

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC, d/b/a
HAWAII TRIBUNE-HERALD

and

Cases 37-CA-7043
37-CA-7045
37-CA-7046
37-CA-7047
37-CA-7048
37-CA-7084
37-CA-7085
37-CA-7086
37-CA-7087
37-CA-7112
37-CA-7114
37-CA-7115
37-CA-7186

HAWAII NEWSPAPER GUILD,
LOCAL 39117, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
POST-REMAND BRIEF TO THE BOARD**

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I. BACKGROUND¹

On February 14, 2011, the Board issued a Decision and Order in *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011). In its decision, the Board severed the issue of whether the Respondent had a duty to provide the Union with employee Koryn Nako's October 18, 2005 statement or any other statements that it obtained in the course of its investigation of employee Hunter Bishop's alleged misconduct. The Board has invited the parties to file briefs regarding the scope of the category of witness statements and whether there should be two levels of analysis to determine whether there is a duty to provide a statement: (1) whether the statement is a witness statement under *Fleming* and *Anheuser-Busch*; and (2) if the statement is not so classified, whether it is nevertheless attorney work product.

Regarding the first issue presented by the Board, the Acting General Counsel asserts as argued below that the Nako statement is not a witness statement under *Anheuser Busch* because Respondent did not provide Nako with any assurances of confidentiality. However, even if the Nako statement is found by the Board to constitute a witness statement, the Acting General Counsel urges the Board to modify its rule regarding the duty to furnish witness statements and to adopt the balancing-of-interests test set forth in *Detroit Edison*, 440 U.S. 301 (1979), in situations where there is proof that a request for a witness statement presents legitimate and substantial confidentiality concerns. Regarding the Board's second issue, the Acting General Counsel argues that the statement is not work product because Respondent has not established that the statement was prepared in anticipation of litigation under the Board's existing case law. In addition, the Board should clarify the definition of "in anticipation of litigation" in a manner

¹ References to the transcript are noted by "Tr." followed by the volume and page number(s). References to the General Counsel's exhibits are noted as "GC" followed by the exhibit number. References to Respondent's Exhibits are noted as "R" followed by the exhibit number.

consistent with Circuit Court precedent so that the work product privilege applies only where litigation was the primary motivation for the document's creation or the document was prepared because of existing or expected litigation. Under either the current or proposed standards, the work product privilege does not extend to documents prepared in the ordinary course of business for the purpose of determining whether an employee engaged in misconduct warranting discipline.

II. FACTS²

The relevant background facts of this case are set forth in the decision of the Administrative Law Judge as affirmed by the Board. In summary, on October 19, 2005, Respondent's Advertising Director Alice Sledge ("Sledge") and Business Manager Kathy Higaki asked employee Koryn Nako ("Nako") to give them a brief version of an incident that occurred the day before involving Nako, employee Hunter Bishop ("Bishop"), and Editor David Bock ("Bock"). (Tr. 1: 227). Sledge said that they wanted to know about the conversation between Bock and Bishop and did not want to know about the events that occurred immediately prior to that. (Tr. 1: 227). Sledge testified that the meeting was at the suggestion of Respondent's attorneys. (Tr. 6: 1141). After Nako explained what occurred, Sledge asked Nako to sign a short statement handwritten by Sledge. (Tr. 1: 228). Nako was not informed prior to this that she would be asked to sign anything. (Tr. 1: 228-229; Tr. 6: 1156). After making a few additions, Nako signed the statement. (Tr. 1: 231, 232, 325; GC 6). At some point after Nako signed the statement, Sledge wrote at the top of the document "Prepared at the advice of counsel in preparation for arbitration." (Tr. 6: 1145). Nako received a written warning on October 26 and

² All dates referred to herein occurred in 2005 unless otherwise noted.

Bishop was suspended indefinitely pending investigation on October 19 and terminated on October 27. (GC 2 and 7).

