

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES-SAN FRANCISCO BRANCH OFFICE**

**TRACY AUTO, L.P.
d/b/a TRACY TOYOTA**

**Cases 32-CA-260614
32-CA-262291
32-RC-260453**

and

**MACHINISTS AND MECHANICS LODGE
NO. 2182, DISTRICT LODGE 190,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO**

**ORDER REGARDING DOCUMENTS PRODUCED
BY TYROME JACKSON AND KEVIN HUMESTON**

In response to subpoena duces tecum served by Respondent and in accordance with my December 29, 2020 order on petitions to revoke the same, the above-referenced individuals provided documents to Counsel for the General Counsel for his review. Counsel for the General Counsel subsequently provided me with a copy of these documents in unredacted form and additionally provided me with a copy of the same documents with proposed redactions aimed to protect individual employees' Section 7 rights, Charging Party's *Berbiglia* privilege and/or individual employees' confidential medical information.¹

I have reviewed the documents provided by Counsel for the General Counsel and find the majority of them to be appropriate. I note that the vast majority of redactions proposed by Counsel for the General Counsel excise names and individually identifying information of employees other than foremen. A far smaller number of redactions appear to be based on confidential medical information. To the extent that I have questions regarding redactions falling outside of these two categories, I will raise them with Counsel for the General Counsel upon resumption of the hearing later this week.

Counsel for the General Counsel also provided me with a privilege log reflecting documents that have been redacted to protect his attorney-work product. In his cover email accompanying each set of documents, Counsel for the General Counsel included legal argument in support of his claim reiterated his position that certain of the documents provided had been redacted to protect his attorney-work product. A copy of these emails is attached as Exhibit A hereto. See NLRB Rules and Regulations, Sec. 102.132(a) and (b).

Counsel for the General Counsel is to provide a copy of the redacted Tyrome Jackson (Jackson) and Kevin Humeston (Humeston) documents to Respondent's counsel, along with a copy of the respective privilege log for each production. I have previously ruled that, insofar as

¹ *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977)

the supervisor/agent status of Jackson and Humeston is in dispute in this matter, redaction of information regarding them arguably covered by Section 7 is not appropriate. However, as I mentioned during our last session, I will entertain a motion for protective order and/or motion that exhibits containing such information be filed under seal.

So **ORDERED**.

Date: January 4, 2020, San Francisco, California.



Mara-Louise Anzalone
Administrative Law Judge

Served by email upon the following:

For the General Counsel:

Jason P. Wong, Esq. jason.wong@nlrb.gov

For Tracy Auto, L.P.:

John P. Boggs, Esq. jboggs@employerlawyers.com

For Machinists and Mechanics Lodge No. 2182:

Caren Sencer, Esq. csencer@unioncounsel.net
William T. Hanley, Esq. whanley@unioncounsel.net

EXHIBIT A

Anzalone, Mara-Louise

From: Wong, Jason P
Sent: Thursday, December 31, 2020 2:44 PM
To: Anzalone, Mara-Louise
Cc: Lee, Vanise J.
Subject: Tracy Toyota - Humeston SDT Docs

Your Honor:

All of Humeston's SDT docs are found in this link to a shared drive: https://nrlb-my.sharepoint.com/:f/g/personal/jpwong_nrlb_gov/EiJt869wQsJJrFvXzxLmhMBPjkD64R8BNcbypepDDfeDg?e=kBTWWt

Due to the Agency's size limitations on emails, I am unable to send you the files via email. One copy is redacted and the other is clean. I will send you a separate email for each employee.

Please note that the General Counsel claims work product privilege for all communications between Counsel Jason Wong and the employee. Counsel Wong only contacted the employee after being assigned to represent the General Counsel in this hearing. All his communications to the employee were prepared or obtained because of the prospect of litigation. See below. Counsel Wong would not have had these communications if not to prepare for the General Counsel's case in this matter. As requested, a privilege log is attached also.

ALJ Bench Book: § 8-430 Work Product Doctrine

The work-product doctrine protects documents and tangible things prepared in anticipation of litigation by or for a party representative, regardless of whether the representative is an attorney. It was first recognized in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), and is now codified in FRCP 26(b)(3) (Trial Preparation: Materials).

