

**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 ANSWER
TO RESPONDENT'S LIMITED CROSS EXCEPTIONS TO THE DECISION
AND RECOMMENDED ORDER 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.¹ 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 employee Arturo Bariuad 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

¹ References are as follows. Tr. for transcript; GC Exh. for General Counsel Exhibits; R Exh. for Respondent's Exhibits; Jt Exh. for Joint Exhibits; ALJ Exh for ALJ Exhibits; and ALJD for the Decision of the Judge.

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 filed limited exceptions, and brief in support thereof, to the Judge's decision on May 11, 2012. On May 25, 2012, Respondent filed limited cross exceptions to the Judge's decision and recommended order, and a brief in support thereof. Pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46(d), Counsel for the Acting General Counsel files this answer brief to Respondent's limited cross exceptions.

II. ARGUMENT

A. **Under The *Detroit Edison* Balancing-Of-Interests Test, Respondent Violated Section 8(a)(5) And (1) Of The Act By Refusing To Provide The Union With Requested Witness Names And Job Titles**

Respondent argues in its brief in support of limited cross exceptions that the Judge erred in his application of the *Detroit Edison* test. However, contrary to this argument, the Judge's ruling was wholly supported by well established Board precedent and by the credible testimony at hearing.

As part of the general duty to provide a union with requested relevant and necessary information, it is well established that employers must provide unions with the names of witnesses to an incident for which an employee was disciplined. *See Fleming Companies, Inc.*, 232 NLRB 1086, 1089-90 (2000) (Liebman, W. and Fox, S., concurring); *see also Fairmont Hotel Company*, 304 NLRB 746, 748 (1991); *Anheuser-Busch*, 237 NLRB 982, 984 n.5 (1978); *Transport of New Jersey*, 233 NLRB 694, 694-95

(1977). However, when dealing with union requests for relevant, but assertedly confidential information, the Board must balance the Union's need for the information against any legitimate and substantial confidentiality interest established by the employer. *See Pennsylvania Power And Light Company*, 301 NLRB 1104, 1105 (1991) (adopting the balancing-of-interest approach set forth in *Detroit Edison*, 440 U.S. 301). Whether an employer possesses a legitimate and substantial confidentiality interest will depend on the circumstances of each case, but it is clear that the party asserting confidentiality bears the burden of proof. *See id.* at 1105-06 (citing *Washington Gas Light Co.*, 273 NLRB 116 (1984)). A legitimate interest will be upheld, but blanket claims of confidentiality will not be honored. *See id.* at 1105 (citations omitted).

i. Respondent Does Not Possess A Legitimate And Substantial Confidentiality Interest

In arguing that Respondent has a legitimate and substantial confidentiality interest in keeping the witnesses' names confidential, Respondent argues that it has an interest in patient safety and from the harm that could arise from neglect. However, patient safety and keeping the names of witnesses confidential are not even remotely logically connected. Such a tenuously related concern cannot suffice for legitimate and substantial confidentiality interests as Respondent can certainly promote patient safety without adopting a blanket rule that would keep confidential, in all circumstances, the names of witnesses who witnessed an employee's alleged misconduct. Absent a particularized showing of a need for confidentiality, which is absent here, Respondent has failed to meet its burden.

Respondent repeatedly argues that it possesses a confidentiality interest because its witnesses feared harm from Mr. Bariuad and/or the Union. However, this argument

conveniently ignores the clear testimony at hearing. It is undisputed that none of the witnesses in question experienced incidents of violence or intimidation relating to Mr. Bariuad, Mr. Bariuad was never disciplined for acts of violence or intimidation, no one reported Mr. Bariuad to Respondent for engaging in violent or intimidating behavior, and Mr. Bariuad did not have a reputation for such activity. (Tr: 49: 3-12; 62: 9-13; 73-74; 76-77; 78: 10-23; 103-104). 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). In turn, the Judge correctly found that there was no credible record evidence establishing that Mr. Bariuad actually intimidated or bullied anyone at Respondent's facility or that any employees feared retaliation at Mr. Bariuad's hands. (ALJD 14: 6-14). To that end, the Judge correctly characterized Respondent's fear of harm as speculative. (ALJD 10: 46-47).

