

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

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

and)

HAWAII NEWSPAPER GUILD)
LOCAL 39117, COMMUNICATIONS)
WORKERS OF AMERICA, AFL-CIO)

Case 37-CA-7043, et al.

**BRIEF OF THE UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL
UNION AS AMICUS CURIAE**

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I. INTRODUCTION

The United Food and Commercial Workers International Union (UFCW), as amicus curiae, hereby submits this brief in response to the National Labor Relations Board's (Board's) March 2, 2011 Notice and Invitation To File Briefs in this case. The UFCW is a labor organization with approximately 480 local union affiliates and 1.3 million members throughout North America.

As reflected in the Notice and Invitation To File Briefs, the Board severed "the question of whether the Respondent had a duty to provide the Union 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." *Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011), slip op. at p. 3. The Board framed the issues raised by this case as follows:

Board precedent establishes that the duty to furnish information "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000), quoting *Anheuser-Busch, Inc.*, 237 NLRB 982, 985 (1978). Compare *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (employer notes of investigatory interviews of employees held confidential). This case illustrates, however, that Board precedent does not clearly define the scope of the category of "witness statements." This case also illustrates that the Board's existing jurisprudence may require the parties as well as judges and the Board to perform two levels of analysis to determine whether there is a duty to provide a statement: first asking if the statement is a witness statement under *Fleming* and *Anheuser-Busch* and then, if the statement is not so classified, asking if it is nevertheless attorney work product. *Id.*

For the reasons stated below, the Board should overrule *Anheuser-Busch*, *Fleming Cos.* and like cases, and adopt then-Member Liebman's and Member Fox's concurring opinion in *Fleming Cos.*, which would resolve confidentiality concerns over furnishing witness statements by applying the balancing test set forth by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1976). In applying the balancing test, the Board should first require employers to

prove that employee witness statements requested by a union were provided to the employer confidentially and their disclosure would present a real risk of serious harm to the witnesses. If the employer makes this showing, the Board should then require the employer to meaningfully accommodate the union's need for the statements by offering to provide the statements to those union agents who are involved in or assisting with a grievance or dispute, provided the union agents are willing to enter into an appropriate and reasonable confidentiality agreement if necessary to safeguard the employee witness. In addition, the Board should apply the attorney work product privilege in a manner that is faithful to the public policy underlying the privilege but affords unions meaningful access to employee witness statements covered by the privilege. In this case, the Board should affirm the Administrative Law Judge's conclusion that the employer unlawfully refused to furnish the union with the requested witness statements.

II. STATEMENT OF FACTS RELEVANT TO THE ISSUES

A. The Nako and Bishop Discipline

Koryn Nako is a circulation clerk and Hunter Bishop is a reporter for the Hawaii Tribune-Herald. In October 2005, they both served as shop stewards for Hawaii Newspaper Guild Local 39117. On October 18, 2005, union representative Ken Nakakura called Nako and said he needed to see her. Nako let Nakakura into the employer's facility and they met in the employee breakroom, where they were joined by Bishop. A short time later, the employer's editor, David Bock, came into the breakroom and asked who let Nakakura in. Nako said that she did. Bock told Nakakura he wasn't allowed in the building and escorted him out. 356 NLRB No. 63, ALJD, slip op. at pp. 6, 7.

Bock then returned to the breakroom and told Nako he wanted to speak to her in his office. Another employee asked Bishop if someone should go with Nako. Nako looked at Bishop and said "Okay," and Bishop followed her. Bock told Bishop, "This does not involve you."

Bishop repeatedly asked, firmly but without yelling at Bock, if discipline was involved and Bock repeatedly responded that it was none of Bishop's business. Bishop left but told Nako to get him if during the meeting she needed someone present. In response to Bock's question, Nako said she let Nakakura into the building so he could pick up a note from her. Bock said the union needed permission to come into the building, and Nako should be aware of this policy because it had been sent to the union. *Id.* at pp. 7-9.

The next day, October 19, 2005, the employer's circulation manager, Kathy Higaki, and its advertising director, Alice Sledge, called Nako into a meeting and asked her what happened yesterday. When Nako began explaining, Sledge said they were only interested in the conversation between Bishop and Bock. After Nako explained what she had heard, Sledge asked Nako to sign a short statement Sledge prepared and Nako signed the statement after making a few additions. *Id.* at pp. 7-8. There is no evidence cited in the Administrative Law Judge's decision to support the employer's argument that the Nako statement was prepared in anticipation of litigation at the direction of counsel. *Id.* at p. 24.

