d) of the Act, however, provides: "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." Thus, explicit authorization exists in the statute itself for the Board's action. The Board's ruling in *Harcourt and Co.*, 100 NLRB 1383, cited in this Response, is not germaine to, nor does it derogate from, the Board's power on its own motion to alter its findings and orders as prescribed by Section 10 (d).

[3] The Board is unanimous on all matters except that discussed in paragraph 4, *infra*, where separate views are explicitly set forth.

[4] The evidence relied upon by the General Counsel to support his contention that April 8 was not the effective date evinces at most an agreement between the Association and Respondent Local 78 to postpone *enforcing* the union-security provision. None of the discharges effectuated pursuant to this provision occurred within 30 days after April 8, 1950, and no claim is made of any violation based on the ground of failure to accord an employee 30 days after April 8, 1950, to become a member.

[5] We reject the General Counsel's contention that certain of the Respondent Employers and the Respondent Union further violated the Act by any alleged refusal to employ previously discharged employees who thereafter tendered dues to the Union. The evidence shows that no employee sought new employment Although Higuera and other employees may have sought reinstatement to their old employment, a belated tender justifying discharge can hardly be said to require reinstatement. *Standard Brands, Incorporated*, 97 NLRB 737.

discharge of Clarence M. Horton, and Respondent Stolich, by discharging him, violated the Act.

4. A majority of the Board, consisting of Members Houston, Styles, and Peterson, in disagreement with the Trial Examiner, find that the discharges of Brubaker, Brookover, and Papangellin did not violate the Act.

As set forth in the Intermediate Report, the Union's letters requesting their discharge indicated failure to apply for membership or failure to pay dues as one reason for their nonmembership, and dual unionism as another. The Trial Examiner concluded that the mere existence in the requests of two reasons required each Respondent involved to "disentangle" the legitimate reason from the unlawful reason, and affirmatively "establish, if it could, that it was motivated in its action by the former."

In our opinion, however, the evidence shows that in fact the Union's real reason for requesting these discharges, and the Employer's motive in effectuating them, was nonpayment of dues and not "dual unionism."[6] We base our opinion on (1) the lack of any record evidence to show that any of the three employees were engaged in activities on behalf of another labor organization;[7] (2) uncontradicted testimony to the effect that the Union's letters were form letters, used without regard to the inapplicability of the "dual" reason; and (3) the evidence that the Employers investigated, and ascertained in each case, that the employee was in fact delinquent in dues or failed to apply for union membership.

Accordingly, we reverse the Trial Examiner's finding that the Respondent Union and Respondent Employers Christensen and Englund violated the Act in connection with the discharges of Brubaker, Brookover, and Papangellin, and shall dismiss the complaint insofar as it alleges these violations.[8]

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[6] Indeed, as to employee Papangellin, the evidence affirmatively establishes that she was *not* engaged in "dual unionism," and that the Respondent Union knew, even before it requested her discharge, that she was not so engaged.

[7] *Chairman Herzog* agrees with the Trial Examiner that the Respondents had the burden of disentangling the lawful from the unlawful reasons for the discharges of Brubaker, Brookover, and Papangellin, and that they failed to sustain the burden He would therefore affirm the Trial Examiner in finding the violations as to them.

[8] *Members Houston* and *Styles* would not find a violation by these Respondent Employers, even absent any investigation by them as to the Union's reason for requesting the discharges. The employees were not members in good standing because of either nonpayment of dues or failure to make proper application for membership. Each was thus vulnerable to discharge because of his own improper conduct. The Act gives the Union an absolute right in these circumstances to request their discharge. Congress intended to eliminate "free riders" under a valid union-security provision such as existed in this case, and permitted the ultimate sanction of discharge to prevent employees from "taking a free ride." The Congressional Record and the various committee reports on the amendments to the Act are replete with references that emphasize a man's right to remain at work in a union shop only so long as he pays his union dues, no matter how reprehensible to the union his conduct in other respects might be.

