

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

**AMERICAN MEDICAL RESPONSE WEST**

**and**

**Cases 32-CA-147259  
32-CA-149437**

**UNITED EMERGENCY MEDICAL SERVICE  
WORKERS, AFSCME LOCAL 4911, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY  
BRIEF TO RESPONDENT'S ANSWERING BRIEF**

On December 15, 2015, Administrative Law Judge Eleanor Laws issued her decision in this matter, in which she found that Respondent violated Section 8(a)(1) and (5) of the Act in certain regards but not others. On January 14, 2016, Counsel for the General Counsel filed limited exceptions to the Judge's failure to find that Respondent's failure to provide the charging party Union with witness names also violated the Act. On January 28, 2016, Respondent filed its Answering Brief to those limited exceptions, and this Reply Brief is filed in reply to that Answering Brief. The sole issue before the Board is whether Respondent unlawfully failed to provide the Charging Party Union with the names of the witnesses it interviewed during its investigation of a sexual harassment complaint against employee Tracy Perkin. Counsel for the General Counsel submits that since the Judge did not specifically address or analyze this allegation, it is appropriate for the Board to do so and to find the additional violation.

As set forth in Counsel for the General Counsel's Limited Exceptions and Supporting Brief, it does not appear that the Judge decided whether the Union was or was not entitled to the

names of the witnesses who gave Respondent statements during the Perkin investigation. According to Respondent, the Judge implicitly decided this issue when she found that Respondent did all it was required to do when it gave the Union redacted versions of those witness statements. However, if that was the Judge's determination, it appears to be a conflation of her initial finding that the statements were *Anheuser-Busch*<sup>1</sup> witness statements that could be categorically withheld and her related but much less developed finding that Respondent nevertheless had a duty to provide summaries of those privileged witness statements and its provision of redacted versions of those statements satisfied that obligation. (ALJD 12: 4-7) At a minimum, since the Judge's decision does not clearly explain why the Union did not have a right to the names of the witnesses who gave *Anheuser-Busch* witness statements to Respondent, that issue is properly before by the Board.

As an initial matter, the Consolidated Complaint alleges in paragraph 7(c) that Respondent unlawfully failed to provide the Union with the names of witnesses in the Perkin investigation. While the Judge discussed Board precedent that an employer is obligated to provide the names of witnesses even where a witness statement is confidential, she failed to conclude that the Union was entitled to the names of witnesses, and failed to address this allegation in her Recommended Order.

Contrary to Respondent's argument in its Answering Brief, the record is absolutely clear that the Union asked Respondent for the names of the witnesses that provided it with statements during the Perkin investigation. (Tr. 32-40, GC Exhs. 3-7) Thus, after Respondent gave the Union versions of those statements with the witnesses names redacted, the Union promptly went

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<sup>1</sup> *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978).

back to Respondent and asked for unredacted versions “because the names of these witnesses are vital to our investigation.” (See GC Exh. 5; Tr. 40:22-41:14) In such circumstances, the Union’s request for the unredacted statements was in effect a request for the names of the witnesses. Moreover, it is clear that the Judge understood that the parties’ dispute here was over Respondent’s refusal to disclose the names of bargaining unit witnesses (ALJD 4:16-29), and that Respondent knew that as well.<sup>2</sup> In such circumstances, Respondent’s contention that this matter is not properly before the Board because the Union never asked for a “list of employee names who were interviewed in the Perkin investigation” (Respondent’s Answering Brief, p. 3) both ignores the record and completely exalts form over substance.

Accordingly, as the record shows that the Union asked for witness names, and as the Judge correctly found that Respondent had failed to establish a sufficient confidentiality basis to generally withhold witness names in the Perkin investigation, Respondent did not have any lawful basis to withhold the names of the witnesses who gave it statements during the Perkin investigation even though it had a right to withhold the statements themselves under *Anheuser-Busch*.<sup>3</sup> Counsel for General Counsel therefore requests that the Board find merit to the General

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<sup>2</sup> Respondent’s trial counsel thus viewed the Union’s request for unredacted statements as though it was a request for witness names by asking Union Representative Stephens, “[w]ith respect to the documents that were given to you through Mr. Elzig [referring to the witness statements]. did you ever offer any compromise to him regarding the *names* that you wanted from these documents?” (Tr. 62:4-9, italics added). Consistent with this view, Respondent emphasized this very point in its November 23, 2015 post-hearing brief to the Judge, in which it based its legal analysis relating to the Perkin incident on the underlying (and correct) assumption that the Union, for all intents and purposes, requested witness names when it requested unredacted witness statements. (Respondent’s post-hearing brief at 11-12).

<sup>3</sup> As set forth in detail in Counsel for the General Counsel’s brief in support of limited exceptions, the record contains no evidence that employees in fact feared retaliation from the Union or that Respondent’s disclosure of witness names could reasonably be expected to lead to harassment or retaliation. In the absence of such evidence, Respondent’s confidentiality assurances to the Perkin witnesses do not reflect and cannot on their own establish a legitimate and substantial confidentiality interest sufficient to privilege withholding the witness names from the Union.

Counsel's limited exceptions and in turn find that Respondent violated the Act when it refused to provide the Union with witness names in the Perkin investigation.

**DATED AT** Oakland, California this 11<sup>th</sup> day of February 2016.

Respectfully submitted,



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Date: February 11, 2016

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S  
REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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