Also on October 19, 2005, Bock called Bishop into his office and suspended him for being insubordinate the day before. Bock said Bishop had previously been warned about being insubordinate and that there would be a further investigation. *Id.* at p. 9.

On October 21, 2005, circulation director William Crawford questioned Nako concerning what happened on October 18. Bock and an employee witness were present during the interview. Nako explained what happened, told Crawford – in response to his question – that the note she gave Nakakura concerned union business, and admitted knowing that the employer had a building security policy prohibiting nonemployees from entering its property without management approval but said she didn't know it applied to union officials until her October 18

meeting with Bock. On October 26, Nako received a written warning for allowing Nakakura into the building without management permission. Id. at p. 8.

On October 29, 2005, Bishop received a letter from Bock stating that he had been terminated because of his alleged misconduct on October 18. Id. at p. 9.

B. The Information Requests

The union filed grievances over Nako's written warning and Bishop's termination and requested that the employer furnish it with certain information concerning the grievances. Regarding Nako's grievance, the union requested any company policies Nako violated, Nako's statement given to Sledge, and any material the employer considered in disciplining Nako. Initially, the employer refused to provide any information, but it subsequently furnished a February 17, 2004 letter from the publisher to the union's administrator regarding union access to the facility and a March 3, 2004 memo to employees concerning internal security procedures. Id. at pp. 12-13, 23.

Regarding Bishop's grievance, the union initially sought all information considered by the employer in making its decision to discipline Bishop, and later requested the following information: 1. What Bishop did that caused the employer to suspend and terminate him; 2. Copies of the policies Bishop violated; 3. The names of employees who witnessed the event; 4. The names of employees interviewed in the course of any investigation in the Bishop discipline and the information the employee provided; 5. Bishop's personnel file. The employer provided Bishop's termination letter and personnel file but refused to provide any other information. Id. at pp. 12, 23.

In defending against the §8(a)(5) allegations of the complaint, the employer argued that the union is not entitled to witness lists or witness statements under *Anheuser-Busch*, 237 NLRB 982 (1978), and that the union is not entitled to Nako's statement since it is protected by the

attorney work product privilege. More generally, the employer contended that it timely furnished the union with all information to which it was entitled, the union had all the information it needed to process Bishop's grievance, and the union's information requests amount to pre-arbitration discovery. *Id.* at p. 23.

III. ARGUMENT

A. Legal Background

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5), imposes on an employer a "general obligation" to furnish a union with relevant information necessary to the union's proper performance of its duties as the collective bargaining representative of its employees. This includes information that the union needs to determine whether the employer breached the collective bargaining agreement and whether to take a grievance to arbitration absent settlement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). As the Supreme Court observed in *Acme*:

Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. *Id.* at 438 (footnote omitted).

In *Anheuser-Busch*, *supra*, the Board broadly held, "without regard to the particular facts of th[e] case, . . . 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." 237 NLRB at 984-85. In doing so, the Board relied heavily on the Supreme Court's decision in *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978), decided two months earlier. The issue in *Robbins* was whether the Board was required to disclose, prior to an unfair labor practice hearing, affidavits of witnesses whom the Board intended to call to testify, pursuant to a request

brought under the Freedom of Information Act (FOIA). Concluding that production of the affidavits would “interfere with enforcement proceedings” within the meaning of FOIA’s Exemption 7(a), 5 U.S.C. §552(b)(7)(A), the Court cited the risk that “employers, or in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all,” 437 U.S. at 239, and a concern that without assurances that their statements won’t be disclosed unless they’re called to testify, potential witnesses will be reluctant to “get too involved.” Id. at 240.

