Upon the record as a whole, it is recommended that the complaint be dismissed in its entirety.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. Ethel J. Hinz, As an Individual and as Executrix of the Estate of Lester F. Hinz, d/b/a Myers Ceramic Products Co., Santa Clara, California, is engaged in, and during all times material has been engaged in, commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Brick & Clay Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The allegations of the complaint that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1), (3), and (4) of the Act, have not been sustained.

RECOMMENDED ORDER

It is recommended, upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, that the complaint be dismissed in its entirety.

Hershey Chocolate Corporation *and* Larry S. Moyer and Jacob H. Howard

Local 464, American Bakery and Confectionery Workers International Union, AFL–CIO *and* Larry S. Moyer and Jacob H. Howard. *Cases Nos. 4–CA–2417 and 4–CB–731. December 21, 1962*

DECISION AND ORDER

On April 2, 1962, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Intermediate Report. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Intermediate Report and supporting briefs. Respondent Union filed a brief in support of the Intermediate Report.

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 briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

[The Board dismissed the complaint.]

MEMBER RODGERS took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon charges filed by Larry S. Moyer and Jacob H. Howard, individuals, on August 3, 1961, the General Counsel of the National Labor Relations Board, issued an order consolidating cases, a consolidated complaint, and notice of hearing on December 1, 1961. The complaint alleged that Hershey Chocolate Corporation, herein called the Respondent Company, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, and that Local 464, American Bakery and Confectionery Workers International Union, AFL–CIO, herein called the Respondent Union, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.

With respect to the unfair labor practices, the complaint alleges, in substance, that: (1) The Respondent Company did on or about July 17, 1961, discharge Moyer at the request of the Respondent Union after the Respondent Union stated to the Respondent Company that Moyer was not a member of the Respondent Union because he had failed to pay his dues; and (2) on or about June 20, 1961, Respondent Union requested Respondent Company to discharge Moyer pursuant to the union-security and checkoff provisions in its collective-bargaining agreement entered into on January 18, 1961, stating to Respondent Company that Moyer was not a member of Respondent Union because he had failed to pay his dues.

In its duly filed answer the Respondent Company denied that it had engaged in any unfair labor practices. Affirmatively it averred that it discharged Moyer for failure to maintain membership in accordance with the requirements of the applicable bargaining agreement. It denied that it discharged Moyer for reasons not permissible under Section 8(a)(3) of the Act. The Respondent Union in its answer duly filed denied the commission of the alleged unfair labor practices. Pursuant to notice, a hearing was held at Harrisburg, Pennsylvania, on January 22 and 23, 1962, before Trial Examiner Sidney Lindner. The General Counsel, the Respondent Company, and the Respondent Union were represented at the hearing and all parties were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues. The parties were given the opportunity to present oral argument before the Trial Examiner and to file briefs, proposed findings of fact, and conclusions of law. Briefs were received from the General Counsel and counsel for the Respondent Union and have been carefully considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT COMPANY

Hershey Chocolate Corporation is a Delaware corporation with its principal office and place of business at Hershey, Pennsylvania, where at all times material herein it has been continuously engaged in the manufacture and sale of chocolate and other confectionery products. During the past year Respondent Company in the course and conduct of its business operations, manufactured and sold products, the gross value of which exceeded $500,000. During the same period of time Respondent Company received goods valued in excess of $50,000, transported to its place of business in interstate commerce directly from States of the United States other than the Commonwealth of Pennsylvania, and has shipped goods valued in excess of $50,000 directly to States of the United States other than the Commonwealth of Pennsylvania. The Respondent Company admitted in its answer, and I find, that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 464, American Bakery and Confectionery Workers International Union, AFL–CIO, is a labor organization admitting to membership employees of the Respondent Company.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The facts presented in this record were arrived at for the most part by stipulation of the parties and are not materially disputed. The record reveals that Respondent Union and/or its predecessor has been in collective-bargaining contractual relationship with Respondent Company since 1939 On October 22, 1958, the Board duly

certified Respondent Union as the collective-bargaining representative in the appropriate unit consisting of all production and maintenance employees and teamsters at the Respondent Company's Hershey, Pennsylvania, plant, the Lebanon Creamery, and branch milk receiving stations, excluding office employees, executives, attorneys, traveling and outside salesmen, engineers, professional employees, watchmen, guards, superintendents, supervisors, foremen, assistant foremen, all other supervisors as defined in the Act, or any persons excluded by law.