Notably, as part of its failed attempts to show a legitimate and substantial confidentiality interest, Respondent argues that it has a blanket policy of keeping all witnesses names confidential and it makes a bare assertion that employees rely on this. However, this policy is not posted anywhere in its facility (ALJD 9: 15-20). As such, employees cannot possibly rely on an alleged policy that they were never apprised of. Moreover, the Board has consistently held that when analyzing the balancing-of-interest approach, an employer's legitimate interest will be upheld, but blanket claims of confidentiality will not be honored. *See Pennsylvania Power*, 301 NLRB at 1105.

Therefore, Respondent cannot rely on its self-imposed blanket policy, which runs afoul of Board precedent, as a basis for keeping witnesses' names confidential.

ii. The Union's Need For The Requested Witness Names Is Great

Respondent's argument that the Union's need for the witnesses' names is minimal is equally without merit. Since Respondent did not provide the Union with the requested witnesses' names, the Union cannot complete its investigation into the matter or make an educated decision as to whether to take the matter to arbitration. As a result, Mr. Bariuad remains unemployed because the Union cannot complete its investigation into the matter to determine whether to further pursue Mr. Bariuad's grievance.

While Respondent could argue that the Union could roll the preverbal dice and take the matter to arbitration without the witnesses' names, this argument fails for two reasons. First, the Union would have no way to verify the veracity of an employee's testimony at arbitration without speaking to them first. Second, it ignores the cost of arbitration and that the Union should not be forced to take the matter to arbitration when the grievance may be without merit. By providing the witnesses' names, the Union could fully investigate the matter and determine whether the Employer's termination of Mr. Bariuad was justified and vitiate the need for further expensive proceedings, given the costs of arbitration (due to arbiter, transcript, and attorney fees). As noted by the Board, a restrictive view of disclosure unnecessarily costs unions time and money by forcing unions to take a grievance to arbitration "without providing the opportunity to evaluate the merits of the claim." *Fleming*, 232 NLRB at 1089.

Therefore, despite Respondent's arguments to the contrary, the Union has demonstrated a great need for the requested names of the employee witnesses.

B. Respondent's Argument That The Union Could Determine The Names Of The Employee Witnesses, Without Obtaining Them From Respondent, Is Legally Irrelevant

Respondent's argument that the Union could ascertain the names of the employees who gave statements by talking to the other employees on the same shift as Mr. Bariudad is flawed for five reasons. First, it assumes that the employees will tell the truth. Not all of Respondent's employees are unit members and in the wake of the 2011 Union strike and layoffs that followed,² many of them may harbor ill will towards the Union. Second, employees may be scared to cooperate with the Union since the employer recently replaced employees engaged in a Union sanctioned economic strike.³ Third, this argument presupposes the Union has a duty to find requested information from another source; however, the availability of information from other sources is not a valid defense under Board law. *See, e.g., King Soopers, Inc.*, 344 NLRB 842, 845 (2005). Fourth, the credited testimony at the hearing established that Union Representative Donna Mapp attempted to investigate the matter by talking to employees, but they informed her that they did not take part in Respondent's investigation of Mr. Bariudad. (ALJD 7-8). And fifth, Respondent's argument presupposes that the person(s) who originally complained to Respondent about Mr. Bariudad were employed by Respondent. However, Respondent runs a facility with 300 residents, nearly 40 of whom are in its assisted living section. (ALJD 4: 23-28). As such, any one of those residents, or for that matter the residents' family/friends/visitors could have made a statement to Respondent

² *See American Baptist Homes of the West d/b/a Piedmont Gardens*, Case No. 32-CA-25247, 2011 WL 3489626, at * ___ (NLRB August 9, 2011).

³ *See id.* at * ___.

regarding Mr. Bariudad. Surely, the Union would have no way of knowing who the witnesses are if they were non-employees.

C. Respondent's Citations To *Pennsylvania Power and Alcan Rolled Products* Are Misguided

Respondent further argue that under *Pennsylvania Power*, 301 NLRB 1104, it does not have to turn over witness names. However, it is important to examine the facts of the Board's *Pennsylvania Power* decision. In holding that the *Pennsylvania Power* employer did not have to turn over the names of informants who reported drug use by employees, the Board noted that because the employer's workplace includes both nuclear and fossil power, as well as the inherent criminal nature that follows drug usage, the employer's "confidentiality interests [was] entitled to unusually great weight." *Pennsylvania Power* 301 at 1107. The Board further wrote,

[i]t is incumbent on us to examine the facts of this case in light of the surrounding circumstances. To overlook the pervasive drug problem in this country and in the workplace, and to disregard the violence that accompanies that national concern would be unrealistic.

