

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

Cases 37-CA-7043
37-CA-7045
37-CA-7046
37-CA-7047
37-CA-7048
37-CA-7084
37-CA-7085
37-CA-7086
37-CA-7087
37-CA-7112
37-CA-7114
37-CA-7115
37-CA-7186

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

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
RESPONSE TO BRIEF OF HAWAII TRIBUNE-HERALD**

Submitted by:
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I. INTRODUCTION

Counsel for the Acting General Counsel respectfully submits this response to Respondent's Brief to Address Issues Presented by the Board in its March 2, 2001 Notice and Invitation to File Briefs ("Respondent's Brief"). In so doing, Counsel for the Acting General Counsel reaffirms and refers to the arguments made in the Region's Post-Remand Brief to the Board filed on April 1, 2011 ("CAGC's Brief"). As set forth below, Counsel for the Acting General Counsel avers that the arguments set forth in Respondents' Brief, including arguments regarding the alleged violation of Respondent's due process rights and concerning the work product privilege, are unavailing.

II. ARGUMENT

A. Respondent's Due Process Rights Have Not Been Violated

Respondent initially argues that the Board has violated its due process rights by raising the issue of whether or not the statement of Koryn Nako is in fact a witness statement. Respondent claims that the issue litigated was whether the Nako statement should have been produced to the Union rather than whether the statement is a witness statement. What Respondent presents as two separate issues is actually one: under current Board law whether a statement constitutes a witness statement as defined by *Anheuser Busch*, 237 NLRB 982, 984 (1978), and its progeny determines whether the statement must be produced pursuant to an information request. Respondent accordingly has mischaracterized the issue.

Respondent has also mischaracterized the facts. The ALJ determined in this case the very issue that Respondent claims it never received notice of: that Nako's statement did not constitute a witness statement under *Anheuser-Busch* and that Respondent therefore violated Section 8(a)(5) of the Act by refusing to provide the Union with the Nako statement and any

other similar statements. *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 24 (2011). However, despite the ALJ's ruling, Respondent failed to raise its alleged due process concern in any of its 237 exceptions filed with the Board. Rather, Respondent argued on page 59 of its exceptions brief to the Board that Respondent was under no obligation to provide Nako's statement to the Union citing *Anheuser-Busch, Inc.*, 237 NLRB 982, 984 (1978). Respondent's attempt to raise its purported due process concern at this late date should be disregarded.

In addition, the cases cited by Respondent in support of its assertion that its due process rights have been denied all can be distinguished as involving claims that were far afield from those alleged in the complaint. The complaint in *Buonadonna Shoprite LLC*, 356 NLRB No. 115, slip op. at 1-2 (2011), alleged a standard *Weingarten* violation, but the judge instead found a violation based on respondent's failure to allow the employee to consult with a union representative by telephone to seek advice as to whether he should continue with the investigatory interview. In *New York Post*, 353 NLRB 343 (2008), the judge interjected a completely different theory of violation than alleged in the complaint. Although the complaint alleged that an employee was discharged for his union and protected concerted activities on two specific dates, the judge found that the employee was terminated in retaliation for the sabotage of respondent's printing presses a month prior to the dates alleged in the complaint by persons thought to be union members. *Id.* at 343-344. In *NLRB v. I.W.G., Inc.*, 144 F.3d 685, 687 (10th Cir. 1998), the Board found that certain entities were alter-egos, even though the complaint did not allege that one of the entities was the alter ego of another. The judge in *Metal Processors' Union Local No. 16, AFL-CIO*, 337 F.2d 114, 116 (1964), found discriminatory recall based

upon a set of facts that was not litigated in the hearing and that the complaint allegation was not premised upon.

In contrast, the complaint in this case did allege that Respondent failed to provide the Union with certain information including “all information, written or verbal, that was considered in making the decision to discipline Hunter Bishop” and “a list of the employees interviewed and what information each employee provided.” (Complaint ¶¶ 7(a) and 7(b)(iv)). As evident from the record, on October 19, 2005, Hunter Bishop (“Bishop”) was suspended indefinitely pending investigation regarding his alleged misconduct on October 18.¹ (GC 2). Respondent’s Advertising Director Alice Sledge (“Sledge”) prepared Nako’s statement after questioning Nako on October 19 about the conversation between Bock and Bishop on October 18. (Tr. 1: 227-232). Bishop was terminated on October 27. (GC 2). Thus, Nako’s statement, which was taken in the course of Respondent’s disciplinary investigation concerning Bishop, was responsive to the information requests alleged in the complaint and was encompassed by the complaint. In addition, and not surprisingly, Nako’s statement and the circumstances surrounding the creation of Nako’s statement are set forth in the record.

