

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

Advice Memorandum

DATE: February 22, 2000

TO : Roberto G. Chavarry, Regional Director
Region 25

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

SUBJECT: Hendrickson Truck Suspension Systems
Case 25-CA-26750

530-6067-6067-3400
530-6067-6067-5200
530-6067-6067-7100
530-6067-6067-8100
530-6067-6067-8150

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) of the Act by refusing to provide the Union with requested witness statements, written summaries of witness interviews, interview notes, investigative reports and investigative files in connection with a grievance concerning the discharge of one of its former stewards.

FACTS

The Employer and Union have a long history of collective-bargaining, including a succession of collective-bargaining agreements, the most recent of which expires on January 9, 2000. In early July 1999, the Employer suspended and then terminated a former union steward, Elizabeth Brumbach. Brumbach was fired for allegedly intentionally backing a forklift she was operating into a co-worker who failed to move away from the vehicle after Brumbach told her to get out of the way. The Union filed a grievance which is pending arbitration.

On July 12, the Union submitted its first written request for information to the Employer seeking information concerning the Brumbach discharge grievance, including "all interview notes, your investigative Report Investigatory files, Supervisor notes... and all written statements from all employees." On July 28 the Employer's Human Resource representative responded to each request, agreeing to provide certain of the information not at issue herein. However, he declined to provide other information, specifically:

All interviews notes are considered a (work product and will not be provided.)

My investigatory report would fall under (work product and will not be provided.)
All written statements from all employees i.e. witness statements (These will not be provided exclusive of supervisors notes.)
Investigatory files (will provide supervisor statements, any witness statements and notes would be considered a work product and will not be provided).

On July 30, the Union made a second, more expanded request for information, including documents regarding all accidents involving lift trucks which have occurred during the past ten years, including "... all documentation of each incident... the Company's investigation of such (including but not limited to accident reports or other notes, written statements of witnesses, notes on interviews with witnesses, etc.)." On the same date, pursuant to an Employer July 28 request, the Union gave the Employer a list of 22 names of employees whom it believed had been involved in offenses similar to Brumbach's. On August 3 the Employer's Human Resource representative told the Union that he would have to talk to his attorney and get back to the Union with regard to its information requests and the 22 names.

On August 11, the Union sent yet a third request for information in which it requested written summaries of all witness interviews and witness statements.

To date, the Employer has provided none of the information requested - not even that which it indicated, in its July 28th response, it would provide. Arbitration of Brumbach's discharge is scheduled for February 24, 2000.

The Employer asserts that all of the material referenced above are privileged from disclosure under Anhesuer-Busch, 237 NLRB 982 (1978), and that the Employer is within its rights in refusing to provide the employee statements, summaries, and investigatory notes/reports concerning the Brumbach incident. The Employer cites Anheuser-Busch for the proposition that pre-arbitration disclosure will increase the danger of employee coercion and intimidation. The Employer says it will make such statements available at the arbitration hearing, after any employee has testified, for purposes of cross examination, consistent with Board procedure.

ACTION

We conclude that the Employer violated Section 8(a)(5) by failing to supply the requested information.

1) Witness statements

We initially conclude that the issue of whether the Employer is required to supply the witness statements should be analyzed by applying the Supreme Court's decision in Detroit Edison¹ rather than the Board's rationale in Anheuser-Busch. In Ormet Aluminum Mill Products Corp.,² the General Counsel urged the Board to abandon the Anheuser-Busch per se approach to prearbitration disclosure of witness statements, and instead to apply the Detroit Edison balancing test that the Board applies to all other categories of alleged confidential information.

Applying a Detroit Edison analysis to the instant case, we note initially that the witness statements requested by the Union are relevant. We conclude that the Employer has not offered any legitimate and substantial business justification for failing to turn over these witness statements. The Employer has offered only its bare assertions that the statements are work product and that employees might be coerced. However, there is no evidence that the Union would intimidate or coerce employee witnesses. Bare assertions, standing alone, are insufficient to establish a legitimate and substantial business justification for not turning over relevant information.³

Even assuming, arguendo, that the Employer had established a reasonable and substantial business justification, it has not bargained with the Union about a reasonable, good faith accommodation in lieu of providing the actual witness statements. The Employer simply denied the Union's request for the witness statements without bargaining. Therefore, the Employer did not meet its obligations under Detroit Edison.

Further, the Employer has failed to turn over summaries of the witness statements, which, even under Anheuser-Busch, it is required to do.⁴

¹ Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).

² Case 8-CA-29061, Advice Memorandum dated September 5, 1997.

³ U.S. Testing Co. v. NLRB, 160 F.3d 14, 20-21 (D.C. Cir. 1998).

2) Interview notes, investigatory files and investigatory report

In New Jersey Bell Telephone Co.,⁵ the Board rejected the ALJ's finding that a security department investigation report and a copy of a computer note screen were witness statements under Anheuser-Busch. In concluding that the employer was required to provide the information, the Board instead found that the reports were the work product of the respondent since the witness did not review the report, did not have the report read to her at any time, did not adopt the report in any manner as a reflection of any statement she may have made, and there was no contention that the report was an approximate or verbatim transcript of the witness' statements. 300 NLRB at 43. The Board also relied on the fact that the witness did not request and did not receive any assurance of confidentiality, and stated "the reports are in essence the handiwork of the Respondent's officials, reflective only of their impressions of what transpired in the conversations with the complaining customer, as well as whatever other material the officials may have deemed appropriate to include in the reports." Ibid.

As in New Jersey Bell Telephone, the supervisors' investigatory notes, file and report taken during the investigation are not privileged from disclosure as witness statements of employees under Anheuser-Busch. In this regard, the notes are distinct from the witness statements, discussed above. Further, the Employer admits that they are work product. Thus, as in New Jersey Telephone, the investigatory notes, files and report must be provided.

3) Documentation on past accidents

It is clear that evidence of past accidents and the discipline that resulted is relevant to the Union's grievance. Thus, to the extent this information is still available, and not overly burdensome, the Employer is required to provide it. The Employer has neither claimed nor demonstrated unavailability and/or a significant burden in furnishing this requested information.

⁴ Accord: Pennsylvania Power Co., 301 NLRB 1104, 1107 (1991).

⁵ 300 NLRB 42, 43 (1990), *enfd.* 936 F.2d 144 (3d Cir. 1991).

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to turn over relevant information to the Union.

B.J.K.