

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

Advice Memorandum

DATE: March 28, 2002

TO : Sandra L. Dunbar, Regional Director
Rhonda Aliouat, Regional Attorney
Charles Donner, Assistant to Regional Director
Region 3

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

SUBJECT: Pepsi Bottling Group
Case 3-CA-23224

This case was submitted for advice as to (1) whether tape recordings and transcripts of the recordings obtained by the Employer's agent in the investigation of a worker's compensation claim are witness statements, which the Employer would be privileged to withhold from the Union under Anheuser-Busch, Inc¹ and Fleming Cos., Inc.,² and, if so, (2) whether the privilege to withhold these statements ended when the Employer sought to introduce one of the statements in a workers' compensation hearing.

We conclude that the recordings and transcripts are witness statements, and that the Employer was not required to produce them to the Union. However, the Employer had an obligation to provide summaries of the statements, and the Union's information request was broad enough to encompass such summaries.

FACTS

Teamsters Local 317 (The Union) represents a unit of warehouse employees at the Employer's East Syracuse, N.Y., distribution facility. There is a current collective-bargaining agreement effective from October 15, 2000 to October 14, 2003.

Unit employee [FOIA Exemptions 6 and 7(C)] was injured on the job in December, 2000. In early 2001,³ [FOIA

¹ 237 NLRB 982 (1978).

² 332 NLRB No. 99 (2000).

³ All dates hereafter are in 2001 unless otherwise noted.

Exemptions 6 and 7(C)] stopped working and filed a workers' compensation claim. The Employer is self-insured and retains RSKCO Claims Services to administer its workers compensation program. RSKCO concluded that [*FOIA Exemptions 6 and 7(C)*] claim was fraudulent and is opposing it before the New York State Worker's Compensation Board.

The Employer suspended [*FOIA Exemptions 6 and 7(C)*] in early June, pending the completion of RSKCO's investigation into [*FOIA Exemptions 6 and 7(C)*] claim. The Union grieved the suspension, and the Employer denied it at the first step. By letter dated June 19, the Union asked the Employer for "...the company's position and all information regarding the alleged dishonesty of employee, [sic] [*FOIA Exemptions 6 and 7(C)*] which resulted in his suspension from Pepsi Cola." The Union repeated its request on July 12. By letter dated July 13, the Employer responded that all requests for information relating to [*FOIA Exemptions 6 and 7(C)*] should be directed to RSKCO. The Employer's letter also stated that "Due to the personal nature of the information gathered, we feel an obligation to protect [*FOIA Exemptions 6 and 7(C)*] privacy. The ability to release this information to you will be solely determined by RSKCO and their counsel." The Union did not address an information request to RSKCO, but repeated the request to the Employer by letters dated July 30 and September 24.

The Union has received no further response. The Union states that it needs this information to determine whether to advance the pending grievance concerning [*FOIA Exemptions 6 and 7(C)*] suspension. The Employer has informed the Region that the information responsive to the Union's request consists solely of witness statements taken by RSKCO in conducting its investigation.

In its investigation, RSKCO investigator Chapman interviewed seven employees, including [*FOIA Exemptions 6 and 7(C)*], concerning [*FOIA Exemptions 6 and 7(C)*] claim.⁴ In each interview, Chapman explained that he was investigating a worker's compensation claim filed by [*FOIA Exemptions 6 and 7(C)*]. Chapman told each employee that he wished to tape the interview, and he placed a tape recorder in plain view. Employees were told that they could stop the interview at any time. Employees were not sworn in at the outset of the interview, but, toward the end of each interview, Chapman asked if the employee had understood all the questions he was asked and whether he had answered them

⁴ Chapman also interviewed an employee of the hotel (an Employer customer) where [*FOIA Exemptions 6 and 7(C)*] allegedly sustained his injury.

truthfully. Chapman asserts that each employee answered in the affirmative. Chapman did not give any of the employees an assurance that the recordings would be held in confidence. Employees were informed that they would be provided a copy of the transcript of the interview if they wished. Only [FOIA Exemptions 6 and 7(C)] requested and was provided a copy of the transcript of his interviews.⁵ The tapes were transcribed, verbatim, by a transcription service, and were returned to RSKCO with the transcripts. No one attended any of the interviews on behalf of the Union.