The Hawaii Newspaper Guild's Administrative Officer Wayne Cahill sent a letter to Bock on October 19, in which he requested "the exact reason for [Bishop's] suspension, including all information, written or verbal, that was considered in making the decision to discipline Mr. Bishop." (GC 20). Bock responded via letter on October 31, 2005, stating, *inter alia*, "[w]ith respect to our reasons for the indefinite suspension, attached please find a copy of my letter converting the indefinite unpaid suspension to discharge." (GC 21).

On November 3, 2005, Cahill sent Bock another letter renewing the Union's request for information regarding Bishop, as set forth in the October 19 letter. (GC 22). Among other things, Cahill asked for a list of employees interviewed in the course of the investigation of the matter involving Bishop and the information provided by the employees. On November 7, Bock responded by letter to Cahill's November 3 letter. (GC 23). Bock stated that "[t]he reasons for the discipline and discharge were provided to you in my letter dated October 31, 2005." (GC 23). Bock also stated that he would provide Bishop's personnel file to the Union under separate copy. (GC 23).

On November 15, 2005, Cahill met with Bock and Circulation Director Crawford. (Tr. 4: 713-714; Tr. 1: 210). During the meeting, Cahill asked Respondent to explain specifically what Bishop did to cause Respondent to terminate him. (Tr. 4: 715). Cahill asked what Bishop did or said that was disrespectful to supervisory authority; what Bishop did that was insubordinate; and what Bishop did or said that interfered with Respondent's right to have a meeting with one of its employees. (Tr. 4: 715). Cahill also noted that the Union had not received any of the information that it had previously asked for, including Bishop's personnel file. (Tr. 4: 715-716).

Bock said that he was not going to give the Union any of the minutiae that would be presented in the arbitration. (Tr. 4: 716). Bock directed Cahill to Bock's October 27 letter to Bishop. (Tr. 4: 768). Cahill eventually received a copy of Bishop's personnel file. (Tr. 4: 783).

Cahill testified that apart from Bock's October 31 and November 7 letters (GC 21 and 23), and Bishop's personnel file, the Union did not receive anything else from Respondent in response to the Union's written information requests regarding Hunter Bishop (GC 20 and GC 22). (Tr. 4: 726). Cahill did not receive any other information in response to his oral request of November 15, 2005. (Tr. 4: 727).

III. ARGUMENT

It is well-settled that Section 8(a)(5) of the Act obligates an employer upon request to furnish a union with information that is needed by the union to properly perform its duties as bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This general obligation extends to the duty to supply information necessary for processing grievances. *Id.*; *U.S. Postal Service*, 337 NLRB 820, 822 (2002). As explained by the Supreme Court, “[a]rbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened.” *Id.* at 438. However, despite this general obligation and the policy concerns behind it, the Board has carved out an absolute exception for witness statements and summaries of those statements. *Anheuser Busch*, 237 NLRB 982, 984 (1978); *Fleming Cos.*, 332 NLRB 1086, 1087 (2000); *Boyertown Packaging Corp.*, 303 NLRB 441, 444 (1991).

A. The ALJ Correctly Found that Respondent Violated Section 8(a)(5) of the Act by Refusing to Provide the Union with Employee Statements

The Board has sought briefing regarding the scope of the category of witness statements. The Acting General Counsel respectfully avers that the category of witness statements should be strictly limited to those statements that are a verbatim transcript, or close approximation, of the witness's statements, are reviewed and adopted by the witness through his or her signature, and for which the witness receives assurances of confidentiality. See *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), enf'd 936 F.2d 144 (3d Cir. 1991); see also *El Paso Electric Co.*, 355 NLRB No. 71, slip op. at 1, n.3, 31 (2010). In *New Jersey Bell* the Board concluded that the documents in question – reports made by the employer's officials that reflected conversations and contact with a customer – were not witness statements. *New Jersey Bell*, 300 NLRB at 43. In making its determination the Board relied on the fact that the witness did not review or adopt the reports “as a reflection of any statement or complaint she may have made.” *Id.* The Board pointed out that “there is no contention that the reports are or even approximate a verbatim transcript of the customer's statements.” *Id.* In addition, the Board limited the category of witness statements to those statements for which the witness received assurances that the statement would remain confidential. *Id.*

