

Roadway Express, Inc. and Local 560, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Richard Erbacher. Cases 2-CA-19359 and 2-CA-19422

27 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 1 March 1984 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief and an answer to the Respondent's exceptions, and the Respondent filed a brief in reply to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith.

The judge found that the Respondent violated Section 8(a)(1) and (3)² of the Act by discharging employee Richard Erbacher on 15 December 1982. We find merit in the Respondent's exceptions³ to these findings.

The facts, as more fully set forth by the judge, are as follows. The Respondent and the Union have been parties to successive collective-bargaining agreements for many years. The bargaining unit consists of drivers and dockmen. Employee Erbacher worked essentially as a porter, a position which was not part of the bargaining unit. Prior to November 1982,⁴ Erbacher refused requests by the bargaining unit's shop steward to join the Union.

In November, Erbacher decided to join the Union and signed a union authorization card. Thereafter, about 29 November, Union Business Agent Jaronko informed the Respondent's terminal manager, Ward, that the Union wanted to repre-

sent Erbacher. Ward replied that he would get back to Jaronko.

On 10 December, the Respondent and the Union held a meeting to discuss a variety of problems. The Union again requested recognition as Erbacher's representative. The Respondent refused on the basis that Erbacher would constitute a one-person unit. The subject was not further pursued. The Union then claimed that the Respondent was assigning bargaining unit work to nonbargaining unit employees, including Erbacher. The Union contended that nonbargaining unit employees were receiving freight at the dock and in support of this claim presented the Respondent with copies of bills of lading signed by nonbargaining unit employees,⁵ including Erbacher. Since bills of lading are signed by the employee who receives the freight, the documents supported the Union's claim, and the Respondent agreed to have the work done in the future by bargaining unit employees.⁶

For some time prior to this 10 December meeting, the Union had expressed to the Respondent its concern that nonbargaining unit employees had been receiving freight at the dock. However, according to the shop steward, the issue had never been pressed before with the Respondent since the Union did not have proof until obtaining copies of the bills of lading.

After the conclusion of the 10 December meeting, the Union's shop steward, when asked by Terminal Manager Ward how he had obtained the copies of the bills of lading, stated "that is for you to find out." At that time, the Respondent kept its copies in unlocked files in its office in the terminal. Ward suspected that Erbacher had provided the copies to the Union since he was the only employee, other than supervisors and the clerical staff, who had access to the office where the documents were kept. On 14 December, Ward confronted Erbacher, and Erbacher admitted taking the documents from the Respondent's files, making copies, and giving them to the Union. On 15 December, the Respondent discharged Erbacher. At that time Ward told Erbacher that he was discharged because of his unauthorized use and distribution of company documents. At the hearing, Ward asserted that it is company policy to prohibit disclosure

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² Although the judge found at one point that Erbacher's discharge violated Sec. 8(a)(1) of the Act, it is clear from his decision as a whole, including his conclusions of law and recommended Order, that he found the discharge violated Sec. 8(a)(1) and (3) of the Act.

³ The judge found, and we agree, that the Respondent did not violate Sec. 8(a)(1) and (3) of the Act by discharging Erbacher because he joined the Union. The General Counsel excepts to the judge's failure to find that the Respondent's discharge of Erbacher was motivated by his assistance to the Union in its claim that nonunit employees were performing unit work. We find no merit to the General Counsel's exceptions.

⁴ All dates refer to 1982 unless otherwise noted.

⁵ A bill of lading is essentially a contract between a shipper and a carrier and is printed on a standard form with four carbon copies. It lists the shipper, the destination, a description of the goods, and the charge. It is signed by the shipper and the employee of the Respondent who accepted the goods. Regulations of the Interstate Commerce Commission require that copies of bills of lading be retained for 3 years.

⁶ The Union also claimed at this meeting that nonbargaining unit employees, including Erbacher, were moving trucks on Saturday. Erbacher also furnished information to the Union supporting this claim. This dispute similarly was settled at the meeting.

of such information, but he conceded that this policy is not in writing.

The judge found that Erbacher was involved in protected concerted activity when he took the bills of lading from the Respondent's files and furnished copies to the Union and that, consequently, the Respondent's discharge of him for this conduct was unlawful. The judge found that Erbacher's action was concerted since it was taken, not in furtherance of an individual claim for his own benefit, but rather together with the shop steward in an attempt to enforce the work preservation clause of the Union's collective-bargaining agreement. The judge also found that Erbacher's actions were protected. In so doing, the judge noted that the Respondent did not have a company rule, known to employees, prohibiting the dissemination of the bills of lading and that the documents were kept in unlocked files and were not marked as being confidential. In addition, he relied on the absence of evidence showing that Erbacher was aware that the Interstate Commerce Act prohibited the disclosure of bills of lading and the fact that neither Erbacher nor the Union disclosed the information to outside persons. Finally, he found that the bills of lading clearly were relevant to the Union's claim that the Respondent was breaching the contract.

We do not agree with the judge's finding that Erbacher was involved in protected activity when he took the bills of lading from the Respondent's files and made copies of them.⁷ Thus, the bills of lading were the Respondent's private business records which were kept in files in an office with limited access, and Terminal Manager Ward testified that he suspected Erbacher of furnishing the Union with copies of the bills of lading because Erbacher was the only nonsupervisory, nonclerical employee who had access to the office in which the files were maintained. In addition, the record clearly establishes that the bills of lading were not obtained by Erbacher "in the normal course of work activity and association."⁸ Rather, Erbacher went beyond the normal scope of his employment and took the bills of lading from the Respondent's files and copied them for reasons other than the Respondent's business purposes and without any approval or authorization by the Respondent. Erbacher's action certainly is not of the type which could be equated with that of employees who use information openly available at work.⁹ Thus, it is

⁷ In view of our conclusion that Erbacher's conduct was not protected under the Act, we find it unnecessary to pass on the judge's finding that his conduct constituted concerted activity within the meaning of the Act.

⁸ *Ridgely Mfg. Co.*, 207 NLRB 193, 196-197 (1973).

⁹ See, e.g., *W.R. Grace Co.*, 240 NLRB 813, 820 (1979), and *Ridgely Mfg. Co.*, supra.

clear that Erbacher surreptitiously resorted to the Respondent's business records for information. Such conduct is not protected under the Act.¹⁰

In finding that Erbacher's conduct was protected, the judge emphasized that the Respondent did not have a rule, known to the employees, which prohibited the dissemination of the information involved. The presence or absence of a specific company rule is a factor in deciding whether an employee's conduct is protected by the Act, but it is not the controlling factor. Furthermore, the absence of a written rule is of little significance here, where the documents taken were clearly the Respondent's private business records and were taken from files to which Erbacher had no proper access. In such circumstances, an employer, regardless of whether it has a written rule, has a right to expect its employees not to go into its files and to take its business records for whatever purposes they wish, and it is not unreasonable for an employer to consider such conduct as justifying discipline.¹¹

As noted above, the judge also relied on the facts that neither Erbacher nor the shop steward were shown to be aware that the Interstate Commerce Act prohibited the disclosure of information contained in the bills of lading and that neither Erbacher nor the Union disclosed the information contained in the bills of lading to "outside persons." We reject the judge's reliance on these factors. Thus, to the extent that the judge suggests that Erbacher's action was taken in a good-faith attempt to assist the Union, it does not follow that the manner in which he obtained the information was protected. Nor, contrary to the judge, do we conclude that the Respondent was required to show that it suffered actual commercial harm as a result of Erbacher's conduct before it could act on its legitimate interest in protecting its business records from unauthorized or surreptitious removal

¹⁰ *Bullock's*, 251 NLRB 425, 425-426 (1980); *W.R. Grace Co.*, supra; *Ridgely Mfg. Co.*, supra.

¹¹ To the extent the judge relied on *Ridgely Mfg. Co.*, his reliance is misplaced. The judge stated that in *Ridgely* the Board held that whenever an employee seeks to obtain information from an employer for use in an organizing campaign the employee's activity is concerted and protected. However, the Board in that case also clearly stated that employees, while free to use information which they obtain in the "course of normal work activity and association," are not entitled to an employer's private records. Thus, in *Ridgely Mfg.*, while the Board held that an employee was involved in protected activity when he memorized employees' names and addresses from timecards which were openly available for all employees to see, it also stated that the employee would have forfeited the protection of the Act if he had surreptitiously obtained the same information from the employer's private or confidential records.

Texas Instruments v. NLRB, 637 F.2d 822 (1st Cir. 1981), denying enf. to 247 NLRB 253 (1980), and *International Business Machines*, 265 NLRB 638 (1982), on which the judge relied, also are inapposite. Neither of these cases involved the situation where an employee resorted to an employer's files and removed business records.

Chairman Doison and Member Hunter find it unnecessary to express their views with respect to the Board's decision in *Texas Instruments*.

and copying by its employees. Similarly, we cannot agree with the judge's apparent suggestion that the fact that the information contained in the bills of lading was relevant to the Union's claim, that the Respondent was improperly assigning unit work justifies the manner in which Erbacher obtained the documents.

Thus, based on all the foregoing, we conclude that Erbacher's conduct in removing the bills of lading from the Respondent's files and making copies of them does not constitute activity which is protected under the Act. Accordingly, we find that the Respondent's termination of Erbacher for this conduct did not violate Section 8(a)(1) and (3) of the Act.¹² We therefore shall dismiss these portions of the complaint.

ORDER

The portions of the complaint alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by its discharge of employee Erbacher are dismissed.

IT IS FURTHER ORDERED that the portion of the complaint alleging that the Respondent violated Section 8(a)(1) of the Act by taking photographs of the picketing by striking employees is dismissed. Insofar as the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening on 20 December 1982 to suspend striking employees, jurisdiction is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not with reasonable promptness after the issuance of this Decision and Order either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

¹² In his decision, the judge does not mention that Erbacher also provided the Union with copies of invoices for work he performed on Saturdays for the Respondent as an "independent vendor." These documents were not removed from the Respondent's files and were properly in Erbacher's possession. We find it unnecessary to pass on whether Erbacher's conduct in this regard was protected under the Act since it is clear that the Respondent did not assert that Erbacher was discharged for such conduct and that the record does not show that the Respondent relied on such conduct in discharging Erbacher.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. These cases were heard by me in New York, New York, on October 5 and 6, 1983. The charge in Case 2-CA-19359 was filed by the Union on January 10, 1983, and

the charge in Case 2-CA-19422 was filed by Richard Erbacher on February 4, 1983. On February 18, 1983, the Regional Director for Region 2 issued a consolidated complaint.

In essence, the consolidated complaint alleges

1. That on December 15, 1982, the Respondent discharged its employee Richard Erbacher because he joined, supported, or assisted the Union.

2. That on December 20, 1982, the Respondent warned various of its employees of possible discipline because they engaged in a work stoppage.

3. That on December 20, 1982, the Respondent, by taking photographs of the striking employees, engaged in unlawful surveillance.

The Respondent contends as follows

1. It denies that it discharged Erbacher because he joined the Union and asserts that he was discharged because he furnished to the Union copies of bills of lading and freight bills which are asserted to be confidential documents. In this regard these documents were presented to the Company by the Union at a meeting on December 10, 1982, as evidence of the Union's claim that certain nonunit employees were doing bargaining unit work contrary to the provisions of article 3, section 4 of the collective-bargaining agreement.

2. The Respondent asserts that the Union sought recognition as the representative of Erbacher as a one-man unit and that Erbacher, on behalf of the Union, engaged in picketing for that purpose on December 19 and 20, 1982. The Respondent asserts that when the other employees, who are part of the bargaining unit encompassed by the contract, honored the picket line they were engaged in unprotected activity because: (a) the picketing was for recognition of a one-man unit, and (b) the work stoppage was in breach of the contract's no-strike provisions.

3. The Respondent, while admitting that it took photographs of the strikers on December 20, asserts that this was noncoercive and was necessary in order to gather evidence in the event it needed to commence legal proceedings to enjoin the strike.

4. With respect to the alleged threats of discipline against the strikers, the Respondent asserts that the Board should defer this issue to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses and after considering the briefs filed, I make the following

FINDINGS OF FACT

A. Jurisdiction

Roadway Express is an Ohio corporation with a terminal located in Nanuet, New York. It is engaged in the interstate transportation of freight and commodities. Annually the Respondent has gross revenues exceeding \$50,000 for the transportation of freight from New York to firms located outside the State of New York. It therefore is concluded that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It also is agreed by the parties that the Union is a labor organization within the meaning of Section 2(5) of the Act.

B. *The Alleged Unfair Labor Practices*

For many years the Company and the Union have been parties to successive labor agreements. At Nanuet, New York, the bargaining unit consists of drivers and dockmen. Erbacher, who essentially was employed as a porter, was not part of that bargaining unit. He was employed by the Company since 1978 until December 15, 1982, when he was discharged.

The collective-bargaining agreement involved is the National Master Freight Agreement to which the Company is a party. The most recent agreement runs from March 1, 1982, through March 31, 1985.

As noted above, Erbacher was never a member of the bargaining unit and had, prior to November 1982, refused requests by the shop steward to join the Union. By way of background, Erbacher testified, without contradiction, that in the summer of 1981, he was told by Terminal Manager George Ward, that he (Erbacher) was socializing too much with the drivers, that the Union was the enemy, and that there were things said in the office that Ward did not want Erbacher repeating to the Union's members.

In November 1982, Erbacher decided that he wanted to join the Union. He therefore signed a union card and gave it to shop steward, William Zurheide. Soon thereafter he went on vacation (to Florida), and did not return to work until December 1, 1982. About November 29 Ward had a telephone conversation with Union Agent Stanley Jaronko, wherein the latter informed Ward, *inter alia*, that Erbacher had signed a union card. Jaronko stated that the Union wanted representation on Erbacher's behalf or there would be a strike. Ward replied that he knew nothing about this and would get back to Jaronko. Erbacher testified that, after his return from vacation, Ward's general attitude toward him cooled in the sense that Ward was more formal towards him, and stopped using Erbacher to run personal errands for him. There is, however, no other evidence of animus toward Erbacher because of his membership in the Union.

On December 10, 1983, a meeting was held at the Union's office. Attending for the Union were Jaronko and Zurheide. In attendance for the Company were Ward and a Hassler, who is a labor-relations representative. The meeting was set up to discuss a variety of problems, none of which had reached the stage of formal grievances. Erbacher was present at the Union's office but did not attend the meeting.

At the opening of the meeting, the Union requested recognition as Erbacher's representative. In response, Hassler stated that the Company was not going to recognize the Union for a one-man unit.¹ This subject was then dropped and the parties proceeded to other matters. The Union next made the claim that the Company had been assigning nonbargaining unit employees (including

Erbacher), to do bargaining unit work.² In this respect, the Union asserted (1) that nonbargaining-unit employees were receiving freight at the dock; and (2) that they were moving trucks in the yard on Saturday. In support of its claims regarding the receipt of freight, the Union presented the Company with copies of bills of lading which were signed by nonbargaining unit employees, including Erbacher. As the person who receives the freight is the one who signs the bill of lading, these were shown as proof of the Union's claim. For its part, the Company agreed to have the work done, to the extent possible, by bargaining unit employees. Also the dispute involving the Saturday work was similarly settled and the shop steward was awarded a day's pay.

After the meeting on December 10 concluded, Ward asked Zurheide where he had obtained the bills of lading. Zurheide responded by saying, "That is for you to find out."

With respect to the above, the record shows that before December 10 there had been discussions between Zurheide and Ward regarding the contention that nonbargaining unit employees were receiving freight. According to Zurheide, he had never previously pressed this issue because he did not have proof until obtaining copies of the bills of lading. In this regard, a bill of lading, in essence, is a contract between the shipper and the carrier and is filled out on a standard form which has four carbon copies. The bill of lading lists the shipper, the destination, a description of the goods, and the charge. It is signed by the shipper and the employee of the Respondent who physically receives the goods. The charges to the shipper are regulated by tariffs established by the Interstate Commerce Commission. Copies of bills of lading and another document called a freight bill are, pursuant to law, required to be preserved for a period of 3 years and are retained at Respondent's terminal in unlocked files kept in the office.

Following the meeting of December 10, Ward suspected that Erbacher was the person who had turned over copies of the documents to the Union, as Erbacher had access to the office which was not accessible to the other employees. He credibly testified that on December 14 he confronted Erbacher about this, and Erbacher admitted that this was so.³ He also asked Erbacher why he wanted to join the Union. According to Ward, based on Erbacher's admission concerning the documents, he recommended to his superior that Erbacher be discharged. Regarding his decision, Ward testified that his concern was not with Erbacher having taken the Company's copy of the bills of lading, but rather that Erbacher had furnished copies to the Union. In this respect, Ward asserted that bills of lading and freight bills are confidential

² Art. 3, sec. 4 of the contract reads:

The Employers agree to respect the jurisdictional rules of the Union and shall not divert or require their employees or persons other than the employees in the bargaining units here involved, to perform work which is recognized as the work of the employees in said units.

