United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 13, 2008

TO : J. Michael Lightner, Regional Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Health Professionals and Allied Employees, AFT, AFL-CIO (Englewood Hospital and Medical Center)
Case 22-CB-10549

530-6067-6067-5283
554-1475-6780

The Region submitted this case for advice on whether the Union violated Section 8(b)(3) by refusing to provide the Employer with a handwritten timeline prepared by an employee grievant at the direction of the Union's attorney in order to prepare for an arbitration hearing regarding the grievant's discharge.

We conclude that the Union did not violate Section 8(b)(3) when it refused to provide the Employer with the timeline, because the document is protected from disclosure as attorney work product.

FACTS

Englewood Hospital and Medical Center (the Employer) and Health Professionals and Allied Employees, AFT, AFL-CIO (the Union) have enjoyed a long collective-bargaining relationship. Their current collective-bargaining agreement is effective from June 1, 2006, through May 31, 2009. The bargaining unit is comprised of all employees licensed or otherwise entitled to practice as registered or licensed practical nurses.

On June 2, 2006, the Employer locked out the bargaining unit nurses. The Employer asserts that on June 1 and 2, during the night shift immediately preceding the lockout, a registered nurse ("Grievant") [*FOIA Exemptions 6 and 7(C)*

.] On June 14, 2006, the Employer discharged Grievant [*FOIA Exemptions 6 and 7(C)*
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A few months later, the Union grieved the discharge, and the grievance was submitted to arbitration. In preparation for the arbitration hearing and in order to familiarize himself with the relevant events, the Union's attorney asked Grievant to prepare a timeline summarizing what transpired during the night

shift in the labor and delivery unit on June 1 and June 2.[1] On May 29, 2007, the day before the first day of the arbitration, the Union's attorney received the timeline from Grievant.

The Employer presented its case in chief during the first five days of the arbitration hearing, occurring between May 30 and November 28, 2007. The Employer's evidence included corroborative testimony by four nurses and a nonsupervisory unit secretary regarding Grievant's alleged misconduct. According to the Employer, some of these witnesses testified regarding what Grievant told them on the picket line shortly after the alleged misconduct. [*FOIA Exemptions 6 and 7(C)*

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On December 7, 2007, Grievant testified on direct examination. She denied all wrongdoing and contradicted the testimony of the Employer's witnesses. There is no evidence or allegation that the Union or Grievant referred to the timeline document during the hearing. Grievant was not cross-examined by the Employer on that date, and the arbitration was adjourned. Her cross-examination was scheduled for April 10, 2008, when the arbitration was to resume.

On December 21, 2007, in preparation for Grievant's cross-examination, the Employer sent a letter to the Union requesting the following:

> All documents in [Grievant's] or [the Union's] possession in any way relating to the testimony of [Grievant] and other witnesses in the arbitration over her termination, including, without limitation, notes, statements, affidavits, outlines, summaries, memoranda, computer files, and tape recordings.

In a letter dated February 19, 2008, the Union's attorney advised the Employer that he was in possession of a handwritten timeline, prepared by Grievant at his request, summarizing events in the labor and delivery unit during the shift at issue. The letter stated that the timeline was privileged as attorney work product.

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[1] The Union has not provided a copy of the timeline to the Region.

In a responsive letter dated February 20, 2008, the Employer's attorney disputed the privilege claim of attorney work product. That same day, the Employer subpoenaed the information requested on December 21, including the timeline. The arbitrator has not ruled on the subpoena, and the arbitration is currently on hold until an NLRB determination is made regarding the Employer's information request.

The Employer contends that the timeline is not attorney work product because it was not prepared by a party or a party's representative in anticipation of litigation. Even if the timeline is work product, the Employer asserts that disclosure is appropriate because it has substantial need for the timeline and an inability without undue hardship to obtain substantially equivalent information by other means. Specifically, the Employer claims it needs the timeline to impeach Grievant's credibility, because her testimony was at odds with that of the Employer's witnesses; no witnesses corroborated her testimony; and the timeline, which was prepared months before her testimony, is likely inconsistent with it.

The Union contends that the work product doctrine applies to the timeline because it was generated at the request of a party's counsel in anticipation of litigation, regardless of whether the source was a party or a witness. The Union contends that the Employer has no substantial need for the timeline, which was not prepared with the care and attention of an affidavit, but for the preliminary edification of counsel.