The Administrative Law Judge, citing *New Jersey Bell*, determined that the statement of Koryn Nako does not constitute a witness statement because Respondent did not provide Nako with any assurances of confidentiality. Accordingly, the Administrative Law Judge properly concluded that Respondent violated Section 8(a)(5) the Act by not providing the Union with Nako's statement and the statements of any other employees taken in the course of Respondent's investigation who were not promised confidentiality or who did not adopt their statement.

However, even if Nako's statement is found to constitute a witness statement, the Acting General Counsel asserts that it nevertheless should have been provided to the Union by Respondent because it does not present any confidentiality concerns. In this regard, the Acting General Counsel believes that current Board law regarding witness statements is unnecessarily broad and contrary to the general duty to provide information. The Acting General Counsel urges the Board to modify its *Anheuser-Busch* rule and to adopt the balancing-of-interests test set forth in *Detroit Edison*, 440 U.S. 301 (1979), in situations where a request for a witness statement is shown to present legitimate and substantial confidentiality concerns. The balancing of interests test requires that: "(1) the party asserting a 'legitimate and substantial' confidentiality interest has the burden of demonstrating the interest, and (2) if the burden is met, an accommodation must be sought to resolve the competing need for the information and the justified confidentiality concerns." *Fleming*, 232 NLRB at 1090. This test effectively protects witnesses in those circumstances where there is actual evidence of a substantial and legitimate concern of harassment and intimidation while addressing a union's interest in obtaining information relevant to a grievance. Allowing a union to review witness statements where there is no actual evidence of danger of harassment or coercion would enable the union to be a more effective representative and would facilitate the grievance arbitration process.

As explained in the *Fleming* concurrence, *Anheuser-Busch* was decided based on the rationale of *Robbins Tire*, 437 U.S. 214 (1978), which concerned a prehearing request for Agency prepared witness statements in the context of the Freedom of Information Act. The Court considered the risk of coercion or intimidation of witnesses who have given statements to the Board during the course of its investigation and found that "prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an

‘interference’ with NLRB enforcement proceedings” *Id.* at 241. In particular, the Court referred to the potential for the coercion or intimidation of those who had given statements so that they would alter their testimony or refuse to testify at a Board hearing. The Court pointed out that Congress did not intend FOIA to be used as a tool for private discovery. *Id.* at 239, 242. The Court concluded “that witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until the completion of the Board’s hearing.” *Id.* at 236. In so finding, the Court explained that “[i]t was Congress’ understanding, and it is our conclusion, that release of such statements necessarily ‘would interfere’ in the statutory sense with the Board’s ‘enforcement proceedings.’” *Id.* at 243.

The Acting General Counsel, in agreement with the *Fleming* concurrence, avers that the considerations underlying the Court’s decision in *Robbins Tire* do not justify an absolute rule exempting witness statements from disclosure in the grievance arbitration context. Thus, in contrast with Board proceedings where there is a longstanding rule against the prehearing disclosure of witness statements, employers are obligated under the Act to provide unions with information necessary to properly perform their duties as bargaining representative, which includes the processing of grievances. As pointed out in the *Fleming* concurrence, the “fact that grievances are being resolved through collectively bargained procedures is itself an indication that the parties have achieved a more mature and less contentious relationship than typically exists between charging parties and respondents in unfair labor practice cases.” *Fleming*, 232 NLRB at 1089 (concurrence). In addition, “a factor weighing against the likelihood of employer or union coercion of witnesses in a grievance-arbitration proceeding is the parties’ consideration of the potential long-term adverse impact of such conduct on their continuing collective-bargaining relationship.” *Id.* Significantly, the Board makes no other categorical prohibition

against the provision of any other type of relevant information based on concerns regarding retaliation and coercion. *Id.* In fact, the Board even requires the disclosure of the names and phone numbers of witnesses. *Id.* at 1089-90; *Transport of New Jersey*, 233 NLRB 694 (1977)). This strongly suggests that the concerns about coercion or intimidation of witnesses that were at the heart of the Court's decision in *Robbins Tire* are not present in the grievance arbitration context.

