

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC, d/b/a/ HAWAII TRIBUNE- HERALD	Cases	37-CA-7043 37-CA-7045 37-CA-7046
and		37-CA-7047 37-CA-7048
HAWAII NEWSPAPER GUILD LOCAL 39117, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO		37-CA-7044 37-CA-7045 37-CA-7046 37-CA-7047 37-CA-7042 37-CA-7044 37-CA-7045 37-CA-7046

**In Response to the NLRB's March 2, 2011
Notice and Invitation to File Briefs**

**REPLY BRIEF OF THE NATIONAL SMALL BUSINESS ASSOCIATION
AS AMICUS CURIAE**

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INTRODUCTION

The Counsel for the Acting General Counsel to the Board (“GC”), the United Food and Commercial Workers International Union (“UFCW”) and the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) all urge the Board to overrule the bright-line standard in *Anheuser-Busch Inc.*, 237 NLRB 982 (1978), which protects witness statements from disclosure, in favor of a case-by-case balancing standard. In doing so, they ignore the clear instruction of the Board as to what issues should be addressed. Under the Board’s invitation, overruling of *Anheuser-Busch* is not under consideration. Moreover, overruling that case is unworkable. The National Small Business Association (“NSBA”) asserts that extending case-by-case balancing to all witness information would cause needless additional litigation before the Board, while at the same time complicating the Board’s analysis. From a practical standpoint, *Anheuser-Busch* is a predictable rule that has, for over thirty years, supported employers’ efforts to assure maximum witness participation, protected witnesses from coercion and intimidation, and maintained the confidentiality of internal investigations. Application of *Anheuser-Busch* likewise leaves unions with ample information to meet their representational obligations.

ARGUMENT

- I. **Applying a balancing test to witness statements and related information would cause unneeded litigation in many discipline cases, which would severely burden all parties and the NLRB.**

The practical effects of a case-by-case balancing test would be devastating to all parties—and especially to small businesses and to the Board itself. Employers conduct internal investigations and obtain statements, interview notes, summaries, and other witness information

in *many* discipline cases, often even before grievances are filed. Without a clear, bright-line legal standard protecting such witness information from disclosure, unions will inevitably submit broad information requests in most grievances and arbitrations related to employee misconduct where employers have gathered witness information. Under a balancing test, every refusal could be justified by the employer and every refusal could be challenged by the union—a recipe for confusion and contention.

As a result, overruling or abrogating *Anheuser-Busch* in favor of case-by-case balancing would lead to extraneous unfair labor practice litigation before the Board. Virtually all grievances regarding employee misconduct where witness statements, interview notes, or related information are collected, would require the Board to engage in lengthy, fact-specific assessments, and likely an *in-camera* review of the disputed witness information. *West Penn Power Co.*, 339 NLRB 585, 590 (2003), *enfd. in part*, 394 F.3d 233 (4th Cir. 2005) (finding a confidentiality interest after *in-camera* review). Consequently, retreat from *Anheuser-Busch* would severely tax the resources of the Board and the parties who must endure this process. Small businesses will be especially harmed, as they are unable to shoulder expenses of extended legal proceedings. Because essential confidentiality interests are present in all investigations, this case-by-case approach and the burdens it creates are unnecessary and unjustified.¹

¹ Neither the GC, UFCW, or AFL-CIO effectively distinguished the Supreme Court's decision in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), holding that the Board may protect witness statements obtained in its investigations from disclosure. The Court recognized that protection was necessary due to "obvious risks" of coercion or intimidation, in an effort to make witnesses change their statements or to deter them from testifying at all and stated that such risks are most acute "due to the peculiar character of labor litigation." *Id.* at 239-240. Although *Robbins* involved the Freedom of Information Act, there is no valid reason why employer investigations are not subject to the very same concerns. See NSBA Br. 8-14.

II. The additional litigation over investigation “discovery” resulting from a balancing test would *undermine* the integrity of the grievance and arbitration process by fostering unclear expectations and delaying the resolution of grievances.