Id.

In the case before us, and in stark contrast to drug informants at a nuclear power plant, Respondent operates an assisted living facility where the employee in question allegedly slept while on duty, no patients were at risk, and there is no history of violent or intimidating behavior. In turn, it can hardly be argued that the same concerns that were factored into *Pennsylvania Power* can be applied to the situation at hand—especially since there is no evidence of violent or intimidating behavior on Mr. Bariudad's behalf.

Similarly, Respondent's citation to *Alcan Rolled Products*, 358 NLRB No. 11 (2012), is equally unavailing. In *Alcan* the Board affirmed an administrative law judge's

decision that, when balancing the interests of a union and an employer for requested information under *Detroit Edison*, the *Alcan* employer possessed a confidentiality interest such that it did not need to reveal the names of the witnesses to an incident for which an employee was disciplined. In so holding, the judge relied on *Pennsylvania Power*. The judge reasoned that the *Pennsylvania Power* confidentiality interest was similar to the confidentiality interest in the case before him involving in the names of employee drug and alcohol informants at a facility that uses heavy machinery. Again, Respondent cannot argue the similarity between *Alcan* and this case as *Alcan* involved an employee using drugs and alcohol while driving a heavy lifting truck—not an employee allegedly sleeping while on duty as is involved in the case at bar.

Accordingly, since *Pennsylvania Power* and *Alcan* involve distinctly different facts, involving drug informants in potentially hazardous workplaces, they are sufficiently dissimilar to the case at hand. Therefore, these cases fail to support Respondent's argument regarding the requested names of employee witnesses.

D. Respondent's Arguments To Extend An *Anheuser-Busch* Type Blanket Rule To Witness Statements Is Without Merit

Finally, Respondent argues that the Board should adopt an *Anheuser-Busch* type rule that would allow Employer's to hold all witnesses' names to an investigation confidential regardless of the need. Such a rule would only manifest a great injustice.

Currently, as stated above, where a union requests names of witnesses to an employers investigation, an employer must provide those names unless they claim a substantial and legitimate confidentiality interest, at which point a balancing of interest approach is used. 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. In the balancing-of-interests test, both parties are afforded an opportunity to make their case as to why the information should or should not be divulged. In turn the needs are balanced for the most equitable resolution.

Contrary to this equitable balancing-of-interests approach, Respondent would have the Board move to a blanket rule stating that employers never have to give a requesting union the names of witnesses to an investigation. Such a blanket rule would essentially give employers carte blanche to intimidate and manipulate employee witnesses' statement. For example, an employer could discipline an employee based on the word of one employee, while ignoring other employee witnesses who could exonerate the disciplined employee and the union involved would have no way of knowing about exonerating witnesses and might not have the financial means to risk the matter at arbitration. In a similar vein, employee witnesses could be intimidated by the employer into providing inaccurate information the union might never learn of the intimidation. Without knowing the names of these employee witnesses, a union could also be forced to needlessly take the matter to arbitration, thereby fruitlessly expending both its own time and funds as well as that of the employer on a meritless grievance. If employers are not obliged to provide names of essential witnesses, unions have no real option but to pursue a grievance. *See, e.g., Raley's Supermarkets*, 349 NLRB 26, 28-30 (2007) (Liebman, W., dissenting) (stating the same proposition as it applies to witness statements).

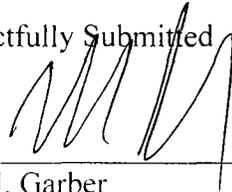
Given that Respondent's arguments are contrary to Board precedent, equity, and would create more labor unrest due to an increased possibility of needless arbitrations, Respondent's desire for an *Anheuser-Busch* type blanket rule for union requests for witnesses' names should be denied.

III. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board uphold the Judge's decision that Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with requested witness names. It is further requested that the Board deny Respondent's fruitless argument to apply an *Anheuser-Busch* blanket rule to union requests for witness names.

Dated: June 7, 2012

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'N. Garber', written over a horizontal line.

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**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWER
TO RESPONDENT'S LIMITED CROSS EXCEPTIONS TO THE DECISION AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, state under oath that on **June 7, 2012**, I served the above-entitled document(s) *electronically* upon the following persons, addressed to them at the following addresses:

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