The material events in this proceeding in substantial sequence follow. On April 17, 1959, the Respondent Company and the Respondent Union entered into a collective-bargaining agreement entitled "Articles of Agreement" which contained among other clauses, the following with respect to maintenance-of-membership:

> 6. *Union Security and Checkoff*
>
> (a) All employees who are members of the Union on the effective date of this Agreement and who are still employed by the Employer thirty (30) days thereafter shall, after such thirty-day period, as a condition of employment, remain members of the Union in good standing for the duration of this contract. All employees who hereafter become members of the Union shall, as a condition of employment, remain members of the Union in good standing for the duration of this contract.
>
> * * * * * * *
>
> (c) A voluntary irrevocable check-off is continued in effect.

The term of the "Articles of Agreement" was set forth in the following clause:

> 31. *Term of Agreement*
>
> (a) This Agreement (except the provisions relating to pensions and insurance) shall be in full force and effect from April 17, 1959, through December 31, 1960, and thereafter until a new agreement has been entered into; provided, that either party, by giving sixty (60) days' advance written notice, may terminate it any time after December 31, 1960.

Earl Light, business manager of Respondent Union since 1960 and previously the branch president and a member of the contract negotiating committee for 11 years, testified that the custom and practice over the years was for the parties to initially exchange ideas with respect to contract changes some 2 months before the set forth termination date, after which negotiations are continued until such time as a favorable conclusion is reached. Thus in October 1960 in accordance with the said custom and practice, the negotiating committees of the parties started to exchange ideas and thereafter continued to negotiate until agreement was reached on January 16, 1961. The "Memo of Settlement" executed by the parties on January 16, 1961, provided for the following:

> 1. Contract term to December 31, 1963.
>
> 2. Wage increase of 8 cents per hour, retroactive to January 1, 1961. Further increases of 7 cents per hour effective January 1, 1962, and 7 cents per hour effective January 1, 1963.
>
> 3. A new category is being added to the vacation schedule as follows:
>
> After twenty-six (26) or more years of continuous service, vacation pay will be 8% or 160 hours, whichever is greater.
>
> Years of continuous service will be measured from December 1 rather than June 1, except to be eligible for one week's (40 hours) vacation pay, employee must have one full year as of June 1.
>
> To clarify the above, the vacation pay will continue to be computed as of June 1. However, employees will be given credit for service as of June 1 if their hire date falls on or before December 1, except employees having less than twelve full months of service.
>
> 4. Employees entitled to the New Year's Day paid holiday shall receive four (4) hours' extra pay at their regular hourly rate of pay. An additional paid holiday to be designated by the employer prior to the signing of the formal agreement shall become effective in 1963; such paid holiday to fall within the first six months of the calendar year.
>
> 5. Effective January 1, 1961, one-eighth premium pay will be paid for all work performed on first and second shifts on Saturdays; such premium pay shall be credited against any premium otherwise payable for overtime worked during that week. Effective January 1, 1963, an additional one-eighth or a total of one-quarter premium pay shall be paid for Saturday work under the same conditions as enumerated above.

6. All provisions of agreement executed April 17, 1959, to remain in full force and effect except as modified herein.
7. Settlement subject to ratification by union membership.

The union membership at a meeting on January 17, 1961, ratified the changes.

Thereafter Respondent Company and Respondent Union executed and entered into "Articles of Agreement" on January 18, 1961, incorporating all provisions of the preceding "Articles of Agreement" and the changes agreed upon in the "Memo of Settlement." The union-security and checkoff clauses are identical. Clause 31 "Term of Agreement" is the same in all essential respects except for changes in dates and the omission of certain language relating to pensions and insurance, not material here. It read as follows:

31. *Term of Agreement*

This Agreement shall be in full force and effect from January 18, 1961, through December 31, 1963, and thereafter until a new agreement has been entered into; provided, that either party by giving sixty (60) days' advance written notice may terminate it at any time after December 31, 1963.

While the Respondent Union and Respondent Company were negotiating the above changes in the "Articles of Agreement" neither party sent notice of termination of contract. In fact Light testified that before Respondent Union can send a notice of termination of contract to the Employer, membership action taken at a special membership meeting called for that purpose is required. By this method the membership has notice of contract terminations.

Larry Moyer became employed by Respondent Company in July 1957. He was discharged on July 17, 1961, at which time he was a floorman earning $2 per hour.