On December 18, a hearing on [FOIA Exemptions 6 and 7(C)] worker's compensation claim was held before an Administrative Law Judge. RSKCO summoned two employees to the hearing. Those employees were provided copies of the transcripts of their interviews at the hearing. Only one of them, [FOIA Exemptions 6 and 7(C)], was called by RSKCO to testify and did so. During [FOIA Exemptions 6 and 7(C)] examination, RSKCO sought to introduce the transcript of his interview in order to impeach his testimony on the stand. [FOIA Exemptions 6 and 7(C)] attorney objected and the transcript was excluded by the Judge.

ACTION

We conclude that the recordings and transcripts are witness statements, and therefore are an exception to the Employer's general obligation to honor requests for relevant information.⁶

A verbatim statement by a witness, taken by the Employer during an investigation of employee misconduct, is a "witness statement" protected from disclosure by the bright line rule laid out in Anheuser-Busch.⁷ The Board

⁵ [FOIA Exemptions 6 and 7(C)] was interviewed twice and received copies of the transcripts of both interviews.

⁶ Anheuser-Busch, supra.

⁷ See New Jersey Bell Telephone Co., 300 NLRB 42 (1990) (investigation reports concerning employee interviews were not "witness statements" where they were not verbatim transcripts of witness testimony and were "in essence the handiwork of the Respondent's officials, reflective only of their impressions of what transpired in the conversations with the [witness], as well as whatever other material the officials may have deemed appropriate to include in the reports").

struck the balance against requiring disclosure of such witness statements to the Union based on the rationale that disclosure would not advance the grievance and arbitration process and would create a potential for witness harassment. The Board analogized the disclosibility of such statements to the pre-hearing disclosibility of witness statements taken by the General Counsel in a ulp investigation, and found that the "same underlying considerations" applied.⁸ In Fleming Co., the Board reaffirmed the Anheuser-Busch rule, and rejected the suggestion by members Fox and Liebman, in a concurring opinion, that employers be required to demonstrate a specific legitimate and substantial confidentiality concern to support withholding these statements from the union. Under Board law, then, the fact that the Employer here has not articulated any specific and legitimate confidentiality concern does not render the statements disclosable.

We also conclude that the Employer did not "waive" its privilege to withhold these documents from the Union when agent RSKCO attempted to introduce one of the statements, by employee [*FOIA Exemptions 6 and 7(C)*], at the worker's compensation hearing. With regard to that statement, it was not accepted into evidence, and therefore there was no public disclosure. Moreover, the Union was not a party to that proceeding, so it did not need [*FOIA Exemptions 6 and 7(C)*] statement in order to cross-examine him after his testimony. As to the statements of the witnesses who did not testify, there clearly could not have been a waiver of the privilege to withhold their Employer-obtained statements.⁹

We further conclude, however, that the Employer violated the Act by failing to provide summaries of the witness statements. The Board has held that, despite the privileged non-disclosure of witness statements, an employer violates the Act by failing to provide a summary

⁸ The Supreme Court had decided, in NLRB v. Robbins Tire and Rubber Co., 98 S.Ct. 2311 (1978), that the Freedom of Information Act did not require pre-hearing disclosure of investigatory statements obtained by the General Counsel because of the risk that it would lead to intimidation of witnesses and the risk that employees may be reluctant to give statements if disclosure were possible.

⁹ In the analogous ulp hearing context, the fact that some of the General Counsel's witnesses testify at the hearing would not make the statements of witnesses who do not testify disclosable. See H.B. Zachry, 310 NLRB 1037 (1993); Smithfield Packing, 334 NLRB No. 5 (2001).

of those statements.¹⁰ The Union's information request - for all information regarding [*FOIA Exemptions 6 and 7(C)*] alleged dishonesty which was the basis for his suspension - was broad enough to encompass witness statement summaries.¹¹ Although the Union did not specifically ask for summaries, the Employer's response to the request - which did not mention witness statements at all and asserted only that all relevant information in the Employer's possession was "personal" and would not be disclosed - did not put the Union on sufficient notice to make a specific request.

Accordingly, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to provide a summary of the witness statements it relied upon in deciding to suspend [*FOIA Exemptions 6 and 7(C)*].

B.J.K.

¹⁰ See Pennsylvania Power Co., 301 NLRB 1104, 1107 (1991).

¹¹ See Pennsylvania Power Co., 301 NLRB at 1106 (the union had requested the names of informants who supplied information that led to drug testing of the suspended employees, as well as any oral or written statements made by the informants and copies of any minutes kept during those interviews; the Board found that the employer was not required to disclose the names, statements, or minutes of meetings, but was required to provide the union with summaries of the statements which would protect the informants' identities while enabling the union to determine the basis for the employer's pre-test suspicion of drug use).