Therefore, there is no merit to Respondent’s due process argument which is appropriately disregarded.

B. Nako’s Statement Is Not A Witness Statement

As set forth in CAGC’s Brief, it is Counsel for Acting General Counsel’s position that the Nako statement is not a witness statement under *Anheuser-Busch* because Respondent did not provide Nako with any assurances of confidentiality. Counsel for General Counsel asserts that the Administrative Law Judge properly concluded that Respondent violated Section 8(a)(5) of

¹ All dates referred to herein occurred in 2005 unless otherwise noted.

the Act by not providing the Union with Nako's statement and the statement of any other employee taken in the course of Respondent's investigation who was not promised confidentiality or who did not adopt the statement.

In support of its argument to the contrary, Respondent states among other things that the Union could have obtained the information in Nako's witness statement from Nako herself. Board law establishes that an employer may not refuse to provide a union with requested information on the ground that the union may have an alternative means of obtaining the information. See, e.g., *River Oak Center for Children, Inc.*, 345 NLRB 1335, 1335-1336 (2005) (citing *Hospitality Care Center*, 307 NLRB 1131, 1135 (1992)); *The Kroger Co.*, 226 NLRB 512, 513 (1976). The Board has found that "[t]he fact that employees may have the information and may be or are willing to give it to the union does not relieve an employer of its obligations under Section 8(a)(5) of the Act." *The New York Times Co.*, 265 NLRB 353 (1982); *Alltel Pennsylvania, Inc.*, 316 NLRB 1155, 1156 (1995) (citing *The New York Times Co.*).

In addition, Respondent argues that the Union eventually received a copy of the statement at the unfair labor practice hearing and suggests that this somehow was sufficient under the law. This argument flies in the face of *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and ignores the fundamental obligation that employers have under Section 8(a)(5) to provide a union with requested information necessary for processing grievances.

In footnote 7 of its brief, Respondent raises the ALJ's proper refusal to permit Respondent to question Union witnesses regarding the information the Union possessed at the time it made its information requests. Respondent claims it was prejudiced by the ALJ's rulings which it suggests would have shown that the Union did not need the Nako statement. Respondent's argument is contrary to well-established Board law, which obligates an employer

upon request to furnish a union with information that is potentially relevant under a liberal “discovery-type standard” and that would be useful to the union in discharging its statutory responsibilities including processing grievances. *Acme Industrial Co.*, 385 U.S. at 435, 437-438; *American Signature, Inc.*, 334 NRB 880, 885 (2001); *U.S. Postal Service*, 337 NLRB 820 (2002); *U.S. Postal Service*, 332 NLRB 635 (2000). The case cited by Respondent in support of its argument, *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006), is not to the contrary. Under the facts of that case, the Board found the requested information (interview notes of an EEO manager) to be confidential. *Id.* at 211. In balancing the interests of the parties, the Board deemed it significant that the employer took no action against any employee and thus the notes in question did not concern employee discipline. *Id.* at 213. It is therefore appropriate to disregard the argument raised in footnote 7 of Respondent’s Brief.²

Respondent also expresses outrage that the Board has asked it to address issues concerning witness statements. In support of this position, Respondent cites a memorandum from a former General Counsel and an Advice memorandum, neither of which is binding on the Board.

In the end, all of Respondent’s arguments share a consistent and self-serving theme. Respondent believes it can and should be able to control what information the Union is entitled to and when and how the Union may receive this information, which in Respondent’s view is apparently very limited. To summarize Respondent’s arguments, Respondent believes it should not have to provide the Union with information that it thinks the Union can obtain through some alternate source or method; it believes that providing the Union with information relevant to a grievance immediately prior to an unfair labor practice hearing is sufficient under the law; and it

² Respondent makes another due process argument in footnote 7. Respondent did not raise this due process argument in its exceptions to the Board.

believes it should be able to make its own determination as to whether requested information is relevant and necessary for the Union to discharge its statutory duties. Counsel for the Acting General Counsel urges the Board to make it abundantly clear to Respondent that its interpretation of the law regarding information requests is unreasonable and completely erroneous.

