

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20**

TRACY AUTO, L.P. dba TRACY TOYOTA

Respondent

and

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

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

Charging Party

**RESPONDENT'S MOTION TO REQUIRE PRODUCTION OF DOCUMENTS  
WITHHELD PURSUANT TO GENERAL COUNSEL'S CLAIM OF PRIVILEGE  
BASED ON ATTORNEY WORK PRODUCT REGARDING DOCUMENTS PRODUCED  
BY TYROME JACKSON AND KEVIN HUMESTON**

As reflected in the ORDER REGARDING DOCUMENTS PRODUCED BY TYROME JACKSON AND KEVIN HUMESTON entered on January 4, 2021, General Counsel submitted privilege logs asserting attorney work product protection of communications between General Counsel and employees Tyrome Jackson and Kevin Humeston. *See* attached **Exhibit A** (Jackson Privilege Log) and **Exhibit B** (Humeston Privilege Log). Respondent hereby moves for an order requiring production of the documents listed on the privilege logs.

General Counsel claims attorney work-product protection of his communications with employees Tyrome Jackson and Kevin Humeston, asserting that such communications were prepared or obtained because of the prospect of litigation, citing Section 8-430 of the ALJ Bench

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Book. As the party asserting the work product protection, General Counsel bears the burden to establish that it applies. Public Service Co. of New Mexico, 364 NLRB No. 86, slip op. at 3 (2016).

As recognized by the Board, the work product doctrine derives from the Supreme Court's decision in Hickman v. Taylor, 329 U.S. 495 (1947), and protects from disclosure written material prepared by a party or his representative in anticipation of litigation or for trial. The strong public policy underlying the work product doctrine is to aid the adversarial process by providing a certain degree of privacy to a lawyer in preparing for litigation. Central Telephone Company of Texas, 343 NLRB 987, 988 (2004). "Protection is needed because an attorney preparing for trial must assemble much material that is outside the attorney client privilege, such as witness statements, investigative reports, drafts, pleadings and trial memoranda." In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998).

"Blanket or speculative assertions of confidentiality, standing alone, are insufficient. Mission Foods, 345 NLRB 788, 791-792 (2005)." Mondelez Glob., LLC 2017 WL 3485229 (2017). General Counsel fails to cite any relevant legal authority for the proposition that the attorney work product doctrine provides blanket protection against disclosure of **communications** between General Counsel and an employee. The cases cited by General Counsel in his email quoting from the ALJ Bench Book do not address communications. Rather, the cited cases examine attorney work product protection in the context of trial material prepared by or for an attorney such as interview notes and discharge memoranda (Public Service Co. of New Mexico, 364 NLRB No. 86 (2016)); and investigation notes and summary report prepared by a human resources specialist at the direction of counsel (Central Telephone Company of Texas, 343 NLRB 987, 988 (2004)).

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Even if—despite General Counsel's failure to provide relevant legal authority that the communications with the employees are protected attorney work product—the communications are deemed to be work product, disclosure should still be ordered. As provided in the ALJ Bench Book § 8-430:

Note that FRCP 26(b)(3)(A)(ii) provides for an exception upon a party's showing that it has "a substantial need for the materials" and "cannot, without undue hardship obtain their substantial equivalent by other means." For cases applying this exception, see *Central Telephone Company of Texas*, above (union failed to meet its burden with respect to the respondent's investigative notes as the respondent had provided the union with witness statements and the union was able to conduct its own witness interviews); and *Marian Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001) (employer seeking copy of responses to union's survey of employer's nursing staff regarding supervisory indicia failed to show that it was unable to obtain the equivalent information by other means, including conducting its own survey of employees). See also *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829 (2003) (respondent failed to show substantial need for a copy of the position statement submitted by the charging party to the General Counsel in support of its charge during the investigation).

Respondent has no other means of obtaining the communications between the employees and General Counsel. They cannot be subpoenaed from the employees, as the General Counsel would seek to revoke the subpoena based on the work product protection, thereby placing the issue exactly in the same position as it is now. The material is relevant for impeachment purposes to show bias of the witnesses.

