

**Cook County College Teachers Union, Local 1600,
IFT-AFT, AFL-CIO and Chicago Newspaper
Guild, Local 34071, The Newspaper
Guild/Communications Workers of America.**
Case 13-CA-37568

May 15, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 10, 2000, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed a brief answering the exceptions, and the Charging Party filed a brief in reply to the answering brief.

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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Howard I. Malkin and David Huffman-Gottschling, Esqs., for the General Counsel.

Gail Mrozowski, Esq., of Chicago, Illinois, for the Respondent.

Craig M. Rosenbaum, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on October 25, 1999, in Chicago, Illinois. The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by issuing a warning notice to employee Louise Winfrey for engaging in protected concerted and union activity, that is, providing a copy of Respondent's directory to the Charging Party Union (the Guild or Charging Party). Respondent denied the essential allegations in the complaint. On December 16, 1999, the parties filed briefs on the matter, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

¹ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's decision, we find it unnecessary to rely on his discussion of the relative strengths of certain Sec. 7 rights and certain union needs.

FINDINGS OF FACT

I. JURISDICTION

Respondent is an unincorporated labor organization with an office and place of business located in Chicago, Illinois, where it represents some 3000 teachers in the Cook County College system. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Guild is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent employs two secretaries, Louise Winfrey and Myrtle Allen, who are represented by the Guild. For the last 3 or 4 years, the Respondent and the Guild have had a bargaining relationship with respect to the two-person secretarial unit, which resulted in an initial collective-bargaining agreement that expired on July 30, 1999. At the time of the trial, the Guild and the Respondent were engaged in negotiations for a new agreement.

In late 1995 the Guild and Respondent had not reached their first agreement, and, in the Guild's view, negotiations were not progressing fast enough. In order to pressure the Respondent, the Guild's executive director, Gerald Minkinen, asked Louise Winfrey for a copy of the Respondent's directory, which he wanted to use to contact the leaders of the Respondent at their homes, in support of the Guild's bargaining positions.

The directory contains a list of about 120 of Respondent's officials, including officers, executive board members, grievance chairpersons, and delegates to Respondent's elected house of representatives. The list is printed, in booklet form, in-house, once every 2 years. The directory includes not only the names of Respondent's officials, but their titles, home addresses, and telephone numbers, as well. It is distributed to all the listed officials, and is used to facilitate internal communications such as notices of formal meetings. Outside of Respondent's president and his assistant, none of the officials whose names appear in the directory has anything to do with bargaining or labor relations concerning the secretarial support staff. For example, the Respondent's president may bring a bargaining agreement to the attention of Respondent's officers but the contract does not have to be approved by the officers or the executive board.

Winfrey and Allen have access to the directory and use it to prepare official mailings and to note changes in addresses or the like. Winfrey is the person who has custody of the official directory and enters any changes in her computer. She is also responsible for printing the final directory from her computer.

After Minkinen obtained the directory from Winfrey, he prepared a three-page letter, which was actually signed by Winfrey and Allen. Dated January 16, 1996, the letter set forth the Guild's bargaining positions and its view of the negotiations. The letter was addressed and sent to members of Respondent's elected house of representatives, who constituted most of the people in the directory. Winfrey testified that the letter was also sent to Respondent's president, Norman Swenson. Although the parties have assumed in their briefs that the letter was sent to all the listed officials, the record is not clear on this point. The letters were, however, sent to the recipients' homes.

When Respondent's president, Norman Swenson, learned that Winfrey and Allen had sent a letter to individuals listed in

the directory, he spoke to Winfrey about it. Swenson told Winfrey that she was responsible for an “unauthorized use” of the directory, and he reminded her, as he had in the past, that the directory was to be used for official business only. He also told her not to share the directory with the Guild in the future. Swenson considered his admonishment to Winfrey a verbal warning. Winfrey testified that Swenson spoke to her about her misuse of the directory. She gave few details about the conversation, but conceded that Swenson was “very angry that I had used the directory.”

Some time later, in 1998, Winfrey filed a grievance concerning Respondent’s having disciplined her for matters unrelated to her use of the directory. In connection with that grievance, and contrary to the previous specific instructions from Swenson, Winfrey again provided the Guild with a copy of a new directory showing leadership changes as a result of a new election. Using the directory provided by Winfrey, Minkinen first wrote a letter to the Respondent’s officers at their homes and then a similar letter to a broader group of Respondent’s officials, again at their homes. The letters, which are not in evidence, apparently set forth the Guild’s position on the Winfrey grievance. The grievance ultimately went to arbitration and apparently was resolved amicably.