The *Anheuser-Busch* Board, noting that the employer had given employees who witnessed altercations between the grievant and co-workers assurances of confidentiality in order to obtain their statements, concluded that the same underlying considerations present in *Robbins Tire* applied “and that requiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process.” 237 NLRB at 984. The Board did hold, however, that an employer has a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined, reaffirming its decision in *Transport of New Jersey*, 233 NLRB 694 (1977). 237 NLRB at 985 n. 5. In *Transport of New Jersey*, the Board had ordered the employer to furnish the union with the names and addresses of witnesses to an accident which the union needed to process a grievance. Finding unpersuasive the employer’s argument that providing this information would expose the witnesses to improper harassment, the Board thought that the danger of witness harassment was “at most speculative” and the likelihood of harassment was “substantially outweighed” by the union’s need for the information. 233 NLRB at 695.

Transport of New Jersey seemingly anticipated the Supreme Court’s decision in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In *Detroit Edison*, the union filed a grievance over

employees who were denied promotions based on the results of an employee aptitude test, and requested certain information in order to prepare for arbitration, including the test questions, employees' answers, and their test scores. The employer refused to provide this information, maintaining that its confidentiality was essential to insure the integrity of the tests and to protect the employees' privacy interests. Although the employer offered to release the scores of employees who signed a waiver of confidentiality, the union declined to seek such waivers. The Board ordered the employer to furnish the requested information but the Supreme Court disagreed, holding that the employer's demonstrated confidentiality interest must be balanced against the union's need for the requested information. The Court, believing that the employer satisfied its obligations under §8(a)(5) by offering to disclose the test scores "only upon receipt of consents from the examinees," *id.* at 317, concluded:

In light of the sensitive nature of testing information, the minimal burden that compliance with the Company's offer would have placed on the Union, and the total absence of evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities, we are unable to sustain the Board in its conclusion that the Company, in resisting an unconsented-to disclosure of individual test results, violated the statutory obligation to bargain in good faith. *Id.* at 319-20 (citation omitted).

Following *Detroit Edison*, the Board has applied the Supreme Court's balancing-of-interests test whenever a party asserting confidentiality satisfactorily demonstrates a legitimate and substantial confidentiality interest in response to a request for information other than witness statements.¹ Under this test, the party asserting the confidentiality interest has the burden of demonstrating that interest and that disclosure of the confidential information poses serious risk of adverse consequences. If the burden is met, the Board must balance the party's interest in

¹ The types of information that give rise to a confidentiality interest include highly personal information such as personal medical information or psychological test results, substantial proprietary information such as trade secrets, the identity of witnesses or similar information that the party asserting confidentiality demonstrates would likely lead to their harassment or retaliation, and traditionally privileged information such as documents prepared for pending or anticipated litigation. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995).

confidentiality against the requesting party's need for the information. However, the party meeting this burden has "an obligation to come forward with some offer to accommodate both its concerns and the [other party's] legitimate needs for relevant information." *Metropolitan Edison Co.*, 330 NLRB 107, 107 (1999). This "is often done by making an offer to release information conditionally or by placing restrictions on the use of that information." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998) (citations omitted). If the party fails to seek an accommodation and then refuses to provide the requested information, a §8(a)(5) violation should be found. *Id.* at 21; *Northern Indiana Public Service Co.*, 347 NLRB 210, 218 (2006) (Liebman, dissenting); *Mission Foods*, 345 NLRB 788, 791-92 (2005). Whether the accommodation offered is an appropriate one depends on the particular facts and circumstances of each case. See, e.g., *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1106-07 (1991).

Where witness statements have been requested, the Board, rather than engage in balancing, has continued to follow *Anheuser-Busch* and hold that witness statements are privileged from disclosure. See, e.g., *Fleming Cos.*, 332 NLRB at 1087; *Boyertown Packaging Corp.*, 303 NLRB 441, 444 (1991); *Manchester Health Center, Inc.*, 287 NLRB 327, 346 (1987), remanded on other grounds 861 F.2d 50 (2d Cir. 1988), on remand 295 NLRB 525 (1989). Cf. *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), *enfd.* 936 F.2d 144 (3rd Cir. 1991) (report prepared by employer's security representative that was not read to or adopted by a witness who did not request and receive any assurance of confidentiality was not a statement under *Anheuser-Busch*).