Moreover, there is no showing in the privilege logs produced by General Counsel that any of the communications disclose the "mental impressions, conclusion, opinions, or legal theories of a parties' attorney or other representative concerning the litigation." See Central Telephone Company of Texas, 343 NLRB 987, 988 (2004). Rather, General counsel's privilege log merely asserts the blanket objection that the communications were work product without describing why. See Fed. R. Civ. P. 26(b)(5)(A) ("When a party withholds information otherwise

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discoverable by claiming that it is privileged or subject to protection as trial-preparation material, the party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”). The privilege logs fail to provide a description in a manner which would allow Respondent to assess the work product claim. CNN America., Inc. & Team Video Services, LLC, 2008 WL 5068926 (2008) (“[T]he privilege log should contain a specific explanation of the basis for the assertion of the privilege.”). Thus, the communications must be produced in accordance with the exception to the attorney work product doctrine. To the extent that the communications reflect General Counsel's mental impressions, conclusions, opinions, or legal theories, those portions may be redacted. See Quality Roofing Supply Co., 2011 WL 3625915 (2011).

Respectfully Submitted,

  
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John P. Boggs  
FINE, BOGGS & PERKINS, LLP

Dated: January 8, 2021

# **Exhibit A**

Privilege Log for Communications Between Jackson and Counsel Wong

| Item  | Regarding  | Privilege    |
|---|--|--------------|
| Texts between JW and TJ from 11/6/20 - 12/24/20 Bates 214 - 219 | JW asking TJ to review and answer questions about certain documents that may appear at trial ; JW informing TJ about when he will likely testify; JW telling TJ he is doing well at trial; JW asking whether TJ received Respondent's SDT. | Work product |
| 11/6/20 email from JW to TJ (Bates 225 - 237)                   | JW provide TJ with his affidavit.  | Work product |
| 11/19/20 email from JW to TJ (Bates 238 - 247)                  | JW asking TJ to review and answer some questions about certain documents Respondent will likely present at trial.  | Work product |
| 11/30/20 email from JW to TJ (Bates 247 - 249)                  | JW providing his spreadsheet to TJ, analyzing TJ's paystubs.   | Work product |
| 12/1/20 email from JW to TJ (Bates 249 - 251)                   | JW asking TJ to review a repair order to prepare for trial   | Work product |
| 12/7/20 email from JW to TJ (Bates 252 - 253)                   | JW asking TJ to review another employee's text message to prepare for trial  | Work product |

# **Exhibit B**

Privilege Log for Communications Between Humeston and Counsel Wong

| <b>Item</b>   | <b>Regarding</b>  | <b>Privilege</b> |
|---|---|------------------|
| 12/14/20 email from JW to -KH. Bates 57 - 59; and 68 - 78 | JW asking KH to review a chart to help GC prepare for trial | Work product     |

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**CERTIFICATE OF SERVICE**

I, Kathryn M. Cherry, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 16870 West Bernardo Drive, Suite 360, San Diego, California. My email address is [kcherry@employerlawyers.com](mailto:kcherry@employerlawyers.com). I am not a party to the cause, and I am over the age of eighteen years.

2. On January 8, 2021, I caused to be served the following document(s):

**RESPONDENT'S MOTION TO REQUIRE PRODUCTION OF DOCUMENTS  
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on the interested parties in this action by addressing true copies thereof as follows:

- BY MAIL:** I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.
- BY ELECTRONIC SERVICE:** by electronically mailing a true and correct copy through Fine, Boggs & Perkins' electronic mail system from [kcherry@employerlawyers.com](mailto:kcherry@employerlawyers.com) to the email addresses set forth below.

William T. Hanley  
Weinberg, Roger & Rosenfeld  
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Alameda, CA 94501-6430

[whanley@unioncounsel.net](mailto:whanley@unioncounsel.net)

Jason Wong  
National Labor Relations Board, Region 20  
901 Market Street, Suite 400  
San Francisco, CA 94103-1738

[Jason.Wong@nlrb.gov](mailto:Jason.Wong@nlrb.gov)

I certify under penalty of perjury that the above is true and correct. Executed at San Diego, California on January 8, 2021.

/s/ Kathryn M. Cherry  
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