Stephens Media, LLC, d/b/a Hawaii Tribune-Herald *and* Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL–CIO. Cases 37–CA–007043, 37–CA–007045, 37–CA–007046, 37–CA–007047, 37–CA–007048, 37–CA–007084, 37–CA–007085, 37–CA–007086, 37–CA–007087, 37–CA–007112, 37–CA–007114, 37–CA–007115, and 37–CA–007186

December 14, 2012

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On February 14, 2011, the National Labor Relations Board issued a Decision and Order in this case, finding that the Respondent committed numerous violations of Section 8(a)(1), (3), and (5) of the Act.[1] In addition, the Board severed the issue of whether the Respondent had a duty to furnish the Union with a statement given by employee Koryn Nako on October 19, 2005, or any other statements that the Respondent obtained in the course of its investigation of employee Hunter Bishop's alleged misconduct. On March 2, 2011, the Board invited the parties and interested amici to file briefs addressing the applicability of the Board's witness statement exception, and the attorney work-product privilege, to the Union's request for this information.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having reviewed the judge's decision and the record in light of the briefs filed by the parties and amici,[2] we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with Nako's statement, or with any other statements obtained in the course of its investigation.

Facts

On October 18, 2005,[3] David Bock, the editor of the Respondent's newspaper, asked Nako to accompany him to his office to discuss whether she had, that day, violated the Respondent's security access policy by admitting a union representative into the Respondent's facility.[4] As Nako began to walk to Bock's office, she asked Bishop, her union steward, to accompany her. Bishop followed Bock and Nako toward Bock's office. Along the way, Bishop and Bock argued about whether Nako was entitled to have a witness in the meeting. As they approached the office, Bock held firm to his refusal to allow Bishop to attend the meeting, and Bishop walked away.

The following day, Nako met with the Respondent's advertising director, Alice Sledge, and its circulation manager, Kathy Higaki. Sledge and Higaki arranged the meeting at the suggestion of the Respondent's attorneys. At this meeting, Sledge and Higaki asked Nako about the confrontation between Bock and Bishop. Nako recounted what had happened, and Sledge asked her to sign a short written account of the incident that Sledge had prepared during the meeting. Nako made several minor corrections and signed the document. At some undetermined time after the meeting ended, Sledge wrote on the top of the document, "prepared at the advice of counsel in preparation for arbitration."[5] At the time that Nako's statement was sought, no discipline had been imposed, nor had the contractual grievance procedure been invoked.

Later that day, the Respondent suspended Bishop without pay. It subsequently discharged him by letter dated October 27. The Union filed a grievance over the suspension and discharge. The Union had similarly grieved and arbitrated several prior disciplinary actions against Bishop.

On November 3, the Union requested that the Respondent furnish it, among other things, any information provided by employees whom the Respondent inter-

[1] 356 NLRB No. 63, enfd. 677 F.3d 1241 (D.C. Cir. 2012).

[2] The Respondent and the Acting General Counsel each filed a brief and reply brief. Amicus briefs were filed by: the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); the United Food and Commercial Workers International Union (UFCW); the National Small Business Association (NSBA); the Association of Corporate Counsel (ACC); and the Chamber of Commerce of the United States of America, Council on Labor Law Equality, and Society for Human Resource Management.

By Order dated May 24, 2012, the Board granted the Respondent leave to file a supplemental brief limited to addressing whether the Board should overrule the holding in *Anheuser-Busch*, 237 NLRB 982, 985 (1978), that the general duty to furnish information "does not encompass the duty to furnish witness statements themselves." The Respondent thereafter filed a supplemental brief. We have determined that it is unnecessary for us to reach this issue in light of our finding that the statement in this case is not covered by *Anheuser-Busch*.

[3] Unless otherwise indicated, all of the following dates are in 2005.

[4] In the original decision, the Board adopted the judge's finding that the Respondent violated Sec. 8(a)(1) by disparately and discriminatorily enforcing its security access policy against the Union, and by interrogating Nako about her alleged violation of the policy. The Board also found that the Respondent violated Sec. 8(a)(3) and (1) by issuing a written warning to Nako for her actions. See 356 NLRB No. 63, slip op. at 1 (2011).