In their concurring opinion in *Fleming Cos.*, then-Member Liebman and Member Fox argued that *Anheuser-Busch* created an overly broad exception to the general statutory obligation to provide information relating to the duty to bargain. 332 NLRB at 1088-91. They advocated resolving any confidentiality concerns presented by a request for witness or informant statements

by using the *Detroit Edison* balancing test for information requests raising serious confidentiality concerns, the test that the Board uses to decide confidentiality issues in other contexts. *Id.* at 1090, citing *Postal Service*, 306 NLRB 474 (1992) (names of witnesses to drug transactions); *Pennsylvania Power & Light Co.*, *supra* (names and addresses of informants providing probable cause for employee drug testing); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), *enfd.* sub nom. *Oil, Chemical & Atomic Workers Local No. 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983) (trade secrets).

B. The Board Should Overrule *Anheuser-Busch* and Apply the *Detroit Edison* Balancing Test Consistent With the Concurring Opinion in *Fleming Cos.*

The concurring opinion in *Fleming Cos.* is persuasive. For the reasons stated therein, the Board should overrule *Anheuser-Busch* and its progeny and use the *Detroit Edison* balancing test to resolve disputes over requested witness statements where the party asserting confidentiality demonstrates that the witness requested and was promised confidentiality as a condition for providing the statement and its disclosure would present a risk of serious consequences.

Anheuser-Busch placed undue reliance on *Robbins Tire*, involving FOIA's prohibition against disclosure of witness statements in public law enforcement proceedings. In contrast with the policies underlying FOIA's Exemption 7(a), not only is there no labor law policy against the pre-arbitral exchange of information, the duty to bargain encourages the parties to exchange information concerning the strength or weakness of grievances to avoid the arbitration of unmeritorious claims. *Fleming*, 332 NLRB at 1089 (concurring opinion), citing *Acme*, 385 U.S. at 438.

In addition, witness intimidation is less likely to occur where parties resolve their disputes through a collectively bargained grievance-arbitration procedure rather than through unfair labor practice proceedings because the employer is non-union and/or there is no contractual dispute resolution procedure in place. See *Fleming*, 332 NLRB at 1089 (concurring

opinion). In any event, the Board should not presume that witness intimidation routinely occurs in grievance-arbitration proceedings and then rely on that presumption to justify an absolute rule against requiring the production of witness statements. Such a presumption is inconsistent with other legal rules, such as the rule requiring employers to provide unions with the names and addresses of strike replacements unless the employer makes a specific evidentiary showing of danger that the replacements will be harassed or coerced. *Id.*, citing *United Aircraft Corp.*, 181 NLRB 892, 903 (1970), *enfd.* 434 F.2d 1198 (2d Cir. 1970), *cert. denied* 401 U.S. 993 (1971).

As the concurring opinion in *Fleming* compellingly observed, “[i]t is not readily apparent . . . why the ‘speculative nature of the dangers of harassment is greater’” in the case of witness statements than in the case of witness names. 332 NLRB at 1089-90. Yet the Board has long required production of witness names, absent specific proof that such production would lead to harassment. *Anheuser-Busch*, 237 NLRB at 984 n. 5 (reaffirming *Transport of New Jersey*); *Metropolitan Edison Co.*, 330 NLRB at 109; *New England Telephone Co.*, 309 NLRB 196, 196 (1992). *Cf. Pennsylvania Power & Light*, 301 NLRB at 1107 (employer who presented specific proof of potential for harassment not required to disclose informants’ identity, but Board concluded that a summary of their statements should be provided); *Mobil Oil Corp.*, 303 NLRB 780, 781 (1991) (same). Indeed, it seems less likely that witnesses would be bothered if the requesting party to a collective bargaining agreement received copies of their statements (subject to appropriate restrictions on disclosure) than merely their names, since then the requesting party would often not need to contact the witness and disclosure of the statements would often facilitate settlement or withdrawal of the grievance.

In sum, the Board should resolve confidentiality issues raised by a party’s request for witness statements the same way it resolves such issues raised by a request for interview notes, reports and similar non-attorney employer work product: by using the *Detroit Edison* balancing

test. *Metropolitan Edison Co.*, 330 NLRB at 107-08; *Detroit Newspaper Agency*, 317 NLRB at 1071, 1074. This approach, requiring the parties to attempt to work out their differences, would facilitate rather than interfere with investigations of workplace misconduct, since both employers and unions have an interest in getting at the truth and ensuring compliance with the collective bargaining agreement. See *Northern Indiana Public Service Co.*, 347 NLRB at 215 (2006) (Liebman, dissenting).

