

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**AMERICAN BAPTIST HOMES OF THE WEST
d/b/a PIEDMONT GARDENS**

and

Case 32-CA-063475

**THE SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS—WEST**

**COUNSEL FOR THE ACTING GENERAL
COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. Preliminary Statement

On January 31, 2012, Administrative Law Judge Gerald M. Etchingham, herein called the Judge, issued his decision in the above-captioned case. In his decision, the Judge correctly concluded that American Baptist Homes of the West d/b/a Piedmont Gardens, herein called Respondent, violated Sections 8(a)(1) and (5) of the Act by unlawfully failing to provide the Service Employees International Union, United Healthcare Workers—West, herein called the Union, with the names and job titles of witnesses to an incident by which an employee was disciplined. In that regard, the Judge's decision is wholly supported by appropriate findings of fact and conclusions of law. However, the Judge rejected the Acting General Counsel's argument that Respondent also violated Section 8(a)(1) and (5) of the Act by failing to turn over requested witness statements to the Union under a balancing of interests test as set forth by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

Pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46(a), Counsel for the Acting General Counsel has filed limited exceptions to the Judge's decision and hereby files the following brief in support thereof.

II. ARGUMENT¹

A. The Judge Erred In Failing To Apply A Balancing Of Interests Test As Set Forth In *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979)

Currently, the Board has carved out a narrow exception to the general rule that employers have a duty to turn over requested relevant information to a union whereby employers do not have to provide confidential witness statements taken as part of an employer's investigation into employee misconduct. See *Anheuser-Busch*, 237 NLRB 982 (1978). The *Anheuser-Bush* Board wrote that "the 'general obligation' to honor requests for information . . . does not encompass the duty to furnish witness statements themselves." *Id.* at 984-85.

In the instant case, Counsel for the Acting General Counsel urges the Board to modify the unnecessarily rigid *Anheuser-Bush* rule and adopt the balancing of interests test as set forth by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). The balancing of interests test requires (1) that the party asserting a "legitimate and substantial" confidentiality interest bears the burden of establishing that interest, and (2) if the burden is met, an accommodation must be sought to resolve the conflict between the need for the information and the justified confidentiality concerns. *Fleming Companies, Inc.*, 232 NLRB 1086, 1090 (2000).

¹ References to the Administrative Law Judge's Decision are "ALJD ____;" references to the underlying transcript are "Tr. ____;" references to General Counsel's Exhibits and to Respondent's Exhibits are "GC ____" and "R ____" respectively.

Moving towards the balancing of interests test is far from a novel theory. In fact, former Board Members Fox and Liebman championed this approach in their concurring opinion in *Fleming* where they wrote,

We regard *Anheuser-Busch* as an unnecessarily broad exception to the . . . duty to provide requested information . . . To the extent that a request for witness or information statements presents confidentiality concerns, we believe that those concerns can and should be resolved not by a blanket rule exempting such statements from disclosure but rather by utilizing the balancing-of-interests test set forth by the Supreme Court in *Detroit Edison* . . . for analyzing information requests raising confidentiality issues.

Id. at 1088 (Liebman, W. and Fox, S., concurring).

This balancing of interests test effectively protects witnesses in those limited circumstances where there is actual evidence of a substantial and legitimate concern of harassment/intimidation while still addressing a union's interest in obtaining information necessary to fulfill its obligation to process a grievance.

Moreover, as discussed in the *Fleming* concurrence, *Anheuser-Busch* was decided based on the rationale of *NLRB v Robbins Tire & Rubber Co*, 437 US 214 (1978), which concerned a prehearing request for Agency prepared witness statements in the context of the Freedom of Information Act (FOIA). See *Fleming*, 232 NLRB at 1088-89. The Court considered the risk of coercion and/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 involved the type of harm that Congress felt would interfere with NLRB proceedings. See *Robbins Tire*, 437 U.S. at 241. In particular, the Court referred to the potential for coercion or intimidation of witnesses who gave statements that could cause them to alter their testimony or refuse to testify at Board

hearings and that Congress did not intend FOIA to be used as a tool for private discovery. *See id.* at 239, 242. The Court concluded that witnesses' statements in pending unfair labor practice proceedings are exempt from FOIA disclosure until the end of the Board's hearing because the release of witnesses' statement would interfere with the Board's enforcement proceeding. *See Robbins Tire*, 437 U.S. at 236, 243.

Counsel for the Acting General Counsel, in agreement with the *Fleming* concurrence, respectfully asserts 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 prehearing disclosure of witness statements, employers are generally obligated under the Act to provide unions with information necessary to properly perform their duties as a 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 (Liebman, W. and Fox, S., concurring).