It was at this point, on December 30, 1998, that Winfrey received a 5-day suspension, memorialized by a letter setting forth several reasons for the disciplinary action, including her having used the directory for “unauthorized personal business.” The letter continued as follows:

You and your union used the directory to send letters to members of the House of Representatives and chapter officers explaining grievance and attacking the President of the Union and his assistant. The directory . . . is only to be used for official union business.

In order to separate the charges involving the unauthorized use of the directory from the charges involving other matters—which are the subject of a separate grievance and arbitration—a separate letter from Swenson to Winfrey set forth only the former charge. That letter dated March 9, 1999, was designated a written warning. It states that the directory is “an official document” of the Respondent and is not to be used for personal mailings. The letter continues as follows:

The purpose of the directory is for use in sending official notices of the union to its leadership. It has been the official policy of the union for the past 32 years that all mailings from this directory must be approved by me and must be official notices of the union. Twice you or the [Guild] have sent mailings to people in the official directory about labor-management issues. . . . This violated official policy. . . . If you continue this practice, you will receive additional discipline.

President Swenson testified that Respondent has long had a policy against using the directory for anything but official business, even though such policy was not set forth in writing. Respondent has repeatedly refused outside requests for its membership list and for the list of the officials set forth in the directory. Swenson also testified that he had repeatedly told Winfrey and Allen, as well as others, that the directory was not to be used for personal business or by any outside agency. He first told Winfrey of the policy when he hired her in 1978.

Winfrey testified that she could not recall whether she was ever told that the directory was only for official use. She acknowledged, however, that she was told by Swenson as early as 1978, when she was hired, that she was only to send official documents to the homes of the people listed in the directory. Allen denied ever being told that the directory was only for official use. But Winfrey conceded she was admonished about the use of the directory after the Guild’s first use of it. And she testified that, except for the two times she provided the directory to the Guild, she has not provided it to outside parties.

There was some testimony by Winfrey, and to a lesser extent by Allen, that they used the directory to obtain home addresses of officials of Respondent to whom they then sent birthday, condolence, get well, or thank you cards, the latter to people who may have sent them “flowers or candy like for Christmas.” The testimony was vague and general and it was my impression, in assessing the relevant testimony of Winfrey and Allen, that this happened only on a very limited basis. As for the thank you notes, Winfrey said the gifts that prompted the notes were sent to her at Respondent’s office, where she worked. Winfrey testified she once sent Swenson a birthday card at his home, which she and Allen signed. Allen denied sending any birthday cards and although she mentioned several names of people to whom she sent other cards, she did not mention Swenson. Swenson testified that he did not recall ever receiving any card at home from either Allen or Winfrey and definitely not in the last few years. To the extent that there are conflicts between Swenson, on the one hand, and Winfrey or Allen, on the other, I credit Swenson, whose testimony was much clearer and more plausible.

In considering all the evidence, I find that Respondent has long had a policy against the use of the directory for anything but official business and that employees and other users of the directory, including Winfrey, knew or were notified of this policy. Any use of the directory to obtain home addresses to send thank you notes or cards was de minimis, not condoned by Respondent and insufficient to amount to acquiescence on the part of Respondent to a violation of its policy concerning use of the directory.

B. Discussion and Analysis

As shown above, Winfrey was issued a warning for providing the Respondent’s directory, a work-related list of 120 of its management officials and their home addresses, to her collective-bargaining agent for use in advancing its bargaining and representational interests. Use of the directory was restricted to official business and Winfrey knew of such restriction before she was issued the warning that is the subject of the complaint in this case. Thus, the question here is whether Winfrey’s use of the directory in these circumstances was protected activity under the Act, or whether, as Respondent contends, it could properly restrict the use of the directory as a private, internal matter. I find that the General Counsel has failed to show, by a preponderance of the evidence, that Winfrey was engaged in protected activity when she used the directory as she did, after being warned not to do so for nonwork-related purposes. Accordingly, Respondent has not violated Section 8(a)(3) and (1) of the Act as alleged by the General Counsel.