On or about November 17, 1960, Moyer notified the Respondent Company that he desired to discontinue the checkoff of his union dues. The Respondent Company complied with the request. About the same time Moyer talked with Herbert Vernet, director of labor relations for Respondent Company, indicating his intention to resign from Respondent Union. Vernet, according to Moyer, told him he could not resign. In spite of the alleged admonition, Moyer by letter to Respondent Union dated November 28, 1960, advised, "I am giving you notice that I resign from the Union at the end of the contract which expires December 31, 1960."

Moyer paid his union dues for the month of December and was paid up in full for the year 1960. Moyer did not pay dues to Respondent Union in January 1961.

On February 1, 1961, Harold Gingrich, financial secretary-treasurer of Respondent Union, sent Moyer "a reminder" that according to union records he owed dues for January 1961 and asked that he promptly remit if this was correct. In answer Moyer sent the Union a letter dated February 6, 1961, in which he stated he notified it on November 28, 1960, that he was resigning from the Union at the end of the contract December 31, 1960, that he paid union dues for December 1960, and that he owed nothing for January 1961, and requested the Union to check and correct its records.

On April 24, 1961, Gingrich in a letter to Moyer called his attention to the fact that several notices of delinquent dues had been sent to him. Moyer was also advised that he owed dues for the months of January, February, March, and April, 1961, in the amount of $14. The letter noted that the collective-bargaining contract contained provisions with respect to maintenance of membership and set forth verbatim clause "6. *Union Security and Checkoff.*" Gingrich warned Moyer that if he did not hear from him within the next 10 days, his name would be submitted to management for discharge, but he hoped this step would not be necessary.

On June 20, 1961, Gingrich certified to Vernet that "Moyer, an employee of Hershey Chocolate Corporation, is a member of Chocolate Workers Local 464, American Bakery and Confectionery Workers International Union, AFL–CIO, and that continued membership in the Union is available and has always been available to him on the same terms and conditions generally applicable to other members, but that said employee has lost his status as a member of the Union in good standing because, and only because, of his failing to tender the periodic dues uniformly required as a condition of maintaining membership in good standing and that he lost his good standing in accordance with the provisions of the constitution, bylaws and all other applicable regulations of the Union. The Union accordingly requests the discharge of said employee. The undersigned officer represents that he has the authority of the Union to submit this certification and request on its behalf." [1]

[1] The constitution of American Bakery and Confectionery Workers International Union, AFL–CIO, provides in article XVII, section 5, that dues and assessments for each calendar month must be paid on or before the first day of the respective calendar month in order

Vernet wrote to Moyer on June 22, 1961, enclosing a copy of Respondent Union's certification. Vernet again called to Moyer's attention clause "6. *Union Security and Checkoff*" in the collective-bargaining contract and urged Moyer to give the matter his immediate attention in order to obviate the removal of his name from the payroll.

On July 6, 1961, Vernet wrote to Moyer again reminding him of the June 22 letter. Vernet noted that Respondent Company had been advised that Moyer had not paid the dues certified as delinquent by Respondent Union. Vernet then stated that unless Moyer's delinquent dues are paid on or before July 15, 1961, Respondent Company had no alternative except to discharge him.

On July 17, 1961, Moyer was called to the personnel office at about 9:30 a.m. where Richard Bacastow, employee relations coordinator, told him unless he paid his union dues Respondent Company would have no choice except to discharge him. Moyer said he would not pay the dues and protested he had papers in his car to prove he had resigned from Respondent Union [2] and had paid his dues to the end of 1960 Moyer's protests were not accepted and he was again told he had to pay his dues or be dismissed. Moyer returned to his place of work and was told by his foreman to leave the premises.

Upon Moyer's request, Bacastow under date July 18, 1961, sent him written confirmation of the discharge and detailed the reasons therefor.

CONCLUSIONS

The General Counsel contended at the hearing and argued in his brief that Respondent Union caused Respondent Company to discriminate against Moyer by bringing about his discharge for nonpayment of dues at a time and under circumstances when Moyer was not required to pay such dues as a condition of employment and, accordingly, violated Section 8(b)(1)(A) and (2) of the Act. He contends also that Respondent Company made no effort to investigate Moyer's claim that he had previously resigned from Respondent Union, that it was at least under an obligation to seek further verification of the validity of Respondent Union's demand before discharging Moyer, with the result that Respondent Company violated Section 8(a)(1) and (3) of the Act in failing to meet the basic requirements established by the Board for the protection of employees from discharges on the basis of an unlawful union demand.

Two propositions underlie the General Counsel's contention regarding the alleged violation by Respondent Union: first, that the "Articles of Agreement" effective January 18, 1961, is a new contract, the maintenance-of-membership provisions of which can only be enforced against employees who were members on the "effective date," and second, that Moyer had resigned from Respondent Union prior to the "effective date."