Case-by-case balancing by the Board would also inevitably lead to divergent decisions and to scholastic parsing of witness information into ever finer categories. This approach would confuse both unions and employers regarding what types of witness information are protected from disclosure and under what circumstances. The lack of a clear standard on the protection of witness information is likely to result in contradictory outcomes as case law develops, leading to yet more litigation as parties are forced to take each case to the Board.

The Board’s constant involvement in litigating these issues would cause significant delays and destroy the effectiveness and efficiency of the grievance and arbitration process. For example, the union’s information request in this very case has been litigated for over *six years* since employee Koryn Nako’s statement was taken on October 19, 2005—without a final resolution. *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No 63, *11 (2011). The absence of a bright-line standard regarding protection of witness information would effectively bring the grievance and arbitration process to a halt, as every information request could be brought before the Board for a drawn-out “balancing.”

III. Case-by-case balancing would impose costly burdens and expenses on all parties involved—and especially upon small employers.

Small businesses would be especially hampered by case-by-case balancing, not only because it would undermine their ability to conduct internal investigations, but also because they would face crushing financial burdens to protect their interests. For employers, conducting thorough internal investigations and witness interviews is a "must" in order to comply with a

myriad of statutes and regulations. The balancing test advocated by the GC, the UFCW, and the AFL-CIO will force small businesses to shoulder additional litigation costs that will inevitably result from an unclear case-by-case standard or, alternatively, to act either at their own peril by not engaging in full investigations or at the peril of their employees by erring on the side of disclosing otherwise protected information. Small businesses conducting investigations would be forced to hire attorneys and to brace themselves for a lengthy legal process—or to give up their legal rights.

The NSBA fears that unions are advocating for a balancing approach in hopes that the threat of litigation would force employers to take the least expensive route and turn over confidential information, even though in practically all cases employers have inherent, overriding confidentiality interests in protecting witnesses and ensuring participation. NSBA Br. 8-14. Thus, balancing benefits unions at the expense of critical employer interests. On the other hand, protecting witness information from disclosure under a bright-line rule does not harm unions, who remain entitled to all the information necessary to investigate grievances, arbitrate, and fulfill their duty of fair representation. NSBA Br. 15-17. Hence, the GC, UFCW, and AFL-CIO advocate for a “convenience” to unions in accessing employers’ work product that ignores legitimate employer interests in conducting internal investigations, imposes crippling financial burdens on small businesses, and hampers the effectiveness of the negotiated systems of dispute resolution.

IV. The standard for witness statement protection proposed by the UFCW is especially egregious and poses even greater problems than a regular balancing test.

The UFCW’s proposed standard for protecting witness statements and other information goes well beyond traditional balancing, ignores well-established policy reasons for protection, and

imposes extreme burdens on employers.² The UFCW's proposed standard seeks to overrule *Anheuser-Busch* and to recognize a confidentiality interest only if, in addition to requiring the employer to provide assurances of confidentiality, the employee must *expressly request* that the employer keep her statement confidential. UFCW Br. 11. Only then would the Board apply case-by-case balancing to decide whether the witness information should be protected. *Id.*

The UFCW then goes so far as to advocate that, even if the employer wins the balancing, the employer should nevertheless accommodate the union by entering into a confidentiality agreement, thereby giving the union access to its confidential information *regardless of the balancing outcome*. See UFCW Br. 12-14. The UFCW's proposed standard is not supported by existing Board law, which consistently protects substantive witness information from disclosure.³

A. Requiring witnesses to request assurances and employers to provide them in order for a confidentiality interest to attach arbitrarily penalizes employers and leads to unnecessary litigation.