Application of the *Detroit Edison* balancing test presupposes that the party asserting confidentiality in a witness statement has demonstrated a legitimate confidentiality interest in the statement and a real risk of harm to the witness if the statement is disclosed. If a witness provides a statement without asking for and receiving an assurance of confidentiality as a condition for providing the statement, the party in possession of the witness statement has no legitimate confidentiality interest in the statement. *Hawaii Tribune-Herald*, 356 NLRB No. 63, ALJD at p. 24; *Fleming Cos.*, 332 NLRB at 1090 (concurring opinion). Cf. *Anheuser-Busch*, 237 NLRB at 982 (witnesses who provided statements “had been told their identities would not be disclosed”). In this circumstance, there is no need for the Board to engage in any balancing. Rather, the party requesting the witness statement should be entitled to receive a copy of the statement if it is relevant to the grievance.

Where a witness statement is subject to a legitimate confidential interest, the Board should require the party asserting confidentiality to demonstrate that the witness requested confidentiality, and that it assured the witness that the statement would be kept confidential at least unless and until the witness is required to testify at a hearing. Without this showing, unilateral employer assurances of confidentiality should not be deemed sufficient to insulate a witness statement from production. Otherwise, employers could too easily promise confidentiality “in order to . . . frustrate subsequent Union attempts to process employee

grievances.” *Detroit Edison*, 440 U.S. at 319. Beyond that concern, an employer’s “unconditional promise of confidentiality seems unrealistic in a business setting where collective-bargaining duties,” “public interests in disclosure of information,” and “other legal requirements may collide with the promise.” *Northern Indiana Public Service Co.*, 347 NLRB at 217 n.12 (Liebman, dissenting). For these reasons, the Board has rightly been reluctant “to allow an interviewer’s promise of confidentiality to trump a union’s right to obtain relevant information.” *Id.* at 215 n.3. Accord, *Postal Service*, 332 NLRB 635, 637 (2000).

Moreover, an integral part of the balancing test is the requirement that the party asserting confidentiality has the affirmative obligation to come forward with an offer to accommodate the requesting party’s need for the witness statement with its legitimate confidentiality concerns. The Board should require that the accommodation offered must be reasonable and substantial, at least when an employer is the party asserting the confidentiality interest. Employers typically: conduct the initial investigation into the incident giving rise to the grievance; are better able than unions, given the power they exercise over their employees, to secure cooperation from employee witnesses; have far more resources at their disposal than unions; and impose restrictions on union access to their workplace. Thus, employers have a distinct advantage over unions when it comes to investigating the incident that precipitates a grievance-arbitration proceeding. Absent a meaningful accommodation of a union’s request for witness statements, the union, which owes a grievant the duty to try to obtain all the information it can to properly evaluate the grievance so as not to process it in a “perfunctory fashion,” *Vaca v. Sipes*, 386 U.S. 171, 191, 194 (1967), may end up having to expend considerable resources taking a grievance to arbitration without having the information necessary to properly assess the grievance’s merits. *Anheuser-Busch*, 237 NLRB at 989.

It may be that in unusual cases, an offer to provide written summaries of witness statements may constitute a proper accommodation. See, e.g., *Pennsylvania Power & Light Co.*, supra. However, in the typical case not involving such factors as extraordinary safety concerns, an ongoing criminal investigation or specific proof of danger that witnesses will be harassed or retaliated against if their identities are disclosed, the UFCW submits that the employer should be required to accommodate the union's need for witness statements by offering to give the statement only to those union agents who are involved or assisting with a grievance or dispute, on the condition that they won't disclose the statement or its contents except as necessary to evaluate or process a grievance and are willing, if necessary, to enter into a reasonable and appropriate confidentiality agreement. Without the witness statements, the union is in no position to assess the witnesses' credibility and likely cannot effectively assess the relative strength or weakness of the grievance.