Moreover, the fact that employers and unions have a bargaining relationship with potential long-term adverse impact weighs against the likelihood of employer or union coercion of witnesses in a grievance-arbitration proceeding. *See id.* Furthermore, the Board makes no other categorical prohibition against the provision of any other type of relevant information based on concerns regarding retaliation and coercion. *See id.* Notably, and as discussed in further detail in the Judge's decision (ALJD 13-15), the

Board even requires the disclosure of names of employee witnesses, as well as non-employee witnesses and their telephone numbers, to an incident by which an employee was disciplined. *See Fleming*, 232 NLRB at 1089 (Liebman, W. and Fox, S., concurring); *see also Transport of New Jersey*, 233 NLRB at 695; *Anheuser-Busch*, 982 NLRB at 984 fn. 5. This strongly suggests that the concerns of coercion and 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 obliged to provide essential witness statements, unions have no real option but to pursue a grievance. *See Raley's Supermarkets*, 349 NLRB 26, 28-30 (2007) (Liebman, W., dissenting). As noted by former Board Members Liebman and Fox, a restrictive view of disclosure unnecessarily costs unions time and money by forcing unions to take a grievance to arbitration without "the opportunity to evaluate the merits of the claim." *Fleming*, 232 NLRB at 1089 (Liebman, W. and Fox, S., concurring). Moreover, "nothing in federal law requires such a result." *Id.*

Furthermore, Respondent failed to establish a legitimate and substantial interest in keeping the witness statements in question confidential. To the contrary, Respondent outright concedes that it keeps all witness statements confidential, as part of a blanket rule, regardless of whether there is a need for confidentiality. (ALJD 14: 12-14). Notably, Respondent's policy is not posted anywhere in its facility (ALJD 9: 15-20), so Respondent cannot legitimately argue that employees relied on its blanket rule when creating their witness statements.

Moreover, as the Judge correctly found, there was no credible record evidence establishing that Mr. Bariuad actually intimidated or bullied anyone at Respondent's facility or that any employees feared such retaliation. (ALJD 14: 6-14). To that end, there was no evidence that Mr. Bariuad acted in a violent manner. Notably, Mr. Bariuad was never disciplined for alleged bullying or intimidating other employees or for engaging in violent behavior. Furthermore, the Union never received complaints from other members about Mr. Bariuad's conduct and the Employer never received direct evidence of any employee complaints about Mr. Bariuad prior to its refusal to provide the information in question. (ALJD 6: 6-43; 11: 10-25; 15: 8-17).

As regards the written statement of Charge Nurse LVN Lynda Hutton in particular, no legitimate or substantial interest exists in keeping her statement confidential from the Union. In this regard, the Judge correctly credited Hutton's original testimony that she was unaware of anyone at Respondent's facility who was threatened by Mr. Bariuad, and the Judge correctly discredited Hutton's later testimony to the contrary. (ALJD 11: 1-36). In the two years that Ms. Hutton worked with Mr. Bariuad, she admitted that Mr. Bariuad never threatened her or anyone else that Ms. Hutton knew of. (ALJD 6: 5-7). Additionally, there were no incidents of violence between Ms. Hutton and Mr. Bariuad. (ALJD 6: 5-7). Tellingly, Ms. Hutton's witness statement did not express any concern for her safety or well-being at the hands of Mr. Bariuad. (ALJD 6: 29-33). Moreover, Ms. Hutton testified that she created her statement without talking to her supervisor first. (ALJD 7: 12-14). As such, she was not instructed to write her statement and could not have been overly intimidated or afraid to write her statement

without the instruction of Respondent. As such, there was no reasonable, legitimate, or substantial concern that would warrant keeping Ms. Hutton's statement confidential.

Counsel for the Acting General Counsel further notes that Ms. Hutton was Mr. Bariuad's supervisor and it is undisputed that the duties of Respondent's Charge Nurses include reporting employee misconduct and writing a statement about what they witness. (ALJD 5-6). In fact, Ms. Hutton was disciplined for not reporting Mr. Bariuad's alleged misconduct sooner. (ALJD 7: 6-8). Therefore, Respondent cannot legitimately argue that it needs to keep Ms. Hutton's statement confidential to encourage her to write such a statement when, in fact, her job duties mandate that she write such a statement about actions of her subordinates like Mr. Bariuad. (ALJD 4: 41-42; 5-6).

As regards the statement of CNA Rhonda Burns, Respondent again failed to establish a legitimate and substantial need to keep her statement confidential. Ms. Burns, who worked on the same shift as Mr. Bariuad, was neither threatened by Mr. Bariuad nor was she aware of Mr. Bariuad threatening anyone. (ALJD 6: 37-46). Additionally, when Ms. Tobin requested that Ms. Burns write a statement about Mr. Bariuad, Ms. Burns did not request assurances of confidentiality from Ms. Tobin or Respondent and Ms. Burns did not express fear about writing a statement. (ALJD 5: 31-37). Furthermore, Ms. Burns no longer works for Respondent. (ALJD 5: 11-12). Since she is no longer employed by Respondent, Respondent has even less of a need to keep her statement confidential as Mr. Bariuad and the Union would have no way of contacting Ms. Burns to harass her. In turn, the only rational basis by which the Employer could hold Ms. Burns' statement confidential is because Respondent maintains a blanket policy of confidentiality

regardless of the need. (ALJD 14: 12-14). Such a blanket policy, regardless of need, is clearly insufficient to establish a legitimate and substantial need for confidentiality.

