

Abercrombie & Fitch Co. and Local 153, Office & Professional Employees International Union, AFL-CIO. Case 2-CA-12859

October 17, 1973

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND PENELLO

On July 3, 1973, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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 Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case held on May 16, 1973, is based on charges filed by the above-named Union on January 22, 1973, and a complaint issued on March 23, 1973, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of the Board, Region 2, alleging that Abercrombie & Fitch Co., herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, herein called the Act. The Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the General Counsel's oral argument and the Respondent's posthearing brief, I make the following:

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

Abercrombie & Fitch Co., the Respondent, a New York corporation with a store located in New York City on the corner of East 45th and Madison Avenue, herein called the New York City Store, is engaged in the retail sale of sporting goods and related products in several States, including New York. In the course of business operations, Respondent annually receives gross revenues in excess of \$500,000 and annually purchases goods and commodities valued in excess of \$50,000 directly from suppliers located outside the State of New York. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

Local 153, Office & Professional Employees International Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III THE QUESTION PRESENTED

The ultimate question presented in this proceeding is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to supply the Union with information relevant and necessary to the Union's evaluation and prosecution of a grievance filed by an employee represented by the Union.

IV THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Union, the collective-bargaining representative of the salesmen employed at the New York City store, is signatory to a collective-bargaining agreement with the Respondent covering these employees. The agreement, effective from March 1, 1972, until February 28, 1975, contains a grievance-arbitration procedure which provides for binding arbitration by an arbitrator selected by the New York State Mediation Service. On September 29, 1972, Respondent discharged salesman Raymond Morillo. The Union filed a grievance on his behalf and eventually submitted the grievance to arbitration. The instant case involves this grievance, particularly the Union's requests for information to evaluate and successfully prosecute the grievance.

Morillo on Friday, September 29, 1972,¹ signed a statement in which he admitted stealing \$10 that day from a cash register. He was discharged the same day. On Monday morning, October 2, the Union's chief steward at the New York City Store, Briggs, spoke to the Respondent's personnel manager, Charles McDermott, about Morillo's discharge. McDermott showed him Morillo's confession and told Briggs that the cashier reports for Morillo's cash register showed shortages totaling about \$7,000 over a period of

¹ All dates herein refer to 1972 unless otherwise designated.

several months. The same afternoon McDermott again met with Briggs, who was accompanied by Morillo. Morillo stated that he had signed the confession under duress and explained the circumstances under which he had signed the confession.

On October 4, McDermott met with the Union Secretary-Treasurer John Kelly, Briggs, and Morillo at which time Kelly asked for and received the Respondent's explanation for discharging Morillo. Kelly's stated position was that the confession signed by Morillo would not "stand up," and that Kelly did not believe the Respondent had sufficient cause to discharge Morillo. Kelly requested and McDermott refused to reinstate Morillo, at which point Kelly declared that the Union had no alternative but to take the discharge to arbitration and asked McDermott to give him a copy of Morillo's signed confession, the cash register tapes for Morillo, and any other information pertinent to the discharge. McDermott told Kelly to reduce the grievance to writing and to make a written request for the information. On October 5, by letter, Kelly notified McDermott that "it is the [Union's] intention to submit Morillo's discharge under the grievance machinery and arbitration in our contract" and requested that the Respondent supply the following information:

1. A copy of the statement signed by Morillo on September 29, 1972.
2. A copy of the cash register tape of his register for that date.
3. A list of any and all discrepancies between that tape and the record of the Cashiers Department.

McDermott did not answer this letter nor did the Respondent supply the information. The Union on October 25 in Case 2-CA-12770 filed an unfair labor practice charge with the Regional Director for Region 2, alleging that the Respondent, in violation of the Act, was refusing to furnish the Union the information requested in Kelly's letter of October 5. Also, Kelly by another letter to McDermott on November 2 reiterated the previous request for information. On November 7, McDermott responded by letter and refused to furnish the Union the requested information, stating "the company's position in this matter remains unchanged. We will be most happy to meet with [representatives of the Union] and review the evidence on which we discharged Morillo." A meeting was arranged for November 16 at which time McDermott met with Union Representative Scully. They discussed Morillo's grievance. McDermott showed Scully the following documents: Morillo's confession of September 29; the cash register tape of September 29 from Morillo's register; the cashier's daily report showing the total cash sales and the amount of money removed from the register on September 29 indicating a shortage of \$45; the September 29 cash register audit envelope for the register showing the total sales segregated into "cash," "charge," "bank charge," and "credit sales"; and the portions of the 40 odd sales checks written by the three cashiers using this register on September 29 showing the amount of the sale, method of payment, and name of salesman. Scully examined all of these documents—the business record relating to the cash register are herein collectively called the "cash

register records"—and McDermott explained to Scully how they related to each other. McDermott, however, specifically stated that the "cash register records" by themselves did not establish that Morillo took the \$10 because he was not the only salesman who used the register, that two other salesmen used it throughout the day in question. McDermott also told Scully that using the "cash register records" he had prepared an analysis showing that there was a \$45 shortage. Scully at the end of the meeting requested, and McDermott refused to furnish, copies of the various documents shown Scully.²