Any concerns that the union agents in the group involved or assisting with the grievance cannot be trusted not to disclose the witness statements or their contents to the grievant, other union members, or outsiders are overblown. Such concerns ignore the fiduciary nature of the relationship between a union and all the employees in the bargaining unit. *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 74 (1991); see also *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97, 107 (D.N.J. 1994) ("The circuit courts have uniformly agreed that the union's duty of fair representation is a fiduciary responsibility"). The relationship between union and represented employee has been likened to that between attorney and client, and between trustee and trust beneficiary. *O'Neill*, 499 U.S. at 74-75 (citations omitted). Indeed, as the Board has previously explained, union agents, "by virtue of their legal duty of fair representation, may not, in bad faith, reveal or misuse the information obtained in an employee interview. [Their] fiduciary duty to all unit employees," and their "continuing interest in having an amicable relationship with the

employer,” “helps to assure confidentiality for the employer.” *IBM Corp.*, 341 NLRB 1288, 1293 (2004). Surely, in view of these considerations and the prospect of their being sanctioned for breaching a confidentiality agreement, union agents can reasonably be expected to hold in confidence information that if disclosed could lead to witness harassment or retaliation.

C. The Board Should Accord Proper Protection to Attorney Work Product Without Unduly Restricting Union Access to Employee Witness Statements

Application of the *Detroit Edison* balancing test is not the end of the inquiry where the party in possession of the witness statement claims, as the employer has in this case, that the requested witness statement is privileged from disclosure under the attorney work product doctrine. In analyzing such claims, the Board generally applies the rules governing the attorney work product doctrine that have developed in civil cases. See, e.g., *Central Telephone Co. of Texas*, 343 NLRB 987 (2004).² As *Central Telephone* illustrates, however, Board members do not always agree how to apply those work product rules to the facts of the particular case.

First recognized by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947) and later codified in Federal Rule of Civil Procedure 26(b)(3), the attorney work product privilege protects from disclosure written material prepared by a party or the party’s representative in anticipation of litigation. The primary focus of the privilege is to protect from disclosure “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” F.R.C.P. 26(b)(3)(B). Attorney work product that does not contain mental impressions, conclusions, opinions or legal theories may be obtained in discovery if the party seeking the documents shows it “has substantial need of the materials in preparation of his case and . . . is unable without undue hardship to obtain the substantial equivalent by other means.” F.R.C.P. 26(b)(3)(A).

² Cf. *General Dynamics Corp.*, 268 NLRB 1432 (1984). Subsequent Board decisions have questioned the continuing validity of *General Dynamics*. See, e.g., *Central Telephone Co. of Texas*, 343 NLRB at 990 n.6. Cf. *BP Exploration (Alaska), Inc.*, 337 NLRB 887, 889 (2002) (attorney-client privilege case).

The D.C. Circuit and at least six other circuits frame the basic issue in determining whether a document qualifies as attorney work product as “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 n.42 (D.C. Cir. 1987) (citation omitted). Cf. *U.S. v. Davis*, 636 F.3d 1028, 1042 (5th Cir.), cert. denied 454 U.S. 862 (1981) (in Fifth Circuit, document is attorney work product only if “the primary motivating purpose” behind its creation was to aid in possible future litigation). The attorney or other 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).

However, documents “prepared in the ordinary course of business” or for other “non-litigation purposes” fall outside of the privilege even if they might ultimately be used to assist in litigation. F.R.C.P. 26(b)(3), advisory committee’s note (1970 Amendment). “There is consensus in the case law that the mere possibility of litigation is insufficient to warrant a reasonable anticipation of litigation.” *Nicklasch v. JLG Industries*, 193 F.R.D. 570, 572 (S.D. Ind. 1999). “[A]t the very least some articulable claim, likely to lead to litigation, [must] ha[ve] arisen” when the documents were prepared. *Binks Mfg. Co. v. National Presto Industries*, 709 F.2d 1109, 1119 (7th Cir. 1983).

The party asserting the work product privilege bears the burden of proving that the documents were prepared in anticipation of litigation. *In re Grand Jury Proceedings*, 156 F.3d 1038, 1042 (10th Cir. 1998). And, “[b]ecause work product protection by its nature may hinder an investigation into the true facts, it must be narrowly construed consistent with its purpose.” *Central Telephone Co. of Texas*, 343 NLRB at 991 (Walsh, dissenting), citing *Stout v. Illinois Farmers Ins. Co.*, 150 F.R.D. 594, 602 (S.D. Ind. 1993).