Regarding the third employee who provided a witness statement, the other Charge Nurse LVN who was being trained by Ms. Hutton,² Respondent presented no evidence establishing a need to keep this Charge Nurse LVN's statement confidential. In fact, the only evidence presented regarding this witness was the testimony of Ms. Tobin who conceded that this Charge Nurse LVN did not express any concerns about Mr. Bariudad knowing that she wrote a statement about Mr. Bariudad. (ALJD 5:37-40). As Respondent testified, Charge Nurse LVNs are supervisors whose duties include reporting employee misconduct. (ALJD 4: 41-44). As with Ms. Hutton, Respondent cannot legitimately argue a need to keep the other Charge Nurse LVN's statement confidential when it is part of her job to write a statement about Mr. Bariudad's conduct. (ALJD 4: 41-42).

As enumerated above, Respondent cannot demonstrate a significant or legitimate confidentiality interest. In stark contrast, the Union's need for the requested witness statements is great. Without the statements, the Union cannot fully investigate the underlying grievance of a terminated employee. As such, the Union is unable to make an educated decision on whether to process the grievance to arbitration—which could force the Union to expend a great deal in attorney and arbitrator fees preparing for unnecessary arbitration. Alternatively, the Union might be forced to drop a grievance that could turn out to be meritorious. Either alternative is undesirable. As such, the Union's need for the witness statements far outweighs any minute interest, if any, that Respondent possesses in keeping the witness statements confidential.

² This Charge Nurse LVN was identified by the Judge as Barbara Berg. (ALJD 7: 49-51).

In sum, Respondent failed to establish a legitimate and substantial need for keeping the witnesses statements confidential. Neither Ms. Burns nor the other Charge Nurse LVN expressed any fear or any kind when they created their statements for Respondent. While Ms. Hutton expressed ambivalence regarding Mr. Bariuad, this can only be characterized as speculative at best (ALJD 10: 46-47), and occurred after she created her statement. Moreover, the Union's need for the witness statements is great as it cannot effectively represent Mr. Bariuad without them. Therefore, Counsel for the Acting General Counsel respectfully asserts that the Judge erred in applying the *Anheuser-Busch* blanket rule instead of the more equitable *Detroit Edison* balancing of interests approach. Under a balancing of interests approach, Respondent has not met its burden of proving a legitimate and substantial confidentiality interest and has therefore violated Section 8(a)(5) and (1) of the Act as alleged in the Complaint.

B. The Balancing Of Interests Test Should Be Applied Retroactively

The Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage." *SNE Enterprises*, 344 NLRB 673, 673 (2005) (and cases cited therein). The propriety of retroactive application is determined by balancing any ill effect of retroactivity against "the mischief of producing a result [that] is contrary to statutory design or to legal and equitable principles." *Id.* (citing *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (emphasis added); see also *Aramark School Services*, 337 NLRB 1063 (2002). Thus, the Board will apply an arguably new rule retroactively to the parties in a case in which a new rule is announced, and to parties in other cases pending at that time, as long as doing so will not manifest injustice. See, e.g., *Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996); *Pattern*

and Model Makers Association of Warren, 310 NLRB 929, 931 (1993); *Dunn v. Postal Service*, 960 F.2d 156 (Fed. Cir. 1992).

The Board uses a three-part test to determine whether retroactive application of a new rule will manifest injustice. *See SNE Enterprises*, 344 NLRB at 673 (and cases cited therein). First, the Board considers the parties' reliance on preexisting law. *See id.* Second, the Board examines what effect retroactivity might have on accomplishing the purposes of the Act. *See id.* Finally, the Board weighs whether the losing party would suffer any particular injustice as a result of retroactive application. *See id.*

While it is undisputed that Respondent relied on the current *Anheuser-Busch* standard, Counsel for the Acting General Counsel submits that applying the balancing of interest approach retroactively will nevertheless effectuate the purposes and principles of the Act. If Respondent provided the Union with the witness statements, the Union would know whether to pursue the grievance to arbitration or drop the matter. In turn, the matter will be dealt with through the parties' contractually bargained grievance procedure and there will be one less case taking up the Board's precious time. If employers are not obligated to provide witness statements, unions have no real option but to pursue a grievance regardless of merit. *see Raley's Supermarkets, supra*, or file an unfair labor practice charge. Either way, both unions and employers are forced to expend unnecessary funds litigating what could be handled, and possibly dismissed, at the grievance stage. Moreover, if the witness statements support the grievant's version of events, disclosure would facilitate settlement of the grievance by providing the Union with sufficient information to help convince the employer of the merits of the grievance.