[5] It is unclear how much time passed before Sledge wrote the phrase on the document. She testified only that she did so after Nako signed the statement.

viewed in its investigation of the October 18 incident involving Bishop. On November 15, the Union specifically requested Nako's statement from the Respondent. The Respondent refused to provide this information. The Union requested arbitration of the Bishop grievance on January 14, 2006.

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to provide Nako's statement to the Union. Citing *Anheuser-Busch*, supra, and *New Jersey Bell Telephone Co*., 300 NLRB 42 (1990), he rejected the Respondent's contention that the written statement was protected from disclosure, relying on the fact that the Respondent did not provide Nako any assurance that the statement would be kept confidential. The judge further found, contrary to the Respondent's contention, that the attorney work-product privilege did not apply to Nako's statement. For the following reasons, we agree with the judge's findings.

Witness Statement

In *Anheuser-Busch*, supra, the Board held that the general duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Anheuser-Busch* did not, however, clearly delineate what constitutes "witness statements." In subsequent decisions, the Board has addressed the parameters of such statements.

In *New Jersey Bell,* supra, the Board found that an employer's investigative reports, compiled in response to an individual's complaint, were not witness statements exempt from disclosure under *Anheuser-Busch*. Although it acknowledged that "*Anheuser-Busch* did not articulate a requirement that a statement be formally adopted or set forth in any particular manner in order to come within the witness statement exception," the Board nonetheless found that the reports did not constitute a witness statement because (a) "the [individual] did not review the reports, have them read to her at any time, or in any manner adopt them as a reflection of any statement . . . she may have made"; and (b) "the [individual] did not request and did not receive any assurance of confidentiality, unlike in *Anheuser-Busch*." Id. at 43.

A recent example of the Board's application of the *New Jersey Bell* definition of witness statements is found in *El Paso Electric Co.*, 355 NLRB 428, 457–458 (2010). There, the union requested from the employer any statements that it had taken during an investigation that led to an employee's suspension. The employer refused to provide the statements. Applying *New Jersey Bell*, the Board agreed with the judge that the requested statements were not protected from disclosure, because there was no evidence that witnesses had adopted the statements or were given assurances of confidentiality before providing them. Id. at 458 (also relying on *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240–241 (1978)).

Applying *Anheuser-Busch* as explicated in *New Jersey Bell,* we find, in agreement with the judge, that the document at issue is not exempt from disclosure as a witness statement. The record shows that although Nako reviewed the statement prepared by Sledge and signed it, she did not receive any assurance of confidentiality from the Respondent. The document therefore fails to meet the requirements necessary to exempt it from disclosure on this ground. See *El Paso Electric Co.*, supra.

Work Product

The judge also found no merit to the Respondent's contention that Nako's statement was privileged from disclosure as attorney work product. We agree.

In *Central Telephone Co. of Texas*, 343 NLRB 987 (2004), the Board drew upon principles enunciated in Federal court decisions in determining whether a document may qualify as attorney work product. The Board there observed that the work-product privilege "protects from disclosure written material prepared by a party or his representative in anticipation of litigation or for trial. The strong public policy underlying the work product doctrine is to aid the adversarial process by providing a certain degree of privacy to a lawyer in preparing for litigation." Id. at 988. The party asserting the privilege bears the burden of establishing that it prepared the requested documents in anticipation of litigation. *In re Grand Jury Proceedings v. U.S.*, 156 F.3d 1038, 1042 (10th Cir. 1998); *Hodges, Grant & Kaufman v. U.S.*, 768 F.2d 719, 721 (5th Cir. 1985). As explained in *Central Telephone*, supra at 988–989 (footnotes omitted; emphasis in original):

> The essential question in determining whether a document qualifies as work product is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *Senate of Puerto Rico v. U.S. Dept. of Justice*, 823 F.2d 574, 586 fn. 42 (D.C. Cir. 1987) (quoting 8 Charles Alan Wright & Arthur R. Miller,

> *Federal Practice and Procedure* § 2024 (1970)) (emphasis added). Work-product protection will be accorded where a "document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation." [*U.S. v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998).] In order to meet this standard, the party representative "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998). The prospect of litigation need not be actual or imminent; it need only be "fairly foreseeable." *Coastal States Gas. Corp. v. Dept. of Energy,* 617 F.2d 854, 865 (D.C. Cir. 1980).