In this case, the Employer in each instance, when confronted by a request that gave him "reasonable grounds for believing that membership was denied or terminated for reasons

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:

A. Respondent Peter A. Stolich, an individual, d/b/a Peter A. Stolich Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Fresh Fruit & Vegetable Workers' Local No. 78, or in any other labor organization, by discharging or refusing to reinstate any of its employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent permitted by Section 8 (a) (3) of the Act.

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

(a) Offer Clarence M. Horton immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner described in the section of the Intermediate Report entitled "The Remedy."

(b) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records, necessary for a determination of the amount of back pay due under the terms of this Order.

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other than the failure of the employee to tender the periodic dues . . .," acted at his peril. In his own interest and to save himself from violating the statute in the event that the belief engendered by the letter should turn out to be the fact, he would have been prudent to investigate. But a failure to investigate, although risky, clearly would not entail a violation if *in fact*, as is the case here, nonpayment of dues alone caused the employees' loss of membership in the Union. The statute does not penalize an employer's failure to investigate, nor does it save an employer from a violation, merely because he does investigate. Having some grounds for believing that nonpayment of dues was not the reason for an employee's loss of membership in a union, an employer would still not be guilty of a discriminatory discharge if the union's real reason for the expulsion was nonpayment of dues.

As for the Respondent Union, the language of Section 8 (b) (2) itself precludes a finding that it violated that section. In pertinent part, 8 (b) (2) proscribes causing an employer to discriminate against an employee with respect to whom "membership" has been denied or terminated on some ground other than his failure to tender periodic dues or initiation fees There is no showing in this case that the membership of Brubaker, Brookover, or Papangellin was denied or terminated for any reason other than their failure to tender timely dues and initiation fees Whatever motivation the Union may have had for thereafter requesting their discharge is not relevant in determining whether or not it violated the Act.

For these reasons, *Members Houston* and *Styles* would dismiss the complaint insofar as it alleges violations with respect to Brubaker, Brookover, and Papangellin, even apart from the ground expressed in the body of this decision, as to which they concur with *Member Peterson*.

(c) Post at its plant in Salinas, California, copies of the notice attached hereto as Appendix A.[9] Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an authorized representative, be posted immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

B. Respondent Fresh Fruit & Vegetable Workers' Local No. 78, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Peter A. Stolich, its officers, agents, successors, or assigns, to discharge or otherwise discriminate against its employees in violation of Section 8 (a) (3) of the Act.

(b) In any like or related manner restraining or coercing employees of Peter A. Stolich in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent permitted by Section 8 (a) (3) of the Act.

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

(a) Notify Respondent Peter A. Stolich in writing that it withdraws its objection to the employment of Clarence M. Horton.

(b) Notify Clarence M. Horton in writing that it has withdrawn its objection to his employment by Peter A. Stolich.

(c) Make whole,[10] in the manner described in the section of the Intermediate Report entitled "The Remedy," Clarence M. Horton.

(d) Post at its branch or business offices in the Salinas-Watsonville-Hollister area in conspicuous places, including all places where notices to members are customarily posted, copies of the notice attached hereto as Appendix B.[11] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by a representative of Respondent Local 78, be posted by it immediatly upon receipt thereof, and maintained for sixty (60) days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

[9] In the event this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing, an Order."

[10] In accordance with our usual policy, the Respondent Union may terminate its liability for further accrual of back pay to Horton by notifying Respondent Stolich in writing that it has no objection to Horton's employment. The Union shall not thereafter be liable for any back pay accruing after 5 days from the giving of such notice. *Mundet Cork Corporation*, 96 NLRB 1142.

[11] See footnote 9.

(e) Mail to the Regional Director for the Twentieth Region signed copies of the notice for posting, Respondent Employer Peter A. Stolich willing, at its place of business where notices to employees are customarily posted.