Finally, Respondent will not face an injustice by retroactively applying the balancing of interest approach. If Respondent is forced to provide the Union with witness statements, the Union's next step is either to drop the grievance or proceed to arbitration. Either way, Respondent has not suffered any harm and would still be afforded a full opportunity to present evidence of Mr. Bariuad's conduct to an arbitrator. To the extent that Respondent argues that its employees may be harmed by disclosing their statements to the Union, there is no evidence to support this notion. There is no credible evidence to suggest that Mr. Bariuad was violent or displayed intimidating behavior. (ALJD 6: 6-43; 11: 10-25; 15: 8-17). Furthermore, Lynda Hutton is a supervisor whose duties include reporting employee misconduct. (ALJD: 5-6). As such, She will still have to report misconduct whether Mr. Bariuad is reinstated. Further yet, Ms. Burns and the other Charge Nurse LVN are no longer employed by Respondent (ALJD 5: 11-12), so there is no reason to fear that they will encounter Mr. Bariuad.

Therefore, Counsel for the Acting General respectfully requests that the Board overturn the Judge's application of *Anheuser-Busch* and apply the *Detroit Edison* balancing of interests approach retroactively as it will further the purposes of the Act and Respondent will not suffer an injustice.

C. Lynda Hutton's Statement Should Not Qualify
As A Witness Statement Under Current Board Law

Counsel for the Acting General Counsel further argues that even if the Board upholds the Judge's application of *Anheuser-Busch* in lieu of adopting the balancing of interests approach under *Detroit Edison*, the Judge erred in failing to hold that the category of witness statements protected from disclosure under *Annheuser-Busch* should be strictly limited to those statements that that are adopted by the witness and for which

the witness receives assurances of confidentiality. *See New Jersey Bell*, 300 NLRB 42, 43 (1990), *enfd* 936 F.2d 144 (3d Cir. 1991); *see also El Paso Electric Co.*, 355 NLRB No. 71, 52 (2010). In this regard, in *New Jersey Bell*, the Board adopted this approach and strictly limited the category of witness statements to those statements for which the witness received assurances that their statement would remain confidential. *See* 300 NLRB at 43.

In the case before us, Ms. Hutton testified that she created her statement and provided it to Ms. Tobin before she received assurances of confidentiality. (ALJD 7: 1-14). By the very nature of the term, “assurances of confidentiality,” an employer is promising to keep an employee’s statement confidential in return for the employee’s cooperation in writing the statement. The purpose of giving an employee assurances of confidentiality is to ensure that the employee feels comfortable, and free from perceived harm, so that they will create a written statement. Here, these factors are simply not present. Ms. Hutton could not have relied upon Ms. Tobin’s assurances of confidentiality since she was unaware of this policy when she created her statement and when she provided her statement to Ms. Tobin. (ALJD 7: 14-17). In fact, it was only after Ms. Hutton provided her statement to Respondent that Ms. Tobin assured her that her statement would be confidential. Therefore, since Ms. Hutton did not receive assurances of confidentiality until after she wrote her statement and provided it to Respondent, and thus did not rely on such assurances, Ms. Hutton’s written statement should not constitute a confidential witness statement within the meaning of *Anheuser-Busch*.

Accordingly, Counsel for the Acting General Counsel respectfully avers that even under current Board law as set forth in *Anheuser-Busch*, the Judge erred in failing to find

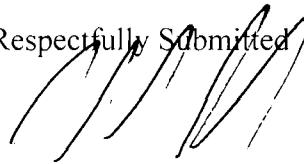
that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with Ms. Hutton's statement.

III. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board modify the unnecessarily rigid *Anheuser-Bush* rule and adopt the balancing of interests test as set forth by the Supreme Court in *Detroit Edison*, find merit to the General Counsel's limited exceptions, and find that Respondent also violated Sections 8(a)(1) and (5) of the Act by refusing to provide the Union with requested witness statements.

Dated: May 11, 2012

Respectfully Submitted



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**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF LIMITED EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, state under oath that on **May 11, 2012**, I served the above-entitled document(s) *electronically* upon the following persons, addressed to them at the following addresses:

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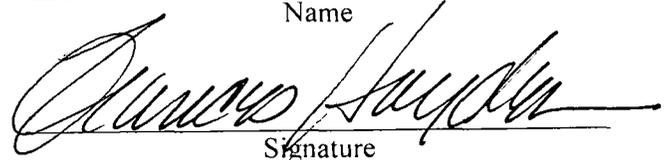
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