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American Baptist Homes of the West d/b/a Piedmont Gardens and Service Employees International Union, United Healthcare Workers-West. Case 32-CA-063475

December 15, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES,
GRIFFIN, AND BLOCK

The issues in this case are whether the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to provide the Union with the names, job titles, and/or written statements of three individuals who claimed that they witnessed an employee engaging in work misconduct that resulted in the employee's termination. The judge, applying *Pennsylvania Power Co.*, 301 NLRB 1104 (1991), found that, because the Respondent did not establish a legitimate and substantial confidentiality interest in the names and job titles, it violated Section 8(a)(5) and (1) of the Act by failing to provide them. By contrast, the judge, applying the categorical exemption for witness statements established in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), found that the Respondent was not required to provide the Union with witness statements obtained during the Respondent's investigation of employee misconduct. Accordingly, he dismissed the complaint allegation regarding those statements.¹

The Acting General Counsel and the Charging Party urge the Board to overrule *Anheuser-Busch*, arguing that the bright-line rule it created is inappropriate and that, instead, the Board should apply the balancing test articulated by the Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).² In the alternative, the Acting General Counsel contends that, even under *Anheuser-Busch*, Charge Nurse Lynda Hutton's statements were not exempt from disclosure, because the Respondent did

¹ On April 16, 2012, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Acting General Counsel and the Charging Party filed exceptions and the Acting General Counsel filed a supporting brief; the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief. Additionally, the Respondent filed limited cross-exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

² Although the Board did not request amicus curiae briefs in this case, the Board requested briefing in *Hawaii Tribune-Herald*, 359 NLRB No. 39 (2012), which also concerns the *Anheuser-Busch* standard. In reaching its decision here, the Board has taken administrative notice of those briefs and has considered the relevant arguments.

not provide her with an assurance of confidentiality before she provided the statements.

The Respondent cross-exceptions to the judge's finding that it violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the names and job titles of the witnesses. The Respondent argues that it was not required to produce the information because, under *Detroit Edison*, supra, it had a confidentiality interest that outweighed the Union's need for the information. The Respondent also argues that the Board should expand the scope of *Anheuser-Busch*'s bright-line rule to include names of witnesses as well.

We agree with the judge, for the reasons set forth in his decision, that the Respondent violated the Act by failing to provide the witnesses' names and job titles. With respect to the witness statements, we have decided, for the reasons set forth below, to overrule *Anheuser-Busch* and to apply the *Detroit Edison* balancing test in future cases where the employer argues that it has a confidentiality interest in protecting witness statements from disclosure. In the present case, however, we will apply *Anheuser-Busch* because, as explained in this decision, we find that retroactive application of the *Detroit Edison* test would work a "manifest injustice" on the Respondent and others who came to rely on the *Anheuser-Busch* rule. Consistent with that rule, we adopt the judge's finding, as set forth in detail below, that two of the witnesses' statements were exempt from disclosure. Contrary to the judge, however, we find that Charge Nurse Hutton's statements were not witness statements within the meaning of *Anheuser-Busch*.

Accordingly, we adopt the judge's rulings, findings,³ and conclusions in part, reverse them in part, and adopt the recommended Order as modified below.

Facts

The Respondent operates a continuing-care facility in Oakland, California, that provides three levels of care for its residents: independent living, assisted living, and skilled nursing. In June 2011,⁴ Charge Nurse Barbara Berg notified the Respondent's human resources director, Alison Tobin, that she had seen certified nursing assistant (CNA) and unit employee Arturo Bariuad sleeping while on duty. Tobin asked Berg to prepare a written statement so that the Respondent could begin an investi-

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ All dates are in 2011, unless otherwise indicated.

gation; Tobin informed Berg that her statement would be confidential. Berg prepared a written statement, as requested.

Charge Nurse Hutton also allegedly observed Bariuad sleeping on duty. After she learned that Berg had reported Bariuad's actions to management,⁵ Hutton wrote a statement reporting Bariuad's conduct and slipped it under Tobin's door. No one had asked Hutton to create a statement, nor was she given any assurances of confidentiality. The record establishes that, in making the statement, Hutton assumed that it would be kept confidential. One or 2 days later, Hutton submitted a second statement after Tobin asked her to clarify the date of the alleged incident.

Tobin also asked CNA Ruth Burns, who was the only other unit employee working the night shift with Bariuad, to prepare a statement documenting instances that she witnessed Bariuad sleeping while on duty. Consistent with the Respondent's general policy, Tobin assured Burns that her statement would be confidential. Burns complied with Tobin's request and prepared a statement.