Employer work product not obtained or prepared in anticipation of litigation is not subject to protection under the attorney work product privilege.³ *Detroit Newspaper Agency*, 317 NLRB at 1072-73; see also *New Jersey Bell Telephone Co.*, 300 NLRB at 43 and cases cited therein. Such work product, if protected from disclosure at all, is protected under the *Detroit Edison* balancing test if the employer has demonstrated a legitimate confidentiality interest therein. *Detroit Newspaper Agency*, 317 NLRB at 1072.

Witness statements are among the “documents and tangible things” that may constitute attorney work product if prepared in anticipation of litigation. F.R.C.P. 26(b)(3)(A); *In re Sealed Case*, 146 F.3d at 884. However, unlike an attorney’s notes, memoranda and investigative reports, non-party witness statements contain “factual information” rather than the “mental impressions and legal theories of counsel.” *Dobbs v. Lamonts Apparel, Inc.*, 155 F.R.D. 650, 652-53 (D. Alaska 1994). Moreover, Federal Rule of Civil Procedure 26(b)(3) treats witness statements differently than other attorney work product. The rule allows any party or other person to routinely obtain, upon request, the party’s or person’s own previous statement concerning the matter in question from the party in possession of the previous statement. F.R.C.P. 26(b)(3)(C).⁴ While the rule does not explicitly give a party to litigation the right to obtain a copy of an ordinary witness’s statement without the usual showing required for attorney work product, “[p]owerful arguments have been made that all statements of witnesses should be routinely discoverable.” 8 Wright, Miller & Marcus, *Federal Practice and Procedure* §2028 (2010), p. 583. As one court put it, “the verbatim, third-party witness statement is, by its very nature, material which must be subject to efficient discovery without being filtered by someone else.” *Dobbs*, 155 F.R.D. at 653.

³ The Board and the courts consider “litigation” to include arbitration proceedings. *Central Telephone Co. of Texas*, 343 NLRB at 989; *Samuels v. Mitchell*, 155 F.R.D. 195, 200 (N.D. Cal. 1994).

⁴ A “previous statement” is defined as “(i) a written statement that the person has signed or otherwise adopted or approved; or (ii) a contemporaneous . . . recording—or a transcription of it—that substantially recites verbatim the person’s oral statement.” *Id.*

Accordingly, and in view of a union's fiduciary duty to fairly represent all bargaining unit employees in administering the contract and processing grievances, the Board should create a presumption that an employer is required to produce to the union previous statements of unit employee witnesses that are relevant to a grievance but the employer claims are protected from disclosure by the attorney work product privilege. The burden should be on the employer to rebut the presumption by: (1) providing specific proof of danger that an employee witness will be harassed or retaliated against if the witness's statement is furnished to the union; or (2) showing that (a) after the employer provided the employee witness appropriate safeguards (including an assurance of no reprisals if the witness declines to cooperate with the employer or talks to the union, no questioning about protected union activities, and an offer to provide the witness with a copy of his or her statement), see *Johnnie's Poultry Co.*, 146 NLRB 770, 774-75 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965)⁵; *Alton Box Board Co. Container Div.*, 155 NLRB 1025, 1040-41 (1965), (b) the employee requested that his or her statement be kept confidential, and (c) specifically asked that it not be disclosed to the union. If the employer rebuts the presumption, it would not have to provide the union with the statements unless the union "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." F.R.C.P. 26(b)(3)(A)(ii).⁶ This rule would give appropriate deference to the public policy underlying the work product doctrine against "unwarranted inquiries into the files and mental impressions of an attorney" that "invad[e] the privacy of [the] attorney's course of preparation," *Hickman v. Taylor*, 329 U.S. at 510, 512,

⁵ Board law is unclear whether *Johnnie's Poultry* safeguards apply to employer questioning of employees about possible misconduct, *Levingston Shipbuilding Co.*, 249 NLRB 1 (1980), or in pre-arbitration interviews. Compare *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), enf. denied and remanded 648 F.2d 712 (D.C. Cir. 1981), on remand 258 NLRB 1230 (1981) with *Pacific Southwest Airlines*, 242 NLRB 1169 (1979).