Scully testified that based on the information furnished him on November 16 and the information previously provided by Morillo that he, Scully, was able to evaluate Morillo's grievance which he concluded had merit. Scully on November 16, following his meeting with McDermott, testified he decided to withdraw his charge which alleged that the Respondent had refused to furnish the Union with information on the Morillo grievance and to submit the Morillo grievance to arbitration. Accordingly, on November 16 Scully by letter to the Regional Director requested that he be allowed to withdraw the Union's charge filed against the Respondent³ and on the same date, by letter, notified the New York State Board of Mediation of a dispute with the Respondent over Morillo's discharge and requested that the Mediation Board designate an arbitrator to hear the dispute. The chairman of the Mediation Board by letter of November 21 notified the Respondent and the Union that a hearing on this matter was scheduled for January 10, 1973, before a designated arbitrator. Shortly before the scheduled arbitration, on or about January 2, 1973, Morillo showed a letter from the insurance company apparently investigating Respondent's cash register shortages which indicated that the shortages involved about \$7,000 over a period of time. The Union's attorney had been under the impression that the Respondent's only defense before the arbitrator would be that Morillo had taken \$10 on September 29. Now, to see whether this was still true, in light of the aforesaid letter, the Union's attorney instructed Union Representative Scully to request all the evidence the Respondent intended to rely on in presenting its case to the arbitrator. Scully, on January 2, 1973, sent the following letter to McDermott.

In view of our upcoming arbitration on the discharge of Mr. Raymond Morillo, we request that you furnish us with copies of all correspondence, documents, papers or records that you propose to rely upon in reference to the arbitration.

We also request that you furnish us with the names of all persons you intend to rely upon to support your position, as well as any statements by such person(s) in the possession of the Employer relative to the above grievance.

This information required by our attorneys and we ask that you forward it to us immediately.

² What took place at this meeting is based on the credible testimony of McDermott, who impressed me as an honest witness.

³ The Regional Director approved the request on November 22.

By a letter to the Union on January 4, 1973, the Respondent's attorney refused to supply this information explaining, "we are unable to provide said information at the present time. I know of no procedural rule of the New York State Mediation Board which provides for pre-arbitration discovery, which is what you are requesting." Shortly after this the Respondent's lawyer notified the Union's lawyer that the only reason the Respondent would advance at the arbitration hearing for Morillo's discharge was the alleged \$10 theft on September 29. In fact, during the arbitration proceeding the Respondent at no time took the position that Morillo was discharged for anything other than the theft of \$10.

The unfair labor practice charge which the complaint in this case is based on was filed by the Union on January 20, 1973.

As described above, the documentary information in the possession of the Respondent relevant to its contention that Morillo had stolen \$10 was his confession and the "cash register records." The only other documents relating to the alleged theft which the record shows that the Respondent possessed are a written analysis of the "cash register reports" prepared in late October by McDermott and a written statement submitted by Morillo on November 16 to an agent of the insurance company investigating the alleged theft. McDermott's analysis is a one-page breakdown of the "cash register records." It takes the sales transactions which are listed in chronological order on the cash register tape and segregates them by the method of payment, i.e., cash, charge, or credit, and illustrates there was a shortage of \$45. McDermott, as found above, when he met with Scully on November 16, informed him that he had made this analysis but did not show it to Scully. McDermott credibly testified that his purpose in preparing such an analysis was "I assumed that on the forthcoming arbitration, this tape [referring to the cash register tape] was to have been submitted in evidence. To have submitted this tape to somebody without an explanation and to try to pick the transactions off it at a table, it would have been a long, cumbersome, and confusing situation." Regarding the statement given on November 16 by Morillo to the agent for the insurance company, the statement, in substance, presents Morillo's version of the events leading up to his discharge, that he did not steal the \$10 and that his written confession given to the Respondent's security people was the result of coercion. There is insufficient evidence to determine the exact date this statement was turned over to the Respondent by the insurance company. The record establishes only that in "early January" the Respondent's lawyer mentioned the statement to McDermott and that in the middle of January the Respondent's lawyer for the first time showed the statement to McDermott.

B. Discussion and Ultimate Findings

It is now settled that an employer fails to bargain in good faith, and thereby violates Section 8(a)(5) and (1) of the Act, if it refuses to furnish a union with information relevant and necessary to the proper performance of the Union's statutory representative function of processing grievances.

N.L.R.B. v. Acme Industrial Co., 385 U.S. 432 (1967). The fact that a request for this type of information is made by a union following its decision to submit, or the actual submission of, a grievance to arbitration does not relieve an employer of its statutory obligation. *Fawcett Printing Corporation*, 201 NLRB No. 139, Sec. II, F.2. However, the Board has held "that the employer is [not] obligated to furnish such information in the exact form requested by the representative. It is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining." *The Cincinnati Steel Castings Company*, 86 NLRB 592, 593. Guided by these principles, I will now review the evidence.