Overruling *Anheuser-Busch* to protect witness statements only when the employee has affirmatively requested confidentiality and the employer has provided such assurances again ignores important practical considerations and imposes extreme burdens, especially on small employers. In contrast to the UFCW's assertions, employers' confidentiality interests remain equally strong regardless of whether employers use specific language to assure witnesses that

² Further, the UFCW collapses the attorney work product doctrine into the balancing test, effectively eliminating any attorney work product analysis. UFCW Br. 17. The NSBA notes that the Board lacks the authority to ignore or abrogate the work product doctrine, which was erroneously applied by the ALJ in this case. NSBA Br. 19-22.

³ *Northern Indiana Public Service*, 347 NLRB at 211 (2006) (protecting witness interview notes); *Pennsylvania Power and Light Co.*, 301 NLRB 220 (1981) (identity of employee informants); see *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (employee aptitude tests); *Boyertown Packaging Corp.*, 303 NLRB 441 (1991) (identities of complaining witnesses and summaries of statements); *Raley's Supermarkets*, 349 NLRB 26, 26-27 (2007) (witness statements and summaries of statements).

their statements will remain confidential. NSBA Br. 11-12. Very importantly, whether or not assurances are provided has *no bearing* upon the prospect of intimidation, harassment, retaliation, or other negative consequences of participation faced by witnesses. *Id.* Small employers, who often lack resources to hire attorneys, are unjustly penalized by such small-print requirements of using specific language, which have no effect on their need to keep information confidential. *Id.* at 12.

Requiring *employees* to request confidentiality in order for confidentiality interests to be recognized or for protection to attach goes even further and presents a wholly arbitrary proposition. This additional requirement erroneously determines the *employer's* confidentiality interest from the *employee's* perspective. Any employee who wants to share information about a prior statement to the employer is always free to do so. Thus, the dispute must assume that the employee *does not* want her information shared. Forcing disclosure because of silence flies in the face of reality and interferes with the rights of both employees and employers.

Employers are tasked with maintaining the integrity of the internal investigatory process as a whole. Disclosing the statement or investigation testimony of one employee to the union (even if that employee does not care about confidentiality) may result in negative consequences for other witnesses involved in the same investigation who do care about confidentiality. Furthermore, witnesses virtually always lack attorney representation in internal employer investigations. Hence, they would not, without instruction, even know that they have the right and—if they want their information to be protected from disclosure to the union—the obligation, to request that their employer keep their information confidential.

Small businesses would be penalized by small-print requirements in Board law if protection of their investigation information hinged on *employers* providing express assurances of confidentiality. NSBA Br. 11-12. Going even further to make protection of investigatory information dependent upon expressions of *individual employees* is even less justifiable because it hinges protection on actions of even less-sophisticated parties, imposes additional burdens of instruction on employers, ignores important policy considerations unique to employers, and interferes with the functioning of the grievance and arbitration process. This requirement has no basis in Board or general law, which has never supported or imposed such a requirement.

In addition, the UFCW's proposal requiring employee confidentiality requests and employer assurances begs for additional unproductive litigation. These unclear requirements will lead to unnecessary disputes over what "magic words" employers and employees will have to use, what language will suffice, whether oral requests or assurances are sufficient, the proper timing of requests and assurances, and numerous other minutia.

B. Requiring employers to demonstrate a "real risk" of intimidation, coercion, or harassment from disclosure of witness information under a balancing standard is impractical, as chilling effects result from mere perceptions of such consequences.

The UFCW also urges that the Board, in balancing, examine whether there is a "real risk" of harassment or retaliation under the facts of each case and the GC's brief stresses the need to show "actual evidence" of such risks. UFCW Br. 10; GC Brief 7. As a practical matter, it is unclear what factual circumstances would satisfy this standard. Harassment, intimidation, and coercion

are often subtle and covert.⁴ Indeed, “actual evidence” of these consequences may not arise until *after* confidential witness information has been disclosed, and the union or its members have improperly used it to intimidate the witness. If such efforts are successful, the witness would be so intimidated that she would not only refuse to testify, but also would not cooperate with the employer's efforts to bring the abuse to light. For the GC to argue that witnesses should be exposed to such risks is contrary to the Board's mission of protecting employee rights.