ACTION

The Union did not violate Section 8(b)(3) when it refused to provide the timeline to the Employer. The timeline is protected from disclosure as attorney work product because it was prepared at the request of the Union's attorney in anticipation of litigation; the Employer failed to establish a substantial need for the timeline and that it cannot, without undue hardship, obtain its substantial equivalent by other means; and the Union did not waive the protection of the work product doctrine. Therefore, the Region should dismiss the charge, absent withdrawal.[2]

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[2] The attorney work product doctrine is our sole basis for dismissing this case. Thus, we are not relying on the fact that the Employer requested the timeline when the arbitration hearing was already underway and/or that its purpose was to impeach Grievant's credibility, because such information requests are cognizable under Section 8(a)(5) and 8(b)(3). Columbia University, 298 NLRB 941, 941 (1990). Nor did the Employer engage in the type of "arbitral discovery" that the Board has found to be unenforceable under Section 8(a)(5) or 8(b)(3). Thus, the timeline is a factual document that does not contain the Union's legal theory or strategy, and the Union is not

It is well established that a union's statutory duty to supply information parallels that of an employer.[3] However, otherwise relevant information is sometimes exempt from disclosure because it is confidential, proprietary, or otherwise privileged.[4] The Board has found the work product doctrine to be such a defense against allegations of refusals to provide information.[5]

The work product doctrine provides a qualified immunity from discovery for documents prepared by a party or its representative in anticipation of litigation.[6] The doctrine's purpose is to promote the adversary system by protecting the confidentiality of papers prepared by attorneys in anticipation of litigation, thereby enabling attorneys to prepare cases without fear that their work product will be used against their

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relying on the timeline to make its argument. See California Nurses Assn., 326 NLRB 1362, 1362 (1998) (information requests seeking a party's legal theory, evidentiary information upon which a party intends to rely, and witnesses a party intends to call at an arbitration hearing constitute arbitral discovery that is not enforceable under the Act; in contrast, requests for factual material, documents, and witnesses in support of the underlying grievance are enforceable).

[3] Firemen & Oilers Local 288 (Diversy Wyandotte), 302 NLRB 1008, 1009 (1991); Service Employees Local 144 (Jamaica Hospital), 297 NLRB 1001, 1003 (1990); Teamsters Local 851 (Northern Air), 283 NLRB 922, 925 (1987).

[4] Detroit Edison Co. v. NLRB, 440 U.S. 301, 318-320 (1979) (upholding employer's contention that certain standardized tests the employer had administered to bargaining unit employees as part of a selection process for promotions would become useless in the future if the test instruments were not kept confidential); Johns-Manville Sales Corp., 252 NLRB 368, 368 (1980) (employer did not violate its obligation to provide relevant information when it refused for reasons of confidentiality to disclose to the union the identities of employees suffering from certain medical disorders).

[5] Central Telephone Co. of Texas, 343 NLRB 987, 989-990 (2004) (work product doctrine applied to notes prepared during course of employer's investigation into alleged misconduct of four union officers); Ralphs Grocery Co., 352 NLRB No. 18, slip op. at 2 (2008) (work product doctrine applied to audit information prepared by attorney at request of employer).

[6] Hickman v. Taylor, 329 U.S. 495 (1947); Fed. R. Civ. P. 26(b)(3).

clients.[7] Nonetheless, "ordinary" or "fact" work product – written or oral information transmitted to the attorney and recorded as conveyed – is subject to disclosure if a party shows a "substantial need" for the material and an inability, without "undue hardship," to obtain the "substantial equivalent" of the material by other means.[8] If the requesting party satisfies this burden, and it outweighs the interest in keeping the materials confidential, the materials must be disclosed. Materials must also be disclosed if the work product protection is waived.

In the instant case, the timeline is at least "ordinary" or "fact" work product.[9] Grievant prepared the timeline at the Union attorney's request after the grievance was assigned for arbitration, so that the attorney could prepare for it.[10] Although Grievant might not be a "party" to the arbitration, courts have found documents prepared by non-party witnesses to be work product.[11] Finally, because arbitrations are adversarial

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[7] See Westinghouse Electric Corp. v. Republic of Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991).

[8] Fed. R. Civ. P. 26(b)(3). "Opinion" work product, on the other hand, which reflects or reveals an attorney's mental impressions, conclusions, opinions, or legal theories, receives absolute or heightened protection. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 733-734 (4th Cir. 1974), cert. denied 420 U.S. 997 (1975) ("no showing of...substantial need or undue hardship should justify compelled disclosure" of opinion work product); In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977) ("opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances"); Director, Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (opinion work product "virtually undiscoverable").

[9] The Union has not alleged that the timeline is opinion work product.

[10] Scanlon v. Bricklayers & Allied Craftworkers, Local 3, 242 F.R.D. 238, 247 (W.D.N.Y. 2007) (timeline created by officials of defendant union at attorney's request in preparation for possible future litigation following plaintiff's discharge from union apprenticeship program and removal from union membership constituted attorney work product).