The Union, using the grievance-arbitration procedure in its contract with Respondent, grieved over the Respondent's discharge of employee Morillo, and in connection with this grievance requested that the Respondent, in effect, furnish it with all information relevant to the discharge, including certain specified information. The Respondent furnished all of the requested information,⁴ but at all times refused to comply with the Union's request for a copy of Morillo's confession and copies of the "cash register records." Respondent's personnel manager, McDermott, however, showed all of these documents to Union Representative Scully and discussed the information contained in documents with Scully. The information was not complicated. There is no evidence that Scully did not have ample time to read over and digest the information or was prohibited from taking notes or that Scully believed he was not competent to evaluate the information. To the contrary, Scully withdrew the Union's charge he had previously filed with the Board alleging Respondent had violated the Act by refusing to furnish this information which was needed by the Union to decide whether to submit Morillo's grievance to arbitration, and at the same time Scully submitted Morillo's grievance to arbitration. Plainly, Scully believed that he had been given an adequate opportunity to intelligently consider and evaluate the requested information.

I realize that the Board in certain situations has stated that good-faith bargaining requires an employer to furnish information "with an opportunity for the Union to make a copy of such information if it so desires." *United Aircraft Corp.*, 192 NLRB 382 (voluminous records covering thousands of employees), citing *Lasko Metal Products Inc.*, 148

⁴ There is insufficient evidence to establish that the signed statement executed by Morillo on November 16 for an investigator employed by an insurance company was in the possession or under the control of the Respondent at the time it received the January 2, 1973, written request from Union Representative Scully to furnish the Union with all documents and papers that the Respondent intended "to rely upon in reference to the arbitration." Moreover, Scully testified, in effect, that the purpose of this request was to determine whether the Respondent in the arbitration proceeding intended to defend against the discharge on grounds other than the alleged theft of \$10, and testified that Respondent's attorney subsequently notified the Union's attorney that the Respondent's sole defense before an arbitrator would be the alleged theft of \$10. Under all of these circumstances, I am of the opinion that the Respondent was not obligated to furnish the Union Morillo's November 16 statement.

Regarding the Union's request embodied in Scully's letter of January 2, 1973, that Respondent furnish the Union with statements of persons other than Morillo, there is no evidence that the Respondent at any time had in its possession such statements relevant to Morillo's discharge.

NLRB 976, 978 (names, hire dates, and wage rates of all new hires and employees hired since the start of a strike). In *United Aircraft* and *Lasko Metal Products* either the volume of information requested or the nature of the information and its intended use made the information useless to the Union without copies. In the instant case, the information consists of Morillo's confession, less than half a page in length, which can be easily read and understood in a matter of a few minutes, and of uncomplicated cash register records consisting of three one-page documents and a series of sales slips. Also, there is no evidence that the union representative was prohibited from making notes about the information, nor did the union representative exhibit or voice any difficulty in evaluating the information in the manner furnished. For all of these reasons, I am of the opinion that the *United Aircraft* and *Lasko Metal Products* cases are distinguishable from the instant situation and conclude that the Respondent in the circumstances of this case made available the requested information "in a manner not so burdensome or time consuming as to impede the process of bargaining." *The Cincinnati Steel Castings Company, supra*.

Regarding the failure of the Respondent to furnish McDermott's analysis of the "cash register reports," this analysis is based on and contains the identical information furnished and explained to the union representative on November 16 by McDermott. The analysis is simply a graphic presentation prepared for use primarily to explain the Respondent's case to an arbitrator. I am of the opinion that in these circumstances the analysis is either irrelevant or, if relevant, of such trivial significance that there is no basis whatever for concluding that the failure to supply it would impede the Union in its proper functioning or that its possession might have enabled the Union to represent Morillo more effectively. Thus, I conclude the Respondent was not obligated to give the analysis to the Union.

To recapitulate, based on the foregoing, I find that the Respondent furnished the Union all relevant information in its possession relating to Morillo's grievance, the Respondent was not obligated to furnish McDermott's analysis to the Union, the Respondent's refusal to furnish copies of the information cannot be said to have been burdensome or restrictive on the Union and, I further find that nothing the Respondent said or did demonstrates that the Respondent was not acting in good faith.⁵ Consequently, I conclude that

Respondent did not violate Section 8(a)(5) and (1) of the Act, as alleged, by failing and refusing to furnish the Union with information. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

Upon the basis of the foregoing findings of fact and the entire record, I make the following:

CONCLUSIONS OF LAW

1. Abercrombie & Fitch Co., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 153, Office & Professional Employees International Union, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. All sales personnel at the Respondent's New York City store who are actually engaged in selling, but excluding buyers, associate buyers, assistant buyers, and supervisors within the meaning of Section 2(11) of the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Local 153, Office & Professional Employees International Union, AFL-CIO, is the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

5. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ⁶

The complaint is dismissed in its entirety.

had been witnessed by two named security employees. The evidence, however, does not establish that this portion of the confession was deliberately concealed rather than that the attestation had been inadvertently left off and added at a later date.

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁵ It appears that, when McDermott on November 16 showed Morillo's confession to Union Representative Scully, it did not indicate on its face it