C. Each Respondent shall notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondent Employers Christensen Bros., R. T. Englund, Al Massera, Inc., J. J. Crosetti Co., Independent Growers Co., Growers Produce Dispatch, and K. R. Nutting Co. violated the Act by discharging respectively Velma Brubaker and Virginia Papangellin, Louise Brookover, Beatrice and Christine Gordon, Margaret Sims, Floyd Kimbriel, Grace Thurman, and Loretta Higuera.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondent Fresh Fruit & Vegetable Workers' Local No. 78 violated the Act by causing or attempting to cause Respondent Employers Christensen Bros., R. T. Englund, Al Massera, Inc., J. J. Crosetti Co., Independent Growers Co., Growers Produce Dispatch, and K. R. Nutting Co. to discriminate against, respectively, Velma Brubaker and Virginia Papangellin, Louise Brookover, Beatrice and Christine Gordon, Margaret Sims, Floyd Kimbriel, Grace Thurman, and Loretta Higuera.

MEMBER MURDOCK, dissenting in part:

While in all other respects I join in the decision of my colleagues, I believe that the majority opinion seriously errs insofar as it reverses the Trial Examiner and finds that no violation of the Act was committed by the Employers in the discharges of employees Brubaker, Brookover, and Papangellin. The circumstances of these discharges, in my opinion, place them squarely within the zone of conduct prohibited by the statute.

The factual background is uncontroverted and is substantially the same in the case of each of the three employees. Brubaker, Brookover, and Papangellin all failed to make timely application for membership or payment of dues to the Union. Their discharges were requested by the Union. The request for discharge forwarded to the Employers by the Union states, in each instance, two grounds for the request. First, that the employees had failed to make application for membership or pay dues, and second, that the employee had engaged in activity on behalf of a rival labor organization. The Employers thereafter terminated the employment of the three individuals.

The Act provides that a union may not request, nor an employer grant, the discharge of an employee for dual union activities. Indeed, the only authorized ground upon which such a request may be made or granted is failure to tender the proper periodic dues and initiation fees uniformly required as a condition of membership in the labor organization. The requested discharges in this case were therefore based, in the notice sent by the Union to the Employers, on *both* an illegal and a legal ground. The majority of my colleagues find that no violation occurred because (1) there was no evidence in the record of this case to back up the charge in the Union's request that the dischargees had engaged in dual unionism; (2) the Union's letters were form letters presumptively used without attention to their content; and (3) the Employers ascertained that each employee was in fact delinquent in dues or had not applied for membership in the Union. This position and these reasons, however, ignore the strict mandate of the statute which, in Section 8 (a) (3), states that "no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . *if he has reasonable grounds for believing* that membership was denied or terminated *for reasons other than the failure of the employee to tender the periodic dues and the initiation fees* uniformly required as a condition of acquiring or retaining membership." (Emphasis added.) In the instant case, it cannot be denied that the very notice sent to the Employers by the Union stated on its face "reasonable grounds" to cause the Employer to believe that the discharges were being requested for reasons other than those allowed by the statute.[12] For the Employers to proceed to consummate the discharges in full knowledge of these reasonable grounds, as they did, was patently in violation of the Act.

The reasons urged by my colleagues for finding that no violation of the Act occurred are unpersuasive in the light of the limited language of the Act. The fact that no evidence supporting the Union's charge of dual unionism was finally introduced at the hearing in this case does not in any way alter the fact that the Employers, at the time of the discharges, had before them the Union's written word that such conduct was charged against the three individuals and was one of the reasons for requesting the discharge. The statute does not state that such discharges shall be lawful unless the employer, the union, or the Board can *prove* that there were reasons other than nonmembership or nonpayment of dues. It does command that an employer shall not act on such a discharge where reasonable grounds for such belief exist at the time of the request. In the presence of such reasonable grounds,

