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 REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

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 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).

---

[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.

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 an answering brief to the Acting General's Counsel's limited exceptions. Pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46(h), Counsel for the Acting General Counsel files this reply brief to Respondent's answer to the Acting General Counsel's limited exceptions.

II. Discussion

In its answering brief, Respondent essentially makes two main arguments. First, Respondent contends that the Board should not overturn *Anheuser-Busch*, 237 NLRB 982 (1978), in favor of a balancing of interest approach as set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Second, Respondent argues that Lynda Hutton's statement should be considered a confidential witness statement within the meaning of *Anheuser-Busch*.

A. Respondent's Assertion's For Adhering To *Anheuser-Busch* Are Tenuous At Best

Respondent, without supporting case law, argues that the case-by-case analysis set forth in the *Detroit Edison* balancing of interests approach is improper because there is always a risk to employee witnesses. Without any case authority, Respondent's base assertion is legally indefensible and mere speculation. Because every employer and every employee is different, a case-by-case analysis affords all parties a fair chance to articulate the need for the requested information and harm, if any, which could befall the employee witnesses and/or an employer. Respondent's blanket argument even ignores the facts of this case. Here, the trial transcript shows that it was 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). While Respondent attempts to engage in semantics over witnesses' use of the word "scared" versus "concern," the Judge did not engage in needless hairsplitting. To the contrary, 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). 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 such, Respondent's blanket assertion that employers always have an interest in keeping witness statements confidential is not only untrue, but is especially inapplicable to the facts of this case.

Moreover, the Union suffers great harm without the witness statements. The Union cannot properly investigate Mr. Bariuad's grievance in order to make an educated decision whether to take the matter to arbitration—a decision that could cost the Union a great deal of money in attorney fees, arbiter fees, and other costs associated with arbitration. In turn, Mr. Bariuad remains terminated from employment with Respondent unable to return to a position that he may have been wrongfully removed.

Next, Respondent argues that transitioning to the *Detroit Edison* balancing of interest approach will force employers to engage in a legal analysis and require attorneys to be

needlessly involved. Again, this simply is not true. Requiring human resources professionals to ask an employee witness if they fear retaliation/harm, and determine if that fear is justified, is hardly arduous or time consuming. Moreover, providing unions with requested witness statements may circumvent the need to get attorneys involved because unions may conclude that the employer's acts were justified and there is no need to grieve the matter further thereby saving thousands of dollars in arbitration costs. 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 Companies, Inc.*, 232 NLRB 1086, 1089 (2000) (Liebman, W. and Fox, S., concurring). While Respondent attempts to counter this point by arguing that employers will provide unions with witness summaries, this argument is equally unconvincing. Such a system is open to a manifest injustice as employers could write anything they want in a summary of a witness statement and unions would have no way of verifying the veracity of an employer's interpretation of a witness statement.

Therefore, Respondent has failed to articulate a legitimate reason for adhering to the unjust *Anheuser-Busch* blanket rule in lieu of adopting the more fair balancing of interests approach set forth in *Detroit Edison*.

B. In Asserting That Lynda Hutton's Statement Qualifies As a Confidential Witness Statement Under *Anheuser-Busch*, Respondent Misstates The Judge's Decision

Respondent further argues that it is not legally relevant whether Respondent's Assisted Living Director Alison Tobin provided Ms. Hutton with assurances of confidentiality before or after Ms. Hutton created her written statement. However, this narrow view ignores the purpose

of providing assurances of confidentiality. 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 for their employer's investigation—a task that in general will never benefit an employee. 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. In other words, it is a quid pro quo relationship whereby the employee takes part in an investigation into his or her peer's conduct in return for their employer's promise of confidentiality.[2]

Here, the quid pro quo relationship is simply not present. 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.*

In arguing that Lynda Hutton's written statement qualifies as a confidential witness statement, Respondent asserts that Respondent Director Alison Tobin *credibly* testified that she first approached Ms. Hutton and requested that she write a statement about Mr. Bariuad. However, this assertion misstates the Judge's findings. Specifically, the Judge wrote,