⁶ The rule we propose would only apply to union requests for *employee* witness statements. Unions seeking *nonemployee* witness statements subject to the attorney work product privilege and employers seeking statements subject to the privilege would still need to make the required showing set forth in F.R.C.P. 26(b)(3)(A).

while allowing unions to properly fulfill their duty to fairly represent bargaining unit employees in grievance-arbitration proceedings.

**D. The Employer Unlawfully Refused To Furnish The
Union With The Requested Witness Statements**

In this case, the Board should affirm the Administrative Law Judge's conclusion that the employer unlawfully refused to provide the union with a copy of Nako's statement. As the judge correctly noted, the *Anheuser-Busch* decision is factually distinguishable from this case: in *Anheuser-Busch*, the employer assured the witnesses that their statements would be kept confidential, whereas here the employer did not offer and Nako did not request any assurance of confidentiality. *Hawaii Tribune-Herald*, 356 NLRB No. 63, ALJD at pp. 8, 24. Clearly, the employer had no legitimate confidentiality interest in Nako's statement.

Likewise, the Board should affirm the judge's conclusion that Nako's statement is not protected by the attorney work product privilege. The judge found that on the date that the Nako statement was created, "there was no subjective or objectively reasonable possibility that the Union would request arbitration." *Id.* at 24. Nothing in the judge's decision even remotely suggests that the employer produced evidence to support its contention that Sledge prepared the Nako statement in anticipation of litigation at the direction of an attorney. The mere fact that the employer had just suspended Bishop, coupled with the possibility that Bishop's discipline could lead to a grievance-arbitration proceeding, is insufficient to support the employer's claim of attorney work product privilege.

There are innumerable business decisions, such as employee terminations, that may become the subject of future litigation. It is well established that this fact alone is not sufficient to bring documents relating to such decisions . . . within the ambit of work product protections. Otherwise, any document which is later used to aid a party in litigation would be considered protected work product, regardless of the purpose for which it was originally prepared. The work product doctrine does not sweep nearly this

far. *Central Telephone Co. of Texas*, 343 NLRB at 994 (Walsh, dissenting) (citations omitted).

Even assuming arguendo that Nako's statement was prepared in anticipation of litigation at the direction of an attorney, the union is entitled to a copy of the statement. Had Nako herself requested her statement, there is no question she was entitled to it under Federal Rule of Civil Procedure 26(b)(3)(C). As Nako's collective bargaining representative pursuing a grievance on her behalf, the union should likewise be entitled to a copy of her statement by virtue of its role as Nako's exclusive bargaining representative. Moreover, in October 2005, when the Nako statement was created, Nako was a union shop steward. The union, as Nako's principal, should have been given a copy of its steward's previous statement as a matter of right. Cf. 8 Wright, Miller & Marcus, *Federal Practice and Procedure* §2027 (2010), p. 575 & n.4 (Rule 26(b)(3) applies to previous statements of employees of a party that is a corporation or other organization if the employee is the organization's agent).

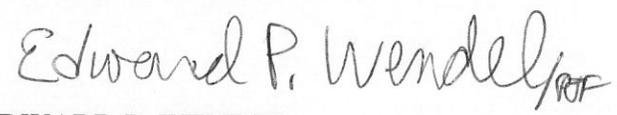
Finally, it is unclear whether anyone besides Nako provided the employer with witness statements concerning the alleged misconduct leading to Bishop's termination. To the extent that the employer obtained any additional witness statements, the same considerations discussed above concerning Nako's statement would also apply to them.

IV. CONCLUSION

For the foregoing reasons, the UFCW requests the Board to overrule the *Anheuser-Busch* line of cases, apply the *Detroit Edison* balancing test and attorney work product doctrine in a manner that meaningfully accommodates a union's need for requested witness statements when an employer has a legitimate confidentiality interest or claims a work product privilege in the witness statements, and conclude that the employer unlawfully refused to provide the union with the requested witness statements.

Dated: April 1, 2011

Respectfully submitted,

Handwritten signature of Edward P. Wendel in cursive script.

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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 United Food and Commercial Workers International Union as Amicus Curiae by e-mail or facsimile on the following:

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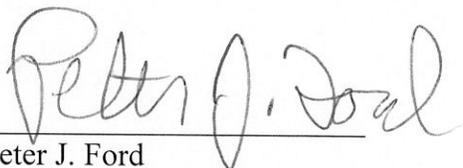
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