The burden is on the party asserting the work product doctrine to establish that it applies. *Public Service Co. of New Mexico*, 364 NLRB No. 86, slip op. at 3 (2016). Specifically, the party must show that the materials were prepared or obtained because of the prospect of litigation, rather than in the ordinary course of business, i.e., they would not have been prepared but for the "fairly foreseeable" prospect of litigation. See *Central Telephone Company of Texas*, 343 NLRB 987, 988 (2004) (finding that the privilege applied, and that the union was not entitled to notes taken by the respondent's HR specialist while investigating alleged misconduct that later became the subject of a grievance, as the investigation was directed by in-house counsel, respondent did not ordinarily conduct such an extensive investigation, and its fear of litigation was "objectively reasonable" even though no litigation had been initiated and the employees had not yet been disciplined when the notes were prepared).

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However, even if the exception is found to apply and trial preparation materials within the privilege are ordered disclosed, Rule 26(b)(3)(B) requires protection against disclosure of the "mental impressions, conclusion, opinions, or legal theories of a parties' attorney or other representative concerning the litigation." *Central Telephone Company of Texas*, above, 343 NLRB at 998.

Thank You,
Jason Wong
Field Attorney
NLRB - Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
Phone: 628-221-8836
Fax: 415-356-5156

The NLRB now requires electronic filing of documents, including affidavits, correspondence, position statements, and documentary or other evidence. This requirement does not apply to ULP charges, or to petitions and showings of interest in representation cases. See GC 20-01. <https://apps.nlr.gov/link/document.aspx/09031d4582dfa410>

E-filing link: <https://www.nlr.gov/cases-decisions/filing>

Written instructions for the Agency's E-Filing System: <https://apps.nlr.gov/myAccount/assets/E-Filing-System-User-Guide.pdf>

Video demonstration with

instructions: https://apps.nlr.gov/myAccount/assets/My%20Account%20Portal%20Overview/story_html5.html

Frequently Asked Questions. <https://apps.nlr.gov/myAccount/#/FileCaseDocument/FAQ>

This electronic message may contain confidential or privileged information. If you received this transmission in error, please reply to the sender to advise of the error and delete this transmission and any attachments.

Anzalone, Mara-Louise

From: Wong, Jason P
Sent: Thursday, December 31, 2020 3:28 PM
To: Anzalone, Mara-Louise
Cc: Lee, Vanise J.
Subject: Tracy Toyota - Jackson SDT Docs

Your Honor:

All of Jackson's SDT docs are found in this link to a shared drive: https://nrlb-my.sharepoint.com/:f/g/personal/jpwong_nlr.gov/EgyD3IWD-ytMtrIBkiF9OdcBWP9yrfSJTir_AC0pzHEcmA?e=zahLif

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Please note that the General Counsel claims work product privilege for all communications between Counsel Jason Wong and the employee. Counsel Wong only contacted the employee after being assigned to represent the General Counsel in this hearing. All his communications to the employee were prepared or obtained because of the prospect of litigation. See below. Counsel Wong would not have had these communications if not to prepare for the General Counsel's case in this matter. Moreover, the documents listed in the privilege log include Counsel Wong's "mental impressions, conclusion, opinions, or legal theories concerning the litigation in this matter. As requested, a privilege log is also located in the link.

ALJ Bench Book: § 8-430 Work Product Doctrine

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Thank You,
Jason Wong
Field Attorney
NLRB - Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
Phone: 628-221-8836
Fax: 415-356-5156

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instructions: https://apps.nlr.gov/myAccount/assets/My%20Account%20Portal%20Overview/story_html5.html

Frequently Asked Questions. <https://apps.nlr.gov/myAccount/#/FileCaseDocument/FAQ>

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DiCrocco, Brian

From: DiCrocco, Brian
Sent: Monday, January 4, 2021 3:07 PM
To: Wong, Jason P; john boggs; caren sencer; whanley@unioncounsel.net
Cc: Gomez, Doreen E.; Lam, Ida
Subject: 32-CA-260614 - TRACY TOYOTA : ORDER REGARDING DOCUMENTS PRODUCED BY TYROME JACKSON AND KEVIN HUMESTON
Attachments: Order re Subpoena Responses by Jackson and Humeston Tracy Toyota LP 32-CA-260614 et al_.pdf

Dear Counsel,

Please see the attached document.

Brian C. DiCrocco, Legal Tech.
NLRB Division of Judges San Francisco
628-221-8821