

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

37-CA-7043, et al.

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations files this brief in response to the request of the National Labor Relations Board for *amicus* briefs addressing the scope of the duty to disclose witness statements relevant to the processing of grievances under a collective bargaining agreement. We submit that the Board should overrule its decision in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), to the extent that it creates a categorical witness exception to the duty to disclose relevant information under *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). *See Fleming Companies, Inc.*, 332 NLRB 1086, 1088-91 (2000) (concurring opinion). We also suggest that the Board clarify that statements given by employees who are being represented by their union in the grievance procedure must be provided even if the employer took the statements in preparation for litigation. *See Fed. R. Civ. Proc.* 26(b)(3)(C) (“Any party or other person may, on request and without [any] showing [of

need], obtain the person's own previous statement about the action or its subject matter.").

1. The witness statement at issue in this case was given by Koryn Nako to one of the Hawaii *Tribune-Herald's* managers on October 19, 2005. One week later, Nako was disciplined by the *Tribune-Herald*. In the course of representing Nako with regard to a grievance filed over her discipline, the Hawaii Newspaper Guild requested a copy of any statement she had given to the *Tribune-Herald*. The *Tribune-Herald* refused to provide the Guild with a copy of Nako's statement, asserting that the union was not entitled to the witness statement under *Anheuser-Busch* and additionally that the statement was protected by attorney work product privilege. Six years later, the parties are still litigating over the production of Nako's obviously relevant and obviously nonconfidential statement.

"As part of its statutory obligation to bargain collectively... [an employer] is required to provide information that is needed by the bargaining representative for the proper performance of its duties. This obligation extends to information needed for the processing of grievances." *NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 150 (3d Cir. 1991) (citations and quotation marks omitted).

The Supreme Court has observed that providing unions with information relevant to the processing of grievances not only aids the union in representing grievants but allows it to "sift out unmeritorious claims." *Acme Industrial*, 385 U.S. at 438. Sifting out meritless grievances allows "[a]rbitration [to] function properly," because "if all

claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened.” *Ibid.*

As the circumstances of this case demonstrate, witness statements can be highly relevant to the processing of grievances. The Newspaper Guild was representing Koryn Nako and another *Tribune-Herald* employee who had been disciplined by the Newspaper for closely related incidents. There is no question that the contents of Nako’s statement regarding those incidents could be highly relevant to the Guild’s decision whether to arbitrate either of the grievances and would be highly relevant to the case presented if the Guild did take one or both grievances to arbitration.

The *Tribune-Herald* does not deny that Nako’s statement would be highly relevant to the Newspaper Guild’s handling of the two grievances. Rather, the Newspaper seeks to take advantage of “a Board created exception to the *Acme Industrial* rule” to the effect “that the duty to provide a union with information related to a pending grievance does not extend to witness statements.” *New Jersey Bell Telephone*, 936 F.2d at 150, citing *Anheuser-Busch*, *supra*.

In *Anheuser-Busch*, the Board held that “the ‘general obligation’ to honor requests for information, as set forth in *Acme* and related cases, does not encompass the duty to furnish witness statements themselves.” 237 NLRB at 984-85. The Board’s ruling rested on the premise that “[w]itness statements . . . are fundamentally different from the types of information contemplated in *Acme*, and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information.” *Id.*

at 984. The Board explained that the “premature release” of witness statements creates a “risk that employers, or in some cases, unions will coerce or intimidate employees and others who have given statements” and “that witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed at least until after the investigation and adjudication are complete.” *Ibid* (quotation marks and citation omitted).

To the extent there is any “risk that employers, or in some cases, unions will coerce or intimidate employees and others who have given statements” or that potential disclosure will make witnesses “reluctant to give statements,” the exact same risks would seem to arise from the disclosure of the witnesses’ identities and the substance of their statements. The vengeful employers and unions do not need to know the witnesses’ exact words in order to decide on a course of retaliation; all they need to know is the witnesses’ identities and the substance of their testimony. But the Board has never suggested that the latter should be categorically exempted from disclosure under *Acme Industrial*. Indeed, the *Anheuser-Busch* decision itself recognizes that the identities of those who have given statements and the substance of what they said are generally subject to disclosure. 237 NLRB at 984 ns. 4 & 5. *See, e.g., Northern Indiana Public Service Co.*, 347 NLRB 210, 214 (2006); *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999).¹

¹ It has been suggested that “[t]he foundation of the *Anheuser-Busch* holding was the Supreme Court’s decision in *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-40 (1978).” *New Jersey Bell Telephone*, 936 F.2d at 150. The principal basis for the *Robbins Tire & Rubber* decision, however, was a close examination of the legislative history of the Freedom of Information Act. 437 U.S. at

This is not to say that disclosure of witness statements can never raise confidentiality concerns that would justify restricting or even denying production. But, precisely because such concerns are not “fundamentally different” from similar concerns that occasionally arise with the disclosure of other materials, confidentiality concerns regarding the disclosure of witness statements should be handled in the same manner as confidentiality concerns regarding, for example, the disclosure of witnesses’ identities. In other words, “the Board [should] balance a union’s need for the information against any ‘legitimate and substantial’ confidentiality interests established by the employer.”