A general rule requiring the disclosure of witness statements would facilitate the arbitral process. If employers are not obligated to provide essential witness statements, unions have no real option but to pursue a grievance. *Raley's Supermarkets*, 349 NLRB 26, 28-30 (2007) (Liebman dissent). A restrictive view of disclosure unnecessarily costs a union time and money by forcing the "[u]nion to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. Nothing in federal law requires such a result." *Fleming*, 232 NLRB at 1089 (concurrency).

In this case, Respondent raised no concerns about witness confidentiality in withholding Nako's statement. Rather, Respondent claimed that the withheld documents were prepared in anticipation of litigation in the grievance and arbitration process. There is no issue regarding union intimidation in this case and, in fact, Union Shop Steward Bishop was attempting to represent Nako in the incident that Nako's statement concerns. Indeed, Respondent apparently felt no need to assure Nako of confidentiality in order to obtain her statement. This case thus illustrates that the Board's categorical rule against the disclosure of witness statements is unnecessarily broad and rigid. The Acting General Counsel therefore urges the Board to adopt a general rule that witness statements, like other relevant information, should be disclosed to a union upon request.

B. The ALJ Correctly Found that the Nako Statement is not Protected by the Attorney Work-Product Privilege

The Board also asked whether a document that does not meet the witness statement standard under *Fleming* and *Anheuser-Busch* may nevertheless be considered attorney work product. As argued below, documents such as Nako's witness statement that are prepared in the course of an investigation for the nonlitigation purpose of determining whether an employee engaged in misconduct warranting discipline should not be regarded as attorney work product.

In order for requested materials to be considered attorney work product, the party asserting the privilege must demonstrate that they were prepared by a party or his representative "in anticipation of litigation." *Central Telephone of Texas*, 343 NLRB 987, 988 (2004). Generally, the Board does not accord work-product protection to documents that are not prepared on an attorney's instructions or with an attorney's assistance. See *Lansing Automakers Federal Credit Union*, 355 NLRB No. 221, slip op. at 9, 11 (2010) (investigative reports prepared by human resources director and internal auditor); *Borgess Medical Center*, 342 NLRB 1105, 1106 n.5 (2004) (hospital incident reports). The work product privilege also does not apply to documents prepared in the normal course of business, such as notes and reports prepared during an investigation to determine whether employee discipline is appropriate, because such documents are not prepared in anticipation of litigation. See *Lansing Automakers Federal Credit Union*, 355 NLRB No. 221, slip op. at 7-8.

The evidence in this case is insufficient to establish that the Nako statement was prepared at the direction of counsel. Instead, the evidence compels the conclusion that Sledge interviewed Nako and drafted Nako's statement for the nonlitigation purpose of determining whether Bishop had engaged in alleged misconduct sufficient to warrant termination. Thus, on October 19, the same day that Bishop was suspended pending an investigation, Sledge, as part of the

investigation, spoke with Nako to determine what occurred the day before in the incident involving Bishop. Sledge testified that the meeting was at the suggestion of Respondent's attorneys. Sledge had Nako focus on the events involving Bishop and the statement she drafted for Nako to sign was restricted to Nako's statements regarding Bishop's actions. Bishop was terminated eight days later on October 27. Although Sledge did write the phrase "prepared at the advice of counsel in preparation for arbitration" at the top of Nako's statement, Sledge conceded that she did so at a later date, after Nako had signed the statement. Accordingly, under these facts, the Administrative Law Judge correctly concluded that Respondent has not met its burden of establishing that the Nako statement falls within the scope of protected work product.