[11] See, e.g., E.E.O.C. v. Rose Casual Dining, L.P., 2004 WL 231287, at *2 (E.D. Pa. 2004) (non-party witness statements prepared at the direction of party's counsel, but without assistance from or communication with counsel, found to be attorney work product).

in nature, documents prepared for use in arbitration are accorded work-product protection.[12]

The Employer has not demonstrated a substantial need for the timeline and that it will be unable to obtain the substantial equivalent without undue hardship. The Employer assertedly needs the timeline in order to impeach Grievant's testimony. The courts have found that the burden of establishing substantial need/undue hardship is not satisfied by the mere possibility that the work product document could assist in the examination or impeachment of witnesses and/or when an alternative source of information or rebuttal testimony exists.[13] Here, the Employer has already examined five witnesses who testified regarding the events at issue and whose testimony contradicted Grievant's; some of the witnesses even testified regarding what Grievant allegedly told them on the picket line shortly after the alleged misconduct. The Employer has the opportunity to impeach Grievant on cross-examination using those witnesses' testimony when the arbitration resumes. Thus, the Employer has obtained, through alternate means, the same type of evidence for impeaching Grievant's testimony as it believes the timeline will provide.[14] Under these circumstances, the balance

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[12] Jumper v. Yellow Corp., 176 F.R.D. 282, 286 (N.D. Ill. 1997); Samuels v. Mitchell, 155 F.R.D. 195, 200 (N.D. Cal. 1994).

[13] Director, Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d at 1308 (substantial need not shown when documents sought would merely reinforce known inconsistencies); Baker v. General Motors Corp., 209 F.3d 1051, 1054-1055 (8th Cir. 2000) (substantial need not shown when an alternative witness exists to rebut the testimony). Compare Duck v. Warren, 160 F.R.D. 80, 83 (E.D. Va. 1995), where the plaintiff demonstrated substantial need for witness statements provided by the defendant and others in a police internal affairs investigation by showing "more than speculation" that the statements would aid in impeaching the defendant. Other statements the defendant had made to the plaintiff during depositions and to witnesses revealed inconsistencies in his account, which the court reasoned was a "good indication" that the internal affairs witness statements "would reveal further inconsistencies." Id. at 82-83.

[14] Unlike Duck v. Warren, 160 F.R.D. at 83, the inconsistencies between Grievant's testimony and the testimony of the Employer's witnesses does not indicate that a timeline is likely to reveal further inconsistencies. The timeline is not a detailed witness statement taken during an internal affairs police investigation, but rather a skeletal outline of events prepared for the preliminary edification of the Union's attorney. As such, it appears more likely that the timeline will simply reinforce known inconsistencies than reveal new ones. In addition, the timeline was created several months after the night shift at issue. Carson v. Mar-Tee, Inc., 165 F.R.D. 48, 50 (E.D. Pa.

should be struck in favor of the important interest of maintaining the privacy of the Union attorney's work product rather than the Employer's claimed necessity and undue hardship.[15]

Finally, the Union did not waive the protection of the work product doctrine. Courts have found waiver where, inter alia, a party makes "testimonial use" of a work product document, i.e. when it seeks to selectively present materials to make a point, but then attempts to invoke the work product doctrine to prevent the opponent from challenging the assertion. For example, in United States v. Nobles,[16] a criminal defendant sought to call an investigator to testify about interviews he had conducted with prosecution witnesses in order to impeach their testimony, but at the same time sought to withhold his written report of the interviews under the work product doctrine. The decision to call the investigator as a witness "waived the [work product] privilege with respect to matters covered in his testimony."[17] Here, on the other hand, there is no evidence that Grievant or the Union made reference to the timeline during the arbitration or otherwise used the timeline to establish its case.[18] Calling Grievant to testify regarding the events that occurred on the night shift at issue does not constitute "testimonial use" of

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1996) (substantial need not established where defendant's witness statement, sought by plaintiff, was taken several months after accident and therefore could not be considered the most contemporaneous statement regarding the accident).

[15] See Ralphs Grocery Co., 352 NLRB No. 18, slip op. at 2 (interest in maintaining privacy of attorney work product outweighed unions' need for requested information).

[16] 422 U.S. 225 (1975).

[17] Id. at 239-240. See also Chavis v. North Carolina, 637 F.2d 213, 223-224 (4th Cir. 1980) (prosecution waived work product privilege when its witness, in defending his credibility at trial, referred to and relied on the evidence prosecution sought to claim as its work product); United States v. Salsedo, 607 F.2d 318, 320-321 (9th Cir. 1979) (when defendant's counsel referred to his alleged work product in cross-examining government informant, he waived any privilege from compelled disclosure).

[18] See Hudson v. General Dynamics Corp., 186 F.R.D. 271, 275-276 (D. Conn. 1999) (no waiver of work product protection of employees' responses to attorney's questionnaires, because employees did not "interject[] the questionnaires into the litigation such as by using them to refresh their recollection or otherwise rely upon their questionnaire responses as an indicium of their credibility").

the timeline merely because the timeline also covers those events.[19] Therefore, there was no waiver of the work product doctrine.

Accordingly, the timeline is privileged from disclosure by the attorney work product doctrine, and the Union did not violate Section 8(b)(3) when it failed to provide it to the Employer.

B.J.K.

[19] Nobles, 422 U.S. at 240 n.14 ("counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, there normally is no waiver").