We turn then to a determination of whether the Respondent Union and Respondent Company entered into a "new contract." I think not. It is axiomatic in the law of contracts that agreements should be liberally construed so as to give them effect and carry out the intention of the parties. As the Supreme Court said in *Davison* v. *VonLingen*, 113 U.S. 40, "an instrument must be construed with reference to the intention of the parties when it was made. . . ." In the instant situation it is clear that the collective-bargaining agreement between the parties provided for a means of termination,"—either party giving 60 days' advance written notice may terminate [it] any time after December 31, 1960." It was stipulated that neither Respondent Union nor Respondent Company sent a notice to terminate. Instead we find the parties engaging in collective bargaining with a view toward arriving at a mutual understanding on changes in their existing agreement. They are successful, albeit agreement is reached after the "terminal" date. They then clearly set forth their intention in writing in the "Memo of Settlement," among certain modifications in economic benefits, to extend the contract term to December 31, 1963, and to have remain in full force and effect all provisions of agreement executed April 17, 1959, except for the above-noted modifications. As noted by the court in the case of *Local Union No. 28, International Brotherhood of Electrical Workers* v. *Maryland Chapter, National Electrical Contractors Association, Inc.*, 48 LRRM 2285, 2290 (D.C Maryland, May 16, 1961): ". . . termination and changes are different things." See also *N.L.R.B.* v. *Lion Oil Company*, 352 U.S. 282. Under the circumstances

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to avoid delinquency Section 6 recites that as soon as a member becomes delinquent in his dues, he becomes immediately subject to loss of employment opportunities and to discharge under a valid union-security clause, at the discretion of his local.

[2] It was stipulated at the hearing that Respondent Company had reason to believe, prior to discharging Moyer, that he was contending he resigned from Respondent Union

herein, I do not construe the "Articles of Agreement" effective January 18, 1961, to be a new contract, but rather I find it was a modification and extension of the April 17, 1959, "Articles of Agreement," in accordance with the expressed intention of the parties.

With respect to Moyer's resignation from Respondent Union "at the end of the contract which expires December 31, 1960," our concern here is not with Moyer's union rights and obligations but rather the effect of such resignation upon his right to retain his job with Respondent Company under the maintenance-of-membership clause. Having found that the April 17, 1959, "Articles of Agreement" was merely modified and extended, and the maintenance-of-membership clause therein not changed in any respect, it follows and I find that the said clause has continued unmarred and unabated through all the time material herein The collective-bargaining contract must be interpreted as intended to accomplish what it purports to accomplish—no hiatus which would allow effective union resignation so as to negate the obligation to pay union dues.[3] I find therefore that notwithstanding Moyer's resignation, his dues obligation under the maintenance-of-membership clause continued.

The *Marlin Rockwell Corporation,* decision, 114 NLRB 553, upon which the General Counsel heavily relies for a finding of violation herein is in my opinion inapposite. In *Marlin Rockwell,* a three-member Board decision, one member found a gap between collective-bargaining contracts, so that the resignations effected by the charging parties under the first contract entitled them to be treated as nonmembers on the effective date of the second contract. The remaining members of the Board found it unnecessary to decide definitely whether or not there was a gap, but stated that even if there was continuity of contracts then "the Union's valid reliance upon its provisions as a 'bar' to the right of the employees to resign from the Union, would be foreclosed by a line of decisions beginning with the *Union Starch* case. [87 NLRB 779, enfd. 186 F. 2d 1008 (C.A. 7), cert. denied 342 U.S. 815.]" The Board then stated:

> As there is no valid contention here that the charging employees were unwilling to contribute dues for the duration of the 1950 contract, it follows that the position taken by the Respondent Union here is subject to the identical considerations underlying the Board's treatment of the position taken by the contracting union, respondent in the *Union Starch* case. We hold, accordingly, that whether or not the 1950 contract remained continuously in force after September 15, and up to October 12, 1953, its provisions did not and could not validly supply any basis for depriving the employees of a right to sever their affiliation with the Union at will.