Respondent, citing *Central Telephone*, has argued that the Nako statement was prepared in anticipation of litigation at the direction of counsel and is therefore protected by the attorney work product privilege. The documents at issue in *Central Telephone* were notes taken by a human resources specialist at the direction of the employer's in-house counsel during witness interviews conducted as part of the employer's investigation into the alleged misconduct of four employees. *Central Telephone*, 343 NLRB at 987. These notes not only contained factual information obtained by the human resources specialist, but also her mental impressions of the demeanor of the witnesses. *Id.* The evidence showed that it was not routine for the human resources specialist to contact the in-house counsel. *Id.* The Board found that under the facts of that case, the investigation notes were prepared in anticipation of litigation and not in the ordinary course of business. *Id.* at 989. Significantly, the respondent in *Central Telephone* did provide the union with copies of the witnesses' signed statements and so the Board did not address the issue of whether the witness statements themselves were protected as attorney work product. *Id.* at 988.

In his dissent in *Central Telephone*, former Member Walsh advocated that the Board look to Circuit Court precedent under the Federal Rules of Civil Procedure to determine whether a document has been prepared in anticipation of litigation. *Id.* at 991 (dissent). Under that precedent, if the “primary motivation behind the creation of the document” was to aid in possible future litigation or the document was prepared “because of” existing or expected litigation, then the document is protected work product. Other documents fall outside the privilege even if they ultimately are used in litigation. *Id.* Member Walsh explained that “the critical inquiry under the Rule is whether the document was produced for litigation or nonlitigation purposes.” *Id.* Under that standard, Member Walsh determined that the notes at issue were not prepared in anticipation of litigation but instead were prepared in the ordinary course of business to determine whether the employees had engaged in misconduct so that the employer could decide the appropriate corrective action. *Id.* at 991. Thus, Member Walsh’s test focuses on the purpose for which a document is created. *Id.* at 994, 996.

The Acting General Counsel urges the Board to adopt former Member Walsh’s test as set forth in his dissent in *Central Telephone* for determining when a document has been prepared in anticipation of litigation. Should the Board endorse Respondent’s expansive interpretation of the law, an employer that contacts its attorney as soon as an incident occurs may deem every document generated in the course of its subsequent investigation to be protected work product. Such a result would prevent a union from obtaining documents that would enable it to fully perform its duties as bargaining representative. This is contrary to the general and well-established duty an employer has to provide a union with relevant information that would be useful to the union in discharging its statutory responsibilities. In a situation such as this, where witness statements are created for the purpose of determining whether an employee engaged in

misconduct warranting discipline, such statements should not be considered as having been prepared “in anticipation of litigation,” and should not be afforded work product protection.

IV. CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Administrative Law Judge properly concluded that Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with Nako’s statement and any other employee statements obtained in the course of its investigation of Bishop’s alleged misconduct. Accordingly, the Judge’s decision and Recommended Order regarding this issue should be adopted by the Board.

Dated at Honolulu, Hawaii, this 1st day of April 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the Acting General Counsel's Post-Remand Brief to the Board has this day been served as described below upon the following persons at their last-known address:

1 copy	L. Michael Zinser, Esq. The Zinser Law Firm 414 Union Street, Suite 1200 Bank of America Plaza Nashville, TN 37219	VIA Express Mail and e-mail
1 copy	Lowell Chun-Hoon, Esq. King Nakamura & Chun-Hoon Central Pacific Plaza 220 S. King Street, Suite 980 Honolulu, HI 96813	VIA U.S. Mail and e-mail
1 copy	Heather Ahue, Administrative Officer Hawaii Newspaper Guild 888 Mililani Street, Suite 303 Honolulu, HI 96813	VIA U.S. Mail and e-mail

DATED at Honolulu, Hawaii, this 1st day of April 2011.



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