C. The Nako Statement Does Not Constitute Attorney Work Product

As set forth in CAGC's Brief, Counsel for the Acting General Counsel's position is that the Nako statement is not work product because the work product privilege does not extend to documents prepared in the ordinary course of business for the purpose of determining whether an employee engaged in misconduct warranting discipline. In this case, Sledge, as part of the investigation into Bishop's alleged misconduct spoke with Nako to determine what had occurred the day before in the situation involving Bishop. Sledge testified on direct examination that the meeting was "at the suggestion" of Respondent's attorneys. (Tr. 6: 1141). That was the extent of Sledge's testimony regarding the reason for her meeting with Nako. Sledge did not testify, as represented in Respondent's Brief, that she conducted the interview at the direction of counsel and that counsel directed her to prepare Nako's statement. Although Sledge did at some point subsequent to Nako's signing of the statement write "[p]repared at the advice of counsel in preparation for arbitration" at the top of the statement, this after-the-fact characterization of the document is insufficient to establish that the Nako statement was prepared at counsel's direction in preparation for litigation. Instead, as set forth in CAGC's Brief, the evidence compels the conclusion that Sledge interviewed Nako and drafted Nako's statement for the nonlitigation purpose of determining whether Bishop had engaged in alleged misconduct sufficient to warrant termination.

Respondent once again attempts to prevent the Union from obtaining documents that would enable it to fully perform its duties as bargaining representative. In so doing, Respondent cites a number of cases that it claims support its assertion that Nako's statement is within the scope of the work product privilege. These cases are easily distinguished. *American Girl Place New York*, 359 NLRB No. 84, slip op. at 8 (2010), concerned documents prepared by a supervisor regarding a captive audience meeting during a union organizing drive. The Board did not determine whether the documents in question were subject to the attorney-client privilege or the work-product doctrine. *Id.* slip op. at 1 n.1. In *Ralph's Grocery Company*, 352 NLRB 128, 128 (2008), the union sought documents prepared by a law firm hired by the employer to audit its hiring practices during a lockout subsequent to the United States attorney's commencement of an investigation into the employer's hiring practices during the lockout. *In Re Sealed Case*, 146 F.3d 881, 883, 885-6 (1998), involved a grand jury subpoena for documents prepared by a lawyer hired by the Republican National Committee in order to protect the RNC from a matter that it feared could lead to litigation involving the Federal Election Campaign Act. *Coastal States Gas Corp.*, 617 F.2d 854, 858 (1980), is a FOIA case concerning legal advice memoranda prepared by government lawyers in response to a specific request from agency auditors examining the compliance of a company with certain regulations.

Accordingly, Counsel for the Acting General Counsel asserts that the Nako statement is not protected by the attorney work-product privilege and that it is appropriate to disregard Respondent's assertions to the contrary.

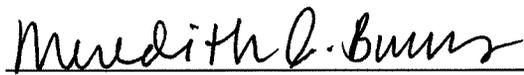
III. CONCLUSION

For the reasons set forth in Counsel for the Acting General Counsel's Brief and as stated above, it is respectfully submitted that Respondent has offered no valid argument to refute the

ALJ's conclusion that Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with Nako's statement and any other employee statements obtained in the course of its investigation of Bishop's alleged misconduct. Accordingly, the Judge's decision and Recommended Order regarding this issue should be adopted by the Board.

Dated at Honolulu, Hawaii, this 15th day of April 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the Acting General Counsel's Response to Brief of Hawaii Tribune-Herald has this day been served as described below upon the following persons at their last-known address:

1 copy	L. Michael Zinser, Esq. The Zinser Law Firm 414 Union Street, Suite 1200 Bank of America Plaza Nashville, TN 37219	VIA Express Mail and e-mail
1 copy	Lowell Chun-Hoon, Esq. King Nakamura & Chun-Hoon Central Pacific Plaza 220 S. King Street, Suite 980 Honolulu, HI 96813	VIA U.S. Mail and e-mail
1 copy	Heather Ahue, Administrative Officer Hawaii Newspaper Guild 888 Mililani Street, Suite 303 Honolulu, HI 96813	VIA U.S. Mail and e-mail

DATED at Honolulu, Hawaii, this 15th day of April 2011.



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