> With respect to Director Tobin's testimony, I do not find it credible that she first contacted Ms. Hutton about the alleged incident when Ms. Hutton credibly explained that no one asked her to provide or create her first written statement before she prepared one and slipped it under Director Tobin's door . . . I reject as non-credible and inconsistent with Ms. Hutton's credible recollection Director Tobin's description of any conversation she allegedly had with Ms. Hutton that led to Ms. Hutton's first written statement. Once again, Director Tobin's response to leading questions from Respondent's counsel that Ms. Hutton was somehow concerned about Mr.

[2] Thus, in *Anheuser-Busch* itself, the Board justified its holding on the basis that "witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed." *See* 267 NLRB at 984.

> Bariuad's retaliating against her is simply an undocumented fabrication.

(ALJD at 10: 21-35).

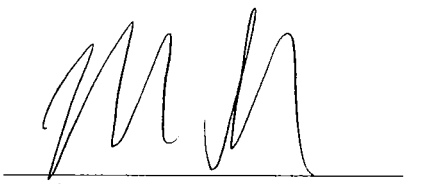
Since Respondent did not request that Ms. Hutton write a statement and thus did not provide Ms. Hutton with assurances of confidentiality prior to Ms. Hutton creating her statement, Ms. Hutton could not have relied on such assurances when drafting her statement. As Ms. Hutton did not rely on such assurances and could not have factored in such assurances prior to writing her statement, Ms. Hutton's statement should not be considered confidential within the meaning of *Anheuser-Busch* and Respondent has violated Section 8(a)(5) and (1) of the Act in refusing to provide the Union with Ms. Hutton's written statement.

III. Conclusion

For the reasons set forth above, it is respectfully submitted that Respondent failed to establish a plausible reason to adhere to the *Anheuser-Busch* blanket confidentiality rule in lieu of the more appropriate *Detroit Edison* balancing of interests approach. It is further submitted that Lynda Hutton's statement should not be considered a confidential witness statement within the meaning of *Anheuser-Busch*. Accordingly, Counsel for the Acting General Counsel respectfully asserts that the Board find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested witness statements under the *Detroit Edison* balancing of interests approach. Counsel for the Acting General Counsel further submits that under either standard, Respondent violated Section 8(a)(5) and (1) of the act by failing to provide the Union with Lynda Hutton's written statement.

DATED AT Oakland, California this 8th day of June, 2012.

Respectfully submitted,



Noah J. Garber
Counsel for the Acting General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Room 300N
Oakland, CA 94612-5224

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

AMERICAN BAPTIST HOMES OF THE WEST d/b/a PIEDMONT GARDENS **and** **THE SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS - WEST**	**Case 32-CA-063475**

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

I, the undersigned employee of the National Labor Relations Board, state under oath that on **June 8, 2012,** I served the above-entitled document(s) *electronically* upon the following persons, addressed to them at the following addresses:

David S. Durham, Esq.
Arnold & Porter LLP
7th Floor, Three Embarcadero Center
San Francisco, CA 94111-4024
VIA E-MAIL: david.durham@aporter.com

Gilbert J. Tsai, Esq.
Arnold & Porter LLP
7th Floor, Three Embarcadero Center
San Francisco, CA 94111-4024
VIA E-MAIL: gilbert.tsai@aporter.com

Manuel A. Boigues, Attorney
Weinberg, Roger, & Rosenfeld
1001 Marina Village Pkwy, Ste 200
Alameda, CA 94501-6430
VIA E-MAIL: mboigues@unioncounsel.net

Les Heltzer
Executive Secretary
1099 14th Street, N.W., Suite 11610
Washington, DC 20005
VIA E-FILE

June 8, 2012
Date

Frances Hayden, Designated Agent of NLRB
Name

Frances Hayden
Signature