It follows, therefore, that the work-product privilege does not apply to documents produced pursuant to routine investigations conducted in the ordinary course of business, as it is limited to those documents specifically created in anticipation of foreseeable litigation. Id. at 989.

Applying this analysis, we find that the Respondent has not met its burden of showing that it prepared Nako's statement because of the prospect of litigation, and that therefore her statement is not protected by the work-product privilege. Specifically, we find that the evidence presented in support, i.e. (a) Sledge's testimony that she met with Nako at the suggestion of the Respondent's attorneys, and (b) Sledge's handwritten note on Nako's statement that it was "prepared at the advice of counsel in preparation for arbitration," is insufficient to meet this burden.

First, Sledge's testimony, that she met with Nako at the suggestion of the Respondent's attorneys, does not demonstrate that she prepared Nako's statement because of the prospect of litigation. Indeed, it is at least equally plausible from this testimony that the meeting with Nako and the preparation of the document were simply part of a routine investigation conducted in the ordinary course of business. Significantly, Sledge did not testify that the Respondent's attorneys suggested that she prepare a written statement. Cf. *In re Sealed Case*, supra at 885–886 (finding subpoenaed documents to be privileged work product based on affidavits from employer's attorneys stating that they prepared the subpoenaed documents in anticipation of litigation); *EEOC v. Lutheran Social Services*, 186 F.3d 959, 968 (D.C. Cir. 1999) (finding that work-product privilege applied based on testimony from the employer's attorney and an affidavit from one of the employer's board members, both stating that subpoenaed documents were prepared in anticipation of litigation).

The Respondent contends that Bishop had a history of filing grievances over disciplinary actions and, indeed, the record shows that he pursued six grievance arbitrations in the previous 3 years. However, the Respondent presented no evidence that it, in fact, considered this grievance history in deciding to procure Nako's statement. In the absence of such evidence, we lack the factual basis to find that the Respondent sought Nako's statement in anticipation of litigation.

Second, Sledge's handwritten note, stating that Nako's statement was "prepared at the advice of counsel in preparation for arbitration," is also unavailing. Sledge acknowledged that she inserted this notation on the document at some unspecified point after her meeting with Nako, which could have been at any time prior to the hearing in this case.[6] It, therefore, does not evince the Respondent's motivation at the time that Nako's statement was prepared. In these circumstances, Sledge's note amounts to nothing more than a conclusory assertion of privilege that has little evidentiary value. See generally *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 381–382 (6th Cir. 2009), citing *U.S. v. Roxworthy,* 457 F.3d 590, 593 (6th Cir. 2006) ("application of the privilege will be rejected where the only basis for the claim is an affidavit containing conclusory statement[s]"). See also *Senate of Puerto Rico v. U.S. Dept. of Justice*, 823 F. 2d at 585 (same).

Accordingly, we find that the Respondent has not established by a preponderance of the evidence that Nako's statement qualifies as attorney work product. As Nako's statement also does not qualify as a witness statement exempt from disclosure, we find that the Respondent's failure to furnish the Union with this requested information violated Section 8(a)(5) and (1) of the Act as alleged.

ORDER

The National Labor Relations Board orders that the Respondent, Stephens Media, LLC, d/b/a Hawaii Tribune-Herald, Hilo, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[6] She further testified that she could not recall the specific time after the interview when she wrote this.

(a) Refusing to provide the Union, Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL–CIO, with employee Koryn Nako's October 19, 2005 statement, or any other statements that it obtained in the course of its investigation of employee Hunter Bishop's alleged misconduct on October 18, 2005.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner Nako's October 19, 2005 statement, and any other similar statements that it obtained in the course of its investigation of Bishop's alleged misconduct on October 18, 2005.

(b) Within 14 days after service by the Region, post at its facility in Hilo, Hawaii, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 14, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide the Union, Hawaii Newspaper Guild Local 39117, Communications Workers of America, AFL–CIO, with employee Koryn Nako's October 19, 2005 statement, or any other statements that we obtained in the course of our investigation of employee Hunter Bishop's alleged misconduct on October 18, 2005.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union in a timely manner Nako's October 19, 2005 statement, and any other similar statements that we obtained in the course of our investigation of Bishop's alleged misconduct on October 18, 2005.

STEPHENS MEDIA, LLC, D/B/A HAWAII TRIBUNE-HERALD