In *National Lead Company, Titanium Division,* 106 NLRB 545, the parties signed a collective-bargaining agreement containing a valid union-security clause effective from May 4, 1951, to March 13, 1952. Three days before the end of the contract term the parties executed a succeeding contract to be effective on March 14, 1952, a date immediately following the expiration of the first agreement. Several employees failed to pay dues between September 1951 and March 13, 1952. About August 1, 1952, the union demanded dues from delinquent employees owing under the contract and threatened to seek their discharge in case of default. The General Counsel there contended that the union improperly demanded dues owing from the term of the first contract, on the ground that the language of the succeeding contract required union membership in good standing only "during the life of this agreement." The Board in arriving at a determination of the liability of employees for dues which accrued under the first contract inspected the contractual relationship between the parties and held:

> The union-security arrangement in the second contract was, essentially, a mere renewal of the provision in the first one. Moreover, there was no time lapse between the terms of the successive agreements. With regard to union-security, therefore, there was unmarred continuity from September 1951, to the time of their discharge. To this extent at least, the second contract was, in effect, a continuation of the previous contract, rather than a completely new bargaining agreement. To find that these employees are relieved from payment of dues owing at the conclusion of the first in a series of uninterrupted contract terms would we believe, place undue emphasis upon the form of the contractual arrangement.

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[3] In this regard it is significant that as a result of prior negotiations the parties agreed to eliminate the escape clause which was contained in previous collective-bargaining contracts.

In *Montgomery Ward & Co., Incorporated,* 121 NLRB 1552, 1558, the Board held "it is well established that the only obligation an employee has under the compulsion of the proviso to Section 8(a)(3) of the Act, is to pay dues for the period of employment with the employer who is a party to the contract and during the term of the contract." (Citing *New Jersey Bell Telephone Company,* 106 NLRB 1322, enfd. *sub nom. Communications Workers of America, CIO* v. *N.L.R.B* , 215 F. 2d 835 (C.A. 2).) The Board went on further to state "the only modification of this doctrine permitted is when there are successive union-security contracts, without a hiatus as set forth in *National Lead Company, Titanium Division,* 106 NLRB 545, where because of the 'unmarred continuity of successive union-shop clauses in connected contracts,' the Board treated the two agreements as one."

Respondent Union's counsel during oral argument referred to Moyer as a "free rider." General Counsel objected to such characterization. It behooves me to note that an analysis of the evidence reveals that although Moyer adamantly refused to pay union dues subsequent to December 31, 1960, he nevertheless sought in effect to be a "free rider" by requesting union assistance, albeit unsuccessfully, on the day of his discharge. In his brief the General Counsel comments that the "Articles of Agreement" between the parties herein, with the "typical" maintenance-of-membership provision inherently contained a method of "escape." That while such an arrangement may be injurious to the Union in its effectiveness as a bargaining agent and allow for free riders, as the Respondent Union contends, it is not for the Board to provide the Respondent Union with another form of union-security clause, but this must be achieved in the collective-bargaining process. As found hereinabove, this is precisely what happened in the collective-bargaining relationship between Respondent Union and Respondent Company. Several years ago the contract contained a maintenance-of-membership clause with an escape period. As a result of negotiations Respondent Union prevailed upon Respondent Company to eliminate "escape" from the contract and for the past number of years it contains a maintenance-of-membership clause without a specified escape period. This, according to counsel for Respondent Union is its sole protection against those who would accrue the benefits of union representation without the assumption of the financial obligation.

That Congress plainly intended to preserve to labor organizations a means of compelling financial contributions by employees and an opportunity to eliminate free riders appears clear from the legislative history. Thus, Senator Taft in his major speech explaining the Taft-Hartley amendments (93 Cong. Rec. 3837, 2 Leg. Hist. 1010) stated:

> In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues.

In *The Radio Officers' Union of the Commercial Telegraphers Union, AFL (A. H. Bull Steamship Company)* v. *N.L.R.B.,* 347 U.S. 17, 40–42, the Supreme Court said:

> The policy of the Act is to insulate employees' jobs from their organizational rights. . . . The only limitation Congress has chosen to impose . . . is specified in the proviso to Section 8(a)(3) which authorizes employers to enter into certain union-security contracts. . . . [The] legislative history clearly indicates that Congress intended to prevent utilization of union-security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of union's concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave the unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. [Citing *N.L.R.B.* v. *Eclipse Lumber Co.,* 199 F. 2d 684 (C.A. 9); *Union Starch & Refining Co.* v. *N.L.R.B.,* 186 F. 2d 1008 (C.A. 7), cert. denied, 342 U.S. 815.]

Upon the record as a whole, and for the reasons set forth above, I conclude and find that Respondent Union did not violate Section 8(b)(1)(A) and (2) of the Act and that Respondent Company did not violate Section 8(a)(1) and (3).

RECOMMENDED ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirety.