

**Lafayette Radio Electronics Corp. and Local 431,
International Union of Electrical, Radio and Ma-
chine Workers, AFL-CIO. Case 29-CA-1578**

December 9, 1971

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
KENNEDY

On May 27, 1971, Trial Examiner Henry L. Jalette issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in certain unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.

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

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Trial Examiner: This case involves allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to permit a representative of the Union to be present at the interrogation of employees concerning their alleged participation in thefts of money and merchandise from Respondent. The complaint was issued on November 9, 1970, pursuant to an unfair labor practice charge filed by the Union on February 4, 1969. The case was heard in Brooklyn, New York, on February 22 and 23, 1971.

Upon the entire record,¹ including my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York corporation with its principal office and a warehouse and store at Syosset, New York (the only facility involved herein), and stores at various other places in the State of New York, where it is engaged in the retail sale and distribution of electronic equipment and related products. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of \$500,000 and purchases and causes to be transported and delivered in interstate commerce goods and materials valued in excess of \$50,000.

II. THE LABOR ORGANIZATION INVOLVED

Local 431, International Union of Electrical, Radio and Machine Workers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

There is no dispute about the essential facts. As noted in the statement of Respondent's business, Respondent is engaged in the retail sale and distribution of electronic equipment. The theft of merchandise is one of Respondent's major problems. Either through the actions of its security guards, observations by its supervisors, or information supplied to it by other employees or by other sources, Respondent will learn that employees are or may be engaging in theft of merchandise. On such occasions, Respondent will conduct an investigation which may follow one of two courses.

A suspected employee will be sent to the office of Personnel Manager Charles Dornbaum. He will interrogate the employee to determine whether or not there is any truth to the information which Respondent has received implicating the employee in the theft of its property. He may even accuse the employee of theft. If possible, he will obtain a written statement from the employee admitting his guilt.

On other occasions, an employee about whom information is received will be sent to Dornbaum's office and Dornbaum will escort the employee to an office where he will introduce him to a private detective working under contract with Respondent. The detective will interrogate the employee privately and, if the employee is willing, give the employee a polygraph test. As in the case where Dornbaum conducts the interrogation, the detective will attempt to obtain from the employee a written statement of guilt. The results of the detective's interrogation are turned over to Dornbaum.

Respondent has a no compromise policy of always

¹ In his brief, counsel for General Counsel moved to correct the transcript as set forth in an Appendix headed "Typographical Errors." The

motion has not been opposed and it is hereby granted, and the Appendix is received in evidence as TX Exh. 1.

discharging any employee it concludes has been guilty of theft, irrespective of the amount of the theft.² Nevertheless, Respondent does not always tell an employee that he is fired immediately upon proof of his guilt.

The interrogation of an employee may reveal not only the employee's own guilt, but also it may reveal thievery to a greater extent than previously suspected and the interrogated employee may implicate others. In these circumstances, the investigation is broadened to include the interrogation of implicated employees. In some cases, the original suspect may be reinterviewed even though he admitted his own guilt in the initial interrogation. Such an investigation may take 2 days with no adverse action until the investigation has been completed.

An additional reason for not discharging an employee immediately on proof of guilt is Respondent's desire to recover some of the stolen merchandise. For example, an employee was caught with three transceivers (mobile radio units) under his coat when leaving work one day. He was questioned by a supervisor and gave a written statement. His guilt was clear. However, he was not discharged then and there. Instead, he was asked to report to Dornbaum the following day. The employee did and he agreed to take a lie detector test, which was administered by a private detective. This test showed the employee had stolen merchandise on other occasions and Dornbaum made arrangements to meet him the following day to receive the merchandise. Dornbaum recovered \$9,000 worth of merchandise. Up to this point there had been no mention of discharge, but after he turned the merchandise over to Dornbaum, the employee remarked, "Well, I guess you don't want me back." Dornbaum replied, "Well, at this point I don't think so."

The interrogations which underlie the allegations of the complaint arose out of thefts at Respondent's Syosset facility and were conducted in August 1968, January 1969, and December 1970. It is not clear how many employees were interrogated in August, but one was found to be innocent and returned to work. In January, nine employees were interrogated, but only five were discharged. Two were interrogated in December, and both were discharged.

The Union has been the bargaining representative of Respondent's employees at certain of its locations for many years and at all times material herein a collective-bargaining agreement was in effect. On August 23, 1968, the Union's business agent, Sidney Gilbert, received information that Respondent had been calling employees into the office and interrogating them about alleged thefts. Pursuant to Gilbert's request, a meeting was held on August 27 with Respondent's labor consultant and other representatives of Respondent. At this meeting Gilbert informed Respondent that the Union objected to interrogation of employees which resulted in their being discharged where they were accused of violating any rules of the Company and stated that the Union wanted to have a union steward present

when any such interrogations were contemplated by Respondent.

Respondent's labor consultant, Louis Basis, told the Union that they would not be permitted any such privileges; that the Union had no right to be present; and that Respondent intended to proceed the way it had been proceeding in the past.

Thereafter, on September 11, 1968, the Union sent a letter to Respondent stating as follows:

We herewith request that the company shall not interrogate any employee with respect to employment or matters that may result in disciplinary action including termination of employment without notice to the Union and having a Union representative present.

Respondent did not reply to the letter, but the Union heard of no complaints until January 1969. Upon learning at that time that employees were again being called in, Gilbert asked for a meeting with Respondent. Such a meeting was held in January 1969, with representatives of Respondent, including Personnel Manager Charles Dornbaum. Gilbert protested Respondent's failure to permit union representation when employees were called in or to advise them that they had the right to have a union representative present. He renewed the demand that union representation be permitted to the employees. Respondent adhered to its previous position.

B. Analysis and Conclusions

The main issue in this case is the right of a Union to be present during a meeting between an employee and management representatives respecting the employee's alleged theft of company property. There are only a few cases which have considered a similar issue and in only one of these did the Board find that the Union had the right to be present, and that case was denied enforcement by the court of appeals.³ (In this case, unlike *Texaco*, the employees were not the ones to request union representation. The only request was that of the Union. There is, therefore no question of an independent 8(a)(1) violation as in *Texaco*.)

From the grist of the *Texaco* case and those cases which have considered the issue, the principle appears to have evolved that the right to union representation exists if the purpose of the meeting between the employee and management is disciplinary; but that the union has no right to be present if the purpose of the meeting is fact finding or investigatory. In *Texaco*, the employee in question had been caught in the act of stealing, had admitted the theft, and had been promptly suspended without pay by his foreman. In the circumstances, the Board concluded that the only purpose of the meeting that was later held was to determine whether the suspension should be lifted or continued, or a stronger sanction imposed. This was a

² As a notice to all employees states, "Theft is theft, whether the amount involved is big or small. The theft of a 50¢ item and the theft of a \$2,000 collection of merchandise involve the same principle as far as we are concerned. If everyone took 50¢ worth of merchandise often enough this company would be bankrupt."

³ *Texaco, Inc., Houston Producing Div.*, 168 NLRB 360, enforcement denied *N.L.R.B. v. Texaco, Inc.*, 408 F.2d 142 (C.A. 5) In *United Aircraft Corporation (Pratt & Whitney Division)*, 179 NLRB No. 160, a Trial Examiner upheld the right of an employee to union representation during interrogation about his alleged misconduct, but the Board had no occasion to pass on the question because the union did not enjoy majority status at the time of the interrogations and the employer accordingly was under no obligation to bargain with it.

disciplinary purpose and it involved direct dealing with the employee.

In *Chevron Oil Company*, 168 NLRB 574 at 578, the Board stated, "But this is not to say that a bargaining agent must be privy to management councils, or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached."

What factors determine whether a meeting is factfinding, rather than disciplinary? In *Chevron Oil*, *supra*, no definite adverse action had as yet been decided on. In *Jacobe-Pearson Ford, Inc.*, 172 NLRB No. 84, the Board found that "the 'potential' for disciplinary action was remote. . . ." In *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB No. 157, the Board found that management was neither precommitted to disciplinary action, nor to whether the conduct under investigation even merited discipline, and if so, what degree of discipline. In *Dayton Typographical Service, Inc.*, 176 NLRB No. 48, management expressly stated the purpose of the meeting was not disciplinary and its actions were consistent with such a statement.

If these two ideas represent the only alternatives in a situation such as is presented herein, the complaint must be dismissed because the evidence clearly shows that the interrogations that occurred had a factfinding purpose and not a disciplinary purpose.

The interviews fall into two categories: those by Dornbaum and those by private detectives. It seems unnecessary to point out that the detectives were not involved in any way in Respondent's decision making respecting the discipline of employees; they are what their job classification signifies, investigators. Their interviews with employees cannot therefore be characterized as having a disciplinary purpose. Discipline by Respondent could, and did, follow from their interviews, but this does not change the nature of the interviews they conducted.

The interviews by Dornbaum could well have had a disciplinary purpose since he is director of personnel. However, this does not preclude a finding that the purpose of his interviews was factfinding. In this connection, two situations must be examined: (1) the interviews of employees about whom Respondent had received information giving rise to a question of possible guilt; (2) the interviews of employees where Respondent had clear proof of guilt.

The first situation is that described by Luis Torres, Anthony Macchia, and Marino Gallon. Whatever information Respondent had about their actions, there was still a possibility of innocence; there was still a possibility that an

interview would clear the employee. Accordingly, one cannot infer from the mere fact of the interview that its purpose was to discuss with the affected employee the discipline to be meted out. One must look elsewhere to find evidence of such a purpose and none is to be found.

The second situation is analogous to the situation in the *Texaco* case. As noted earlier, an employee was caught by a supervisor leaving work with three transceivers. He admitted the theft in a written statement to the supervisor. Yet, Dornbaum had a meeting with him and the employee consented to interrogation by a detective and to a lie detector test. Considering his established guilt before he spoke to Dornbaum and the detective, how could his interrogation be characterized as investigatory? Is not the inference warranted that the interrogation as in *Texaco* had a disciplinary purpose? An inference of disciplinary purpose might have been warranted, but it was negated by Dornbaum's testimony about the purpose of interrogation where guilt is clear. Dornbaum convincingly demonstrated the investigatory purpose of the interrogation by recouping thousands of dollars of stolen merchandise. It can be seen, therefore, that even where guilt has been established it does not necessarily follow that the employee interviews are for the purpose of discipline. There may still be an investigatory purpose, albeit a different investigation from that where guilt has not been established. In my judgment, in this situation, as well as the first one, there must be other evidence of a disciplinary purpose in order to fit this case into the *Texaco* mold.

In none of the cases portrayed in the record, whether of the first variety or the second, was any evidence adduced that Dornbaum discussed with the employee involved the discipline to be imposed for the misconduct. The reason of course is simple: the discipline was predetermined and nonnegotiable. (By saying the discipline was nonnegotiable, I do not mean that discipline of employees is not a mandatory subject of bargaining, nor do I imply that the Union had waived the right to bargain about the matter. I use the term to emphasize that in this case there were no degrees of discipline, unlike *Texaco* where the Board found the purpose of the meeting to determine whether the suspension should be lifted or continued, or a stronger sanction imposed.) Discharge followed a theft of a 5-cent item as well as a \$2,000 collection of merchandise.⁴

What significance attaches to the fact that discipline by discharge has been predetermined? For example, in *Jacobe-Pearson Ford, Inc.*, *supra*, the Board deemed the "potential" for disciplinary action to be remote and relied on that factor in finding no violation. Here the potential for discipline was real, but it was only real if the employee was

⁴ General Counsel in an effort to overcome the evidence that the purpose of the interviews was factfinding states that "assuming *arguendo*, that the sessions are investigatory, at some point prior to the actual discharge the Union should be notified and given the chance to be present." Whatever merit there may be to this position, it is not in issue herein. The Union's written request was very explicit, namely, ". . . that the company shall not interrogate any employees with respect to employment or matters that may result in disciplinary action including termination of employment without notice to the union and having a union representative present." In my opinion, this request is very clear and is addressed to a single matter: the interrogation of the employees about the alleged thefts. The Union's oral requests in August 1968 and January 1969 were not essentially different. Dornbaum testified, without contradiction,

that the Union never requested to be present after an interrogation, but before discharge. Accordingly, as the Respondent had the right under the contract to discharge for good cause shown without prior notice to the Union, the Respondent's failure to notify the Union prior to discharge for theft cannot form the basis of an unfair labor practice finding. In addition, testimony was adduced as to whether or not Respondent gave proper notice to the Union of the discharge of employees found to have stolen company property. This testimony is not relevant to the issues raised by the complaint. The complaint does not allege that Respondent violated the Act by failing to notify the Union of such discharges. The complaint alleges specifically and only that Respondent refused to permit a representative of the Union to be present at the interrogations.

guilty of stealing. And this is what is significant, not the predetermined policy of discharge. If the evidence about the manner in which the interviews were conducted indicates a purpose to discover *whether* employees are stealing, the existence of a predetermined policy of discharge for stealing in no way alters the nature of the interview.

On the basis of the foregoing, if the finding of a violation hinges on whether the interviews were "factfinding" or "disciplinary," I would find that there was no violation here because of the evidence of a factfinding purpose and the absence of any evidence that Respondent discussed with employees the discipline to be meted out to the guilty. But General Counsel argues for a violation on a broader concept than that presented by the factfinding versus disciplinary concept. According to General Counsel, the employees were in need of, and entitled to, union representation, because ". . . the interrogations in the circumstances here were also reasonably calculated to prejudice any future grievances as to the 'cause' for any subsequently imposed discipline because the interrogations were for the purpose of extracting detrimental admissions or confessions. Accordingly, any such interrogations tend to render futile any future grievances concerning the 'merits' of the employee's case and would virtually restrict any meaningful contentions later to the subject of the measure of discipline."

There is a certain appeal to this contention, and although General Counsel does not cite the case, his contention echoes the principle underlying the Supreme Court's decision in *Escobedo v. State of Illinois*, 378 U.S. 478, wherein the Court, quoting from an earlier case, stated that the "right to use counsel at the formal trial [would be] a very hollow thing [if] for all practical purposes, the conviction is already assured by pretrial examination."⁵ By parity of reasoning, the right to union representation in the processing of a grievance through the various steps of the grievance procedure, including arbitration, which the collective-bargaining agreement provides for, is a very

⁵ It is noted that in its brief to the court in *Texaco, supra*, the Board cited not only *Escobedo*, but also *Miranda v. Arizona*, 384 U.S. 436 (1966),

hollow thing if the decision to discharge is immune from challenge because of a statement of the employee obtained in a private interrogation.

Despite the similarity of the two situations, I conclude that General Counsel's contention must be rejected. *Escobedo* rests on a constitutional guarantee of the right to counsel. Although General Counsel is here asserting the existence of a statutory right, in reality the right which he seeks to protect is a contract right, namely, the asserted nullification of the grievance and arbitration provisions of the contract. Of course, in certain circumstances, the statute protects the rights the union acquires by contract. See *St. Louis Cordage Mills*, 170 NLRB No. 7; *W. P. Ihrig & Sons*, 165 NLRB No. 2. In this case, Respondent has not repudiated any of its contractual obligations. It has not refused to process grievances over the discharge of any employee for theft (none was filed). Since the contract does not give the Union the right to be present during an interrogation (the Union sought unsuccessfully to obtain a provision to that effect in the contract in the negotiations in 1969) and since I find the interrogations were part of an investigation and that there is no evidence that Respondent dealt directly with employees about tenure and conditions of employment, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by the conduct alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the complaint be dismissed in its entirety.

and *United States v. Wade*, 388 U.S. 218 (1967), cases which also dealt with the rights of criminal suspects to be represented by counsel.