³ Although Zurheide and Erbacher denied that the latter had turned over copies of these documents to the Union, I do not credit this assertion. Rather, based on the record as a whole, including demeanor considerations, I conclude that Erbacher, at Zurheide's request, did make copies of the documents and did turn them over to the Union.

¹ Under Board law, a company need not recognize or bargain with a union in a one-man unit and the Board will not hold an election in a one-man unit. *Foreign Car Center*, 129 NLRB 319 (1960).

documents because they disclose the names of customers and the rates (including discounts), that are charged to its customers. The Company asserts that the disclosure of such information by employees to persons other than the shipper or consignee is unlawful and punishable by fine if such information "may be used to the detriment of the shipper or consignee or may disclose improperly to a competitor the business transaction of the shipper or consignee."⁴ Ward also asserts that it is company policy to preclude disclosure of such information. He concedes, however, that this policy is not in writing and there is no evidence to show that it was known to any of its employees. There also is no evidence to show that either Erbacher or Zurheide were aware of the provisions of the Interstate Commerce Act, or that either disclosed the information to any person who could use it to the detriment of either the Respondent or its customers. In short, I find the Respondent's argument regarding a breach of confidentiality to be unpersuasive.⁵

On December 15 Ward discharged Erbacher. At the exit interview, Erbacher was told that he was being discharged because of his unauthorized use and distribution of company documents. When Zurheide, at a later point, asked Ward why Erbacher had been fired he was told that Erbacher had given the documents to the Union. Zurheide replied that this was not so and that he (Zurheide) had obtained copies of the documents from the garbage pails where customers disposed of their extra copies.

On the evening of December 19, Erbacher commenced picketing, with signs prepared by the Union. One signed read, "Unfair Labor Practices," and the other read, "Local 560 Demands Recognition."

As a result of the picketing, the other employees, who were represented by the Union, did not go to work on December 20. On the morning of December 20 Coombs, at Ward's direction, went outside to take photographs of the picketing and striking employees. The Polaroid pictures were marked on the back with the times the pictures were taken and listed the names of the strikers. At one point during the day, Ward told the strikers and the shop steward that the work stoppage was illegal. He also told them that they could be suspended pursuant to article 8 of the contract. (Art. 8 sets forth the grievance procedure and the no-strike provisions.) About 3 p.m., Ward attempted to hand copies of the telegrams to the strikers but these were rejected by all except Zurheide. The telegrams were then sent to the employees' homes and informed them that their strike activity could result in their being disciplined, "including suspension from employment up to and including thirty days." Later in the day, another set of telegrams was sent to the employees informing them that they were being suspended for 30 days on a rotating basis. About 4 p.m. December 20, the Union decided to halt the picketing and to have the employees return to work. This was, in fact, done and to

date none of the striking employees have received any disciplinary action on account of the work stoppage.

Analysis

It is my opinion that the Respondent did not discharge Erbacher because he joined the Union. Rather, it is concluded that Ward truthfully testified that his decision to discharge Erbacher was based on his belief that he had furnished copies of bills of lading and freight bills to the Union. This conclusion does not, however, mean that the Company had acted lawfully. For in establishing this defense, it has also established that its reason for discharging Erbacher was illegal under Section 8(a)(1) of the Act.

The evidence shows that for some period of time prior to December 10, the Union, by its shop steward, had expressed to the Company its belief that the Respondent was using nonbargaining-unit employees to perform bargaining-unit work, contrary to the provisions of the collective-bargaining agreement. The evidence also shows that Erbacher assisted the Union in proving its claim by photocopying bills of lading and furnishing them to the Union. As copies of the bills of lading would demonstrate the validity of the Union's contention on this point, it seems to me that Erbacher's assistance would not be in furtherance of any individual claim on his own behalf, but rather constitutes concerted activity as he was acting together with shop steward Zurheide in the latter's attempt to enforce the preservation of work provisions of the collective-bargaining agreement. *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 221 (8th Cir. 1970); *NLRB v. Interboro Contractors*, 388 F.2d 445 (2d Cir. 1967). (As noted above I have credited Ward's testimony to the effect that Erbacher admitted that he had turned over copies of the documents to the Union.)

While it might have been preferable for the Union to have directly asked the Company to produce these documents in support of its complaints, I cannot say that Erbacher's actions in copying and furnishing them to the Union was unprotected by Section 7 of the Act.

In *Ridgely Mfg. Co.*, 207 NLRB 193 (1973), the Board held that when an employee seeks to obtain information from his employer for use by the union in organizing activity (a list of employee names and addresses from time cards), the employee's activity is concerted and protected by the Act. The administrative law judge stated at 196:

Although the purpose of this activity was for use by the Union in organizing and was clearly concerted activity, the question remains whether it was also protected activity. The applicable rule of thumb seems to be that employees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to their Employer's private or confidential records. Thus, Respondent could rightly deny Durban the list of its employees and their addresses and he would not be protected in obtaining such list from Respondent's records surreptitiously.

⁴ Interstate Commerce Act, 49 U.S.C. § 11910 (a)(1).

⁵ The Respondent does not contend that Erbacher was making unauthorized use of the photocopy machine. In fact, the testimony reveals that it was not uncommon for employees to use this machine for their own purposes.

He was, however, protected in his actions of requesting such list from the top official in charge of the plant.

Thus, protection for such activity depends on the question of whether timecards located by the time-clock fall into the category of private or confidential records of the Employer or constitute information available to all employees in the course of their normal work relationship. I place them in the latter category as a source through which any employee may learn the names of his fellow employees as rightfully as through personal in-plant contact. Accordingly, I conclude that when he was memorizing the names of fellow employees from the timecards for the purpose of contacting them concerning union representation he was engaged in protected activity. Durban's discharge, because of his stated intent to obtain the names from this source for the stated purpose, was therefore, violative of Section 8(a)(3) and (1) of the Act.

In *Texas Instruments*, 247 NLRB 253 (1980), the Board held that the Company had unlawfully discharged several employees who had violated a company rule by circulating information contained in confidential wage surveys despite warnings not to do so. However, the First Circuit Court of Appeals, at 637 F.2d 822 (1981), reversed the Board's decision. The court noted that the information (1) was not of a type which would have come to the attention of the employees in the normal course of their work; (2) that the report which cost \$10,000 to prepare, was intended solely for internal use by the Company and was stamped "Strictly Private"; and (3) the Company had a rule known to the employees that required discharge for the deliberate disclosure to unauthorized persons of material marked "strictly private." The court stated at 832:

As we have already observed, *supra*, not every activity in furtherance of self-organization is protected under section 7 of the NLRA. Even were we to assume—and we do not so hold—that the need for proprietary information might in pressing circumstances support a right on behalf of organizing employees to use that information, the facts of this case do not reveal any such circumstances.

To support finding an employee right in the present case that would trigger the protection of the NLRA, the Board argues that the discharged employees did not steal or misappropriate TI's confidential information. The presence or absence of subreption and misappropriation is certainly a significant factor in deciding whether employee conduct is a protected exercise of a section 7 right. However, this factor by itself is, at most, one element among many. Furthermore, the conduct at issue was by no means wholly innocent. The manner in which the employees received TI's wage survey report certainly suggested that the anonymous sender had obtained it through questionable means or was circulating it in breach of confidence. Nevertheless, they reproduced parts of the report in

their organizing leaflet, being careful to cut from each page that they used the label "Strictly Private."

Finally the Board claims that the disclosure of the confidential material did not threaten any commercial harm to the Company. Such a consideration would be more appropriate to an inquiry into the employer's business justifications for its termination of the employees—a portion of the Jeanette inquiry which for present purposes we do not reach, see *infra*. Even, however, if commercial harm were relevant to the existence of an employee right under Section 7, its presence or absence would be out one factor; mere absence of resulting harm would not by itself demonstrate that the activity was protected.

Our examination reveals no basis sufficient to support a finding that the discharged employees' unauthorized and knowing use, in an organizing leaflet, of a confidential wage survey prepared by TI management for its own purposes, was the exercise of a right guaranteed by section 7 of the NLRA. As the employees' conduct was therefore not "protected activity," we need not go on to the other Jeanette criteria. That is, we need not review the Board's balancing, in light of the Act and its policies, of TI's proffered justifications for application of the rule on these facts, against a supposed invasion of employee rights. No such invasion of employee rights existed. Applied to the materials and to the conduct in question, the company security rule was valid.