Pennsylvania Power Co., 301 NLRB 1104, 1105 (1991).

In this case, the balance of interests obviously favors disclosure. The statement at issue was given by a Newspaper Guild shop steward, who the Guild was representing in the grievance procedure. Knowing the contents of the grievant’s statement is obviously relevant to the Guild’s representation of the employee. And, there is not the slightest risk that she would be subject to coercion at the hands of the Guild if a copy of her statement is produced. In contrast with this straightforward balancing of interests, *Anheuser-Busch* requires litigation over whether the statements in question are actually those of the witnesses and not merely “the handiwork of the [employer’s] officials” and whether the witnesses “receive[d] an[] assurance of confidentiality.” *New Jersey Bell Telephone Co.*,

224-36. That legislative history has nothing to do with the duty to produce information under *Acme Industrial*, a precedent that was not even cited in *Robbins Tire & Rubber*. The Freedom of Information Act, moreover, requires the disclosure of information to the general public, while *Acme Industrial* involves the disclosure of information between

300 NLRB 42, 43 (1990). *See, e.g.*, Slip op. 24 (finding that no assurance of confidentiality had been given to Nako).

In sum, the witness statement exception adopted in *Anheuser-Busch* has no basis in law or logic and has the effect of producing wasteful litigation over the disclosure of information that is indisputably relevant to the processing of grievances. The Board should overrule that decision insofar as it creates a categorical witness statement exception to the general duty to disclose information relevant to collective bargaining.

2. The Board has recognized that certain information can be exempt from disclosure under *Acme Industrial* on the ground that it “is confidential because it was prepared in anticipation of litigation,” *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), i.e., because the information constitutes “attorney work product.” As with other claims of confidentiality, the party asserting that material was prepared in anticipation of litigation has the burden of proof. *Id.* at 1073.

The administrative law judge found that the *Tribune-Herald* failed to prove that Nako’s statement was prepared in anticipation of litigation. Slip op. 24. This finding is clearly correct. The only evidence presented by the *Tribune-Herald* in this regard was testimony to the effect that the meeting at which Nako gave the statement was held “at the suggestion of our attorneys” and that the legend “Prepared at the advice of Counsel in preparation for arbitration” was placed at the top of Nako’s statement some time after she signed it. Tr. 1141 & 1145. The testimony concerning the meeting does not mention the

parties to a collective bargaining relationship and only where the information is relevant

possibility of litigation. And, the after-the-fact characterization of Nako's statement does not prove that it was prepared in anticipation of litigation, as the witness does not even adopt the characterization as true.

Even if the *Tribune-Herald* had established that Nako's statement was prepared in anticipation of litigation, it would still have been necessary to "balance the [Newspaper's] confidentiality interests against the Union's need for the requested information in determining whether the Act requires its disclosure." *Ralphs Grocery Co.*, 352 NLRB 128, 129 (2008). And, the fact that the Newspaper Guild was representing Nako in the grievance procedure would have decisively tipped the balance in favor of disclosure.

As the Board has observed, the confidentiality rules regarding disclosure of materials prepared in anticipation of litigation are codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. *Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004). Rule 26(b)(3) provides categorically that a "person may, on request and without [any] showing [of need], obtain the person's own previous statement." Fed. R. Civ. Proc. 26(b)(3)(C). Indeed, "a party[']s affirmative right to production of his own statements," *Miles v. M/V Mississippi Queen*, 753 F.2d 1349, 1351 (5th Cir. 1985), is so well-established that the refusal of such a request is subject to sanctions under the Federal Rules. *See* Fed. R. Civ. Proc. 26(b)(3)(C) ("If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses.").

The fact that the Newspaper Guild was seeking disclosure of Nako's statement in

to collective bargaining. *See Fleming Companies*, 332 NLRB at 1089.

connection with representing her in the grievance procedure requires that the statement be produced regardless of whether the statement had been prepared in anticipation of litigation. This is a common situation, as it frequently occurs that the statements requested by a union were made by an employee whom the union represents. That being so, it would greatly facilitate disclosure under *Acme Industrial* and reduce the amount of litigation under that decision for the Board to expressly recognize “a party[’s] affirmative right to production of his own statements,” *Miles*, 753 F.2d at 1351, in these circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 1, 2011, I caused to be served a copy of the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* by electronic mail or fax on the following:

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