Requiring actual evidence of such risks may not only be an impossible standard to meet without engaging in speculation or hindsight analysis, but it also ignores the fact that a *mere perception* that such negative consequences *may* occur is enough to deter witnesses from robust participation in investigations. *See Robbins Tire*, 437 U.S. 214, 240-41 (1978) (reluctance to participate in an investigation or to give statements may flow from an all too familiar unwillingness to "get too involved" unless absolutely necessary). If employers and witnesses do not understand that information shared with employers will remain confidential, witnesses may steer clear of becoming involved or provide less information, regardless of whether any actual threats against them have been made. *Northern Indiana Public Service*, 347 NLRB at 212.

C. Requiring employers to disclose witness information to unions pursuant to confidentiality agreements is not a reasonable solution and ignores the vast body of law and real-life experience recognizing that unions themselves may be a source of coercion.

In advocating for case-by-case balancing, the UFCW asserts that even if employers win the balancing test, in all but the most extreme cases an appropriate accommodation would require

⁴ The Board and the Supreme Court have repeatedly recognized that risks of coercion, intimidation, retaliation, and harassment from disclosure of witness information collected in investigations are very real and play a large role in necessitating the protected status of such information. NSBA Br. 3-5.

employers to disclose confidential witness information pursuant to a confidentiality agreement. UFCW Br. 12-14. The UFCW further urges that unions already have a duty not to misuse witness information as fiduciary representatives. *Id.* at 13. Thus, regardless of how balancing comes out, the UFCW argues that unions ought to have access to all of the employer’s witness information, either pursuant to a confidentiality agreement, their “fiduciary” obligations, or both. *Id.*

Although unions represent employees in collective bargaining, their representational role does not necessitate the logical leap that employers should be forced to disclose their confidential investigation information to unions or that witnesses feel comfortable having their information shared with the union. Further, *Anheuser-Busch* and related case law protecting witness information has repeatedly recognized the risks of disclosing such information to unions. *See e.g. Robbins Tire*, 437 U.S. at 240 (unions can exercise authority over their members and officers and have the capacity to expose witnesses to reprisal and harassment). The UFCW’s proposed “accommodation” ignores decades of established case law and policy articulating the need to protect witness information from disclosure to unions.⁵ The inadequacy of relying on unions’ voluntary adherence to an alleged fiduciary duty to maintain confidentiality is exactly why the bright-line standard of *Anheuser-Busch* was necessary in the first place. The context of these cases is often one where the union is representing one of its members in an actual or potential grievance, where other employees have information about what the potential grievant has done—and have shared it with the employer. The union is thus in a position of conflict from the start, so

⁵ Many unions have “loyalty” provisions in their Constitutions that could be used to discipline members for providing truthful statements to employers.

its assurances of fiduciary duty ring hollow. The UFCW's proposed approach not only overrules existing Board law, but takes current law to its opposite extreme.

CONCLUSION

The bright-line *Anheuser-Busch* standard has been used for over thirty years without imposing the unnecessary burdens presented by case-by-case balancing. The Board should not reach beyond its invitation for briefing and do something unanticipated by the trusting public. The mere fact that the GC, the AFL-CIO, and the UFCW have chosen to go beyond the issue as to which the Board sought input does not justify disrupting the process. Moreover, the balancing standard advocated by the GC, the UFCW, and the AFL-CIO opens the floodgates to litigation over the protected status of witness information, grossly delays the grievance and arbitration process, and creates unclear expectations for all parties involved. It imposes hardships upon the Nation's small businesses. The Board should facilitate predictability and apply the *Anheuser-Busch* rule to witness statements and related information such as interview notes and summaries, all of which implicate essential confidentiality concerns.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2011, a copy of the foregoing was served via e-mail (where available) and regular U.S. mail upon the parties listed below.

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