I first point out what is not involved in this case. Contrary to the General Counsel (Br. 5), Winfrey was not punished for sending a letter regarding a labor dispute to Respondent’s elected house of representatives, which would have been a

protected activity. She was punished for obtaining the names and home addresses of those representatives from Respondent's directory, whose use was limited to internal business purposes, and providing them to the Guild. The General Counsel does not specifically allege that Winfrey was punished for her part in sending the letter or that her punishment for using the directory was somehow a pretext for having engaged in union or other protected activity, such as sending the letter. Nor were such matters fully litigated or briefed. Moreover, the evidence is quite clear that Respondent did not permit the directory to be used by any other outside parties or for purposes not related to official business. Thus, neither Respondent's overall discriminatory motive nor disparate treatment is at issue here.

The General Counsel nevertheless chiefly relies on just such a case in support of his position, citing *Blue Circle Cement Co.*, 311 NLRB 623, 624 (1993), *enfd.* 41 F.3d 203 (5th Cir. 1994). In that case, the Board found unlawful the discharge of an employee who photocopied, on paid time, an employer's materials on hazardous waste, which were then used in connection with his and his union's environmental efforts. The General Counsel apparently equates use of the directory in this case to the employee's use of the photocopier in *Blue Circle Cement*. Indeed, the General Counsel asserts (Br. 8) that if Winfrey had used the Respondent's photocopier to reproduce the letter—perhaps 120 copies, one for each of the people listed in the Directory—“her actions would clearly have been protected under *Blue Circle Cement*.” I doubt that very much. In *Blue Circle Cement*, the Board found that the actions in question were protected and concerted because they were undertaken for the purpose of protecting the health and safety of the employees. The Board essentially found that the employer, who had accused the employee of “working against” Respondent's interests, discharged the employee because of the content and purpose of the activity, not the means used. More to the point, the Board noted that the employer in *Blue Circle Cement* “routinely permitted employees to use its photocopiers during worktime to copy a variety of nonwork-related material.” Thus, the employer's discipline of the employee in that case “for using the photocopier during working time to photocopy materials pertaining to hazardous wastes, while permitting others to use the photocopiers with impunity, amounted to disparate treatment.” 311 NLRB at 624 fn. 8. Here, on the other hand, the Respondent clearly prohibited use of the directory for nonwork-related purposes, did not engage in disparate treatment and did not punish Winfrey for the content or purpose of the letter that was sent on her behalf.¹

In determining whether certain employee activity is protected under the Act, the Board generally attempts to balance the Section 7 interest of employees with the business interest of the employer. I believe a similar balance is appropriate here.

Several Board cases are particularly instructive in this respect. In *International Business Machines, Corp.*, 265 NLRB 638 (1982), the Board was presented with the question whether an employee who distributed wage information about fellow

employees, which the employer had classified as confidential, was unlawfully discharged. The Board noted that employee discussion of wages is clearly a protected concerted activity, but held that the employer's reasonable confidentiality policy could be enforced and thus found no violation. The Board asked “whether the interests of the . . . employees in learning and discussing each other's wages outweigh the [employer's] legitimate business interests in support of its [confidentiality] policy so that, under the circumstances [the employee's conduct] would fall within the protection of Section 7.” The Board found that it did not, because employees could still talk about their own wages, the employer properly treated what it paid employees as confidential, and the employee knew the employer's policy and had no reason to believe that he was authorized to receive and distribute the information. See also *Texas Instruments v. NLRB*, 637 F.2d 822 (1st Cir. 1981) (similar analysis, with a holding that the motive for the discharges was a violation of a valid security rule rather than antiunion, *id.* at 833); *cf. K-Mart*, 330 NLRB 263 (1999) (employer's rule that company business and documents are confidential does not violate the Act or infringe on legitimate discussion by employees of wages or working conditions).

In *Beckley Appalachian Regional Hospital*, 318 NLRB 907 (1995), the Board upheld the discharge of an employee for violating the employer's policy against the disclosure of confidential patient records. The employee had used those records, secured from other employees, in order to challenge a prior suspension in a grievance proceeding. The Board stated, however, that “the method and means by which [the employee] made use of . . . confidential patient records fell outside the protection of Section 7 of the Act.” The Board again applied a balancing test, quoting from *Altoona Hospital*, 270 NLRB 1179, 1180 (1984). It recognized that an employee could be disciplined for violating a nondisclosure rule even when the disclosure is made for reasons arguably protected by the Act if “the employee's interests in disclosing the information outweigh the employer's legitimate interests in confidentiality.” 318 NLRB at 908–909. The Board went on to uphold the discharge in *Beckley*, in part because the employee could have used other channels to obtain the necessary information, particularly through her collective-bargaining representative.

Another relatively recent case shows that, in some circumstances, the balancing process quickly yields a clear result. In *Canyon Ranch*, 321 NLRB 937 (1996), the Board found unprotected an employee's conduct—reading a draft memo from one management official to another, whose subject was terms and conditions of employment. The case inspired a dissent from Member Browning, but the majority called the employee's conduct “snooping” and stated that the employee knew the memo was “not his business” even though it had been left openly on a management official's desk. The Board concluded that “private communications between management officials . . . are entitled to respect” and the employee's “breach of that privacy” is not to be elevated “into the realm of Section 7 protection.”

The Respondent argues that the directory in this case was every bit as confidential or private as the material in those cases in which the Board upheld the employer's interests over those of the employee arguably exercising Section 7 rights. Among the cases Respondent relies on is *Roadway Express*, 271 NLRB 1238 (1984). In *Roadway*, the Board, reversing an administrative law judge, upheld the discharge of an employee who had

¹ Contrary to the contention of the General Counsel (Br. 9) and the Charging Party (Br. 19–20), the evidence clearly indicates that Respondent had a policy that its directory could not be used for nonwork-related purposes and that Winfrey knew of the policy. She was admonished for her earlier breach of the policy and conceded that Swenson was quite angry with her for that breach. The policy need not, of course, be in writing to be effective. See *Roadway Express*, 271 NLRB 1238, 1239 (1984).

taken certain bills of lading from the employer's unlocked files and provided them to his union representative, who used them in connection with a dispute the union had with the employer. The Board found that the employee was not engaged in protected activity because he "went beyond the normal scope of his employment" and took and copied the files "for reasons other than the [employer's] business purposes and without any approval or authorization." 271 NLRB at 1239.

I believe that the Respondent is correct. I find that the balance struck in favor of the employer's interests in the above cases supports a similar result in this case. The General Counsel, however, attempts to distinguish the cases that uphold the confidentiality or privacy interests of the employer on the ground that some of the documents and information used by the employees in those cases were more clearly private or confidential than the directory in this case. Even if that were true, it would not, of course, establish that use of the directory in this case was itself protected activity. For that proposition, the General Counsel needs to prove that use of the directory here is equivalent to use of information in other cases, which the Board has found to be protected activity. The General Counsel and the Charging Party attempt to meet this burden by arguing that the use of the directory here is equivalent to those cases in which the Board has found protected the use of employee names and other information obtained in the course of normal work activity or association. Those cases are somewhat different because the information there, unlike here, was viewed as essential for basic union organizational activity. But the cases are also distinguishable for other reasons.

For example, the General Counsel cites *Murraysville Telephone Co.*, 241 NLRB 1144 (1979), in support of his position. In that case, the Board adopted a judge's decision which found unlawful the discharge of an employee who used an employer's list of employees to update his own list. Although in his decision, the judge discussed the confidentiality of the original and the updated list—a discussion quoted by the General Counsel (Br. 7–8)—the judge observed that in view of his finding that the employee was discharged because of his union activities and the employer's assigned reason was pretextual, he deemed it "unnecessary to determine whether the obtaining of the list [was] protected activity." 241 NLRB at 1148 fn. 6. Thus, not only was there no finding in *Murraysville* that use of the list was protected, but the case turned on overall antiunion motive, unlike the situation here.

The Charging Party is more to the point, citing *Ridgely Mfg. Co.*, 207 NLRB 193 (1973), and *Gray Flooring*, 212 NLRB 668 (1974), both of which found unlawful the employer's discharge of employees who were engaged in protected activity by using employee names and information in connection with future organizing activity. These cases, however, are also distinguishable. In *Gray Flooring*, the Board, reversing an administrative law judge, found unlawful the discharge and interrogation of an employee with respect to copying names and telephone numbers of employees from the employer's records. The Board found, contrary to the judge, that the names and numbers were not "in any meaningful sense, 'private records.'" 212 NLRB at 669. The Board noted that the employer could have treated the information as confidential or private and unavailable to employees. But, in the case before it, the Board found that the employer did not. Employees apparently openly utilized the information, and not only was there no announced policy to the contrary, but a supervisor had acquiesced in the

employee's use of the specific information involved. Here, on the other hand, the Respondent had a policy of nonuse that was mentioned to Winfrey and known by her.

In *Ridgely Mfg. Co.*, the Board affirmed an administrative law judge's decision that employee Durban was discriminatorily discharged for either copying or memorizing names of employees from openly displayed timecards. Durban then intended to obtain the employees' telephone numbers from the public telephone directory in order to contact them for organizational purposes. The judge specifically found that when Durban "memorized the names of fellow employees" for organizational purposes, he was engaged in "protected activity." 207 NLRB at 197. But the circumstances clearly showed a discriminatory motive for the discharge. Durban had been memorizing the names, then asked an agent for the employer for a list of the employees to make things easier for himself, as well as paper and pencil to copy the names. Shortly thereafter he appeared in the timecard area and was discharged on the spot. Here, there is no general antiunion motive and Winfrey used the directory itself and provided it to the Guild.

Significantly, *Ridgely* has been limited to its facts in subsequent cases. Compare, for example, *Bell Federal Savings & Loan Assn.*, 214 NLRB 75 (1974), where the Board affirmed a judge's decision finding unprotected an employee's disclosure of the contents of a private telephone conversation that dealt with union-related matters. The Board found the conduct there amounted to a "breach of trust" and was not equivalent to the conduct of the employee in *Ridgely*, who used "information obtained at work such as the names and addresses of other employees, openly available from timecards, for organizational purposes." 214 NLRB at 78. And in *Roadway Express, supra*, the Board specifically rejected a broad reading of *Ridgely*. The Board quoted that portion of *Ridgely* stating 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." It described *Ridgely* as recognizing that an employee is engaged in protected activity when he memorizes employees' names and addresses from timecards "openly available for all employees to see," but observed 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." 271 NLRB at 1239 fn. 11.

Nothing in *Ridgely* warrants a finding that employees are entitled to an employer's list of management officials or otherwise supports Winfrey's right to use the directory in this case. First of all, the employee information to which employees are entitled is that which is openly available in the course of normal work activity. Information about management officials in a private list maintained only for communication among such officials is entirely different. Winfrey and the other secretary had access to the directory only to facilitate official communications, such as notices of meetings, or to make ministerial changes, not to use the directory for their own communications. Use of the directory was restricted to internal, official purposes; the directory was thus, in every meaningful sense, private. Accordingly, Winfrey's use of the directory here was outside the scope of Winfrey's employment.

In addition, the protected activity to which the information was to be directed is different. The need of employees to have access to the names of fellow employees in terms of Section 7 rights is greater than the need of a union to have the names and

home addresses of an employer's management officials. The need of the employees in the one case is to facilitate basic organizational activities; in the other, the need would be to permit a bargaining agent to have an employer's private list to make a broader appeal to management in support of its bargaining positions. In this case, the need for information for such a broad appeal—to 120 of Respondent's officials, about 4 percent of its total membership—hardly justifies access to Respondent's directory of their names and home addresses.

The Charging Party makes an attempt to show that access to the names of management officials is the equivalent to access to employee names by citing *Delta Health Center*, 310 NLRB 26 (1993) and *Mitchell Manuals*, 280 NLRB 230 (1986). According to the Charging Party, those cases stand for the proposition that employees can bypass local management officials in matters involving terms and conditions of employment and appeal to members of an employer's board of directors. The cases, however, simply hold that such appeals amount to protected concerted activity. Neither case speaks to whether there is a right to the names and home addresses of an employer's board of directors. In both of the cited cases, the employees knew the names of those whom they wished to contact and presumably obtained the addresses from public sources, not from the employer's own private sources. Moreover, the number of officials contacted in those cases was far fewer than the broad group of leaders contained in the Respondent's directory. Thus, the cases cited by the Charging Party are clearly distinguishable from the instant case.

In the last analysis, this case is closer to those cases in which the Board has upheld employer interests over employee interests than to those in which the Board has upheld employee interests. The Section 7 right of employees or their union to the employer's own list of its management officials' names and home addresses in order to embroil them, individually, in the employer's labor dispute seems tenuous at best. This is particularly so where, as here, apparently all but two of the officials

listed in the directory have no direct involvement in the labor relations matters that were the subject of the Guild's letters. On the other hand, the interest of the employer in restricting its own list of management officials' names and home addresses to official communications and work-related uses seems paramount. This is particularly so where, as here, the employer makes its policy clear and does not reveal its list to outside parties. The names and addresses in the directory were to be used for official communications only, and, to that extent, they were private.

CONCLUSION OF LAW

In sum, I find that the General Counsel has failed to show that Winfrey's use and transfer of the Respondent's directory to the Guild to advance its bargaining positions was protected activity under Section 7 of the Act. Accordingly, Respondent properly refused to authorize Winfrey's use of the directory for that purpose and properly disciplined her for the use of the directory. The complaint alleging that the discipline was unlawful is therefore dismissed.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed in its entirety.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.