[12] The majority, in part at least, appears to admit this when they state, "in this case, *the Employer in each instance, when confronted by a request that gave him 'reasonable grounds for believing* that membership was denied or terminated for reasons other than the failure of the employees to tender the periodic dues .,' acted at his peril

whether they may eventually be proven wrong or not, the Act enjoins any discharge of the individual involved.[13] The same answer applies to the assertion that any possible violation was absolved because the Employers here investigated to see if the dischargees were, in fact, nonmembers or delinquent in dues and such investigation disclosed they were. Such an investigation did nothing to remove the existing grounds for belief that another and illegal reason was a basis for the Union's request; and no investigation was made of the latter reason. Finally, the assertion that the inclusion of the dual unionism charges was only an inadvertency caused by use of a form letter, at most, only would show that the Union did not deliberately attempt to cause the discharges on those grounds. It does not, however, lessen the responsible knowledge or culpability of the Employers in the absence of any evidence that they disregarded the inclusion of the dual unionism charge contained in the requests for that reasons. In this respect it is interesting to note that these "form letters" were apparently not used in the other requests for discharge where the Union's motivation was also alleged to be based solely on nonmembership or dues delinquency grounds.

Accordingly, as Respondent Employers Christensen and Englund discharged employees Brubaker, Brookover, and Papangellin on demand by the Respondent Union, while in the possession of reasonable grounds for belief that the discharges were being requested for reasons other than nonmembership or delinquency in dues, I would find that Respondents Christensen and Englund thereby violated Section 8 (a) (3) and 8 (a) (1) of the Act.

Appendix A

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, as amended, we hereby notify you that:

> We will not encourage membership in Fresh Fruit & Vegetable Workers' Local No. 78 or in any other labor organization of our employees by discriminating against our employees in any

[13] The position taken by two of my colleagues, therefore, that "Having some grounds for believing that nonpayment of dues was not the reason for an employee's loss of membership in a union, an employer would still not be guilty of a discriminatory discharge if the union's real reason for the expulsion was nonpayment of dues" is completely in conflict with the Act

manner in regard to their hire and tenure of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

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

WE WILL offer to Clarence M. Horton immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed and make him whole for any loss of pay suffered as a result of the discrimination against him.

PETER A. STOLICH CO.,
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.

Appendix B

NOTICE TO ALL MEMBERS OF FRESH FRUIT & VEGETABLE WORKERS' LOCAL NO. 78 AND TO ALL EMPLOYEES OF PETER A. STOLICH CO.

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, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause Peter A. Stolich Co., its officers, agents, successors, or assigns, to discharge any employees or otherwise discriminate against its employees in violation of Section 8 (a) (3) of the Act.

WE WILL NOT restrain or coerce employees of Peter A. Stolich Co., its successors or assigns, in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

WE WILL make Clarence M. Horton whole for any loss of pay he may have suffered because of the discrimination against him.

FRESH FRUIT & VEGETABLE
WORKERS' LOCAL NO. 78,
Labor Organization.

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.

IRVING BERLIN AND DENNIS BERLIN, CO-PARTNERS, TRADING AS DENNIS-MITCHELL INDUSTRIES[1] *and* INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, PETITIONER. *Case No. 4-RC-1718. December 8, 1952*

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Morris Mogerman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Murdock and Peterson].

Upon the entire record in this case, the Board finds:

1. The Employers are engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of employees of the Employers within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

The Employers and the Intervenor, Local 404, Upholsterers International Union, AFL, contend that an existing contract is a bar to the instant proceeding.

The Intervenor, an amalgamated local, has been the recognized bargaining representative of the Employers' production and maintenance employees since 1946. A previous agreement had expired in December 1951. The contract urged as a bar herein states that it was executed on the 4th day of April 1952 and will not expire before October 31, 1953. The Petitioner filed its petition on the 21st day of August 1952.

The Petitioner asserts that the existing contract is not a bar because: (1) The contract was not signed until after the Petitioner had made its demand for recognition upon the Employers; (2) a schism has occurred within the Intervenor among the employees at the Em-

[1] The names of the Employers appear as amended at the hearing.

[2] The Petitioner's request for oral argument is hereby denied, as the record and brief filed on behalf of the Petitioner, in our opinion, adequately present the issues and positions of the parties.