After reviewing the witness statements, the Respondent terminated Bariuad's employment. Following Bariuad's termination, Union Representative Donna Mapp sent the Respondent's acting human resources director, Lynn Morgenroth, an information request. Mapp requested, in relevant part, "[a]ny and all statements that [were used] as part of your investigation into Mr. Arturo [Bariuad]" as well as "[t]he names and job title of everyone [who] was involved in the investigation." On June 17, the Union filed a grievance over Bariuad's termination and, that same day, Morgenroth responded to the Union's information request via email. Morgenroth informed the Union that the Respondent would not provide the names or the job titles of the individuals who witnessed Bariuad's alleged misconduct. Morgenroth also denied the Union's request for witness statements, stating:

The employer conducted a confidential investigation regarding the allegations, as such disclosures of this information would breach witness confidentiality. The Grievant (whom you represent) was present when the incident(s) occurred, so you already have this information. The law does not require that we provide you with witness statements collected during our investigation. See *Anheuser-Busch*, 237 NLRB 982 (1978); *Fleming [Cos.]*, 332 NLRB 1086 (2000); *Northern*

Indiana Public Service [Co.], 347 NLRB [210] (2006). However, the Company would like to work with the Union regarding an accommodation to disclosure. Mr. Bariuad's statement is included in his HR file, attached.

Thereafter, the Respondent never furnished the requested information to the Union.

Discussion

After careful consideration, we find that the rationale of *Anheuser-Busch* is flawed. In our view, national labor policy will best be served by overruling that decision and, instead, applying the test set forth in *Detroit Edison* when a union requests the production of witness statements that are necessary and relevant to the union's representational role, but in which the employer has a legitimate and substantial confidentiality interest.

Section 8(a)(5) of the Act imposes on an employer the "general obligation" to furnish a union with relevant information necessary to the union's proper performance of its duties as the collective-bargaining representative of its employees, including information that the union needs to determine whether to take a grievance to arbitration absent settlement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). In *Acme*, the Supreme Court observed that providing a union with information relevant to the processing of grievances not only aids the union in representing grievants, but allows it to "sift out unmeritorious claims." *Id.* at 438. The Board applies a liberal test to determine whether information is relevant; the issue is whether the requested information is of "probable" or "potential" relevance. *Transport of New Jersey*, 233 NLRB 694, 694 (1977). As the Board explained in *Pennsylvania Power*, "the information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided." 301 NLRB at 1105.

Establishing relevance, however, does not end the inquiry. If a party asserts that requested information is confidential, the Board balances the union's need for the relevant information against any legitimate and substantial confidentiality interests established by the employer. See *Detroit Edison*, 440 U.S. at 318-320. The party asserting the confidentiality interest bears the burden of establishing that interest. *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984). Further, "a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation." *Pennsylvania Power*, 301 NLRB at 1105.

⁵ The duties of the charge nurses include reporting employee misconduct and writing accounts of any incidents that they witness. They are not unit employees.

Notwithstanding the employer's general duty to provide relevant information, the Board in *Anheuser-Busch* created a broad, bright-line exception, holding that "the 'general obligation' to honor requests for information, as set forth in *Acme* and related cases, does not encompass the duty to furnish witness statements . . ." 237 NLRB at 984–985. In creating this rule, the Board concluded that witness statements "are fundamentally different from the types of information contemplated in *Acme*, and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information." *Id.* at 984. In support of its position, the Board cited the Supreme Court's holding in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, did not require the Board to disclose, prior to an unfair labor practice hearing, statements of witnesses whom the Board intended to call at the hearing. Although acknowledging that the *Robbins Tire* Court was addressing only the "special danger flowing from prehearing discovery in NLRB proceedings," 437 U.S. at 239, the *Anheuser-Busch* Board relied on the Court's observations that the premature release of witness statements risked employer and union intimidation of potential witnesses, as well as the possibility that witnesses might be reluctant to give statements at all absent assurances against prehearing disclosure. *Anheuser-Busch*, *supra* at 984.

To begin, we reject the premise of *Anheuser-Busch* that witness statements are fundamentally different from the types of information contemplated in *Acme*, which concerned subcontracting information.⁶ If relevant and necessary to the union's representative duties, then requested information is, at bottom, fundamentally the same for purposes of the Act. This is particularly true in the grievance context, where unions must decide whether to expend limited resources processing a grievance at all.⁷ That does not mean, of course, that there are not other factors to consider, much less that a union is always entitled to receive the information that it seeks. But we are not persuaded that there is some fundamental difference between witness statements and other types of information that justifies a blanket rule exempting such statements from disclosure. In this respect, we find it

⁶ See 385 U.S. 432 (finding that the employer was required to provide information about the removal of certain equipment from the plant where the information was relevant to grievances the union had filed).

⁷ We disagree with our colleague and the *Anheuser-Busch* Board's assertion that the disclosure of witness statements "would not advance the grievance and arbitration process." *Supra*, 237 NLRB at 984. In our view, it is the *Anheuser-Busch* rule that fails to advance the grievance and arbitration process, which, as the Supreme Court noted in *Acme*, is aided by prearbitration exchanges of information. See 385 U.S. at 438.

significant that *Anheuser-Busch* predated *Detroit Edison* and, therefore, the Board did not have the opportunity to consider whether the test that the Supreme Court articulated in that case for disclosure of allegedly confidential information should apply to witness statements.

Nor are we persuaded that *Robbins Tire