In *International Business Machines Corp.*, 265 NLRB 638 (1982), the Board held that the company did not violate the Act by its discharge of an employee who knowingly breached a confidentiality rule by distributing certain confidential wage data. In distinguishing the case from *Jeanette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976), the Board concluded that the company had "legitimate business justifications for its policy," that the employee had not obtained the information in the normal course of his work activity, and that he "knew that the documents he received had been classified . . . as confidential and he was aware of Respondent's rule prohibiting dissemination of such material."

The present case, to my mind, is distinguishable from *IBM*, *supra*, and *Texas Instruments*, *supra*. Unlike those cases, the Respondent herein did not have any company rule, known to employees, which prohibited the dissemination of the information involved. The documents were, in fact, kept in unlocked files in the office and were not marked or otherwise designated as being confidential. While the Interstate Commerce Act precludes dissemination of such documents to persons outside the Company, neither Erbacher nor Zurheide was shown to be specifically aware of the provisions of that law and in any event, neither disclosed the information to outside persons who could have used the information to the detriment of either the Respondent or its customers. At the same time, it is obvious that copies of the bills of lading were clearly relevant to the Union's complaint that the

Company was breaching the collective-bargaining agreement by having nonunit employees do bargaining unit work. Indeed, when the documents were shown to the Company on December 10, this proved the Union's contention and the dispute was settled on the Union's terms.

In view of the above, it is my opinion that when Erbacher assisted the Union in its attempt to enforce its collective-bargaining agreement, by furnishing to the Union documents relevant to the Union's claim, that he was engaged in protected concerted activity within the meaning of Section 7 of the Act. As it has not been shown that the Company had any rule known to its employees precluding such activity, it is concluded that the Respondent violated Section 8(a)(1) and (3) when it discharged Erbacher.

With respect to the allegation relating to the threatened suspension of the strikers, the Employer asserts that this matter should be deferred to the grievance-arbitration procedures set forth in the collective-bargaining agreement. Subsequent to the close of the hearing, the Board issued its decision in *United Technologies Corp.*, 268 NLRB 557 (1984), where in it overruled *General American Transportation Corp.*, 228 NLRB 808 (1977). The Board concluded that it would henceforth apply its deferral policy enunciated in *Collyer Insulated Wire*, 192 NLRB 837 (1971), to cases filed by Unions, even where they involved allegations of Section 8(a)(1) and (3). Accordingly, I requested that the parties advise me as to what effect, if any, the Board's decision in *United Technologies* would have on the present case.

On February 8, 1984, the Respondent reiterated its position regarding the deferral issue and, on February 10, the General Counsel advised me that in his view this allegation should be deferred as requested by the Respondent. As it is my opinion that the allegation in question is arbitrable under the terms of the collective-bargaining agreement I shall recommend that this allegation of the complaint be deferred. This conclusion is, however, conditioned on Respondent waiving any timeliness provisions of the grievance-arbitration clauses of the collective-bargaining agreement so that the Union's grievance may be processed.

There finally remains for consideration the allegation of surveillance. In this regard the evidence shows that, on the morning of December 20, Coombs, at Ward's direction, took Polaroid photographs of the picketing by Erbacher and of the strikers. It appears that the reason the photographs were taken was to gather evidence for the purpose of seeking injunctive relief based on the Company's belief that the no-strike clause of the agreement was being breached. Indeed, at one point, Ward told Zurheide and the strikers that the work stoppage was, in his opinion, illegal under article 8 of the contract.

Also, the pictures were marked on the back with the times taken and the persons shown, this indicating a purpose of evidence gathering. As the Company had a colorable basis for seeking injunctive relief under *Boys Markets Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), and as the evidence does not show the employees to have been coerced, it is my conclusion that this photographing activity on December 20 was not unlawful. See *Berton Kirshner Inc.*, 209 NLRB 1081 (1974). Cf. *Electri-Flex Co.*, 238 NLRB 713, 1718 (1978).

CONCLUSIONS OF LAW

1. Roadway Express, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 560, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Richard Erbacher on December 15, 1982, for engaging in protected concerted activity, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except to the extent found above, the other allegations of the complaint are dismissed.

THE REMEDY

Having found that the Respondent has violated the Act in certain respects, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

With respect to Richard Erbacher, it is recommended that the Respondent offer him full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him, such earnings to be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 298 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1982).

Additionally, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982), I shall recommend that the Respondent expunge from its files any reference to the discharge of Erbacher and to notify him, in writing, that this has been done and that evidence of same will not be used as a basis for future personnel actions against him.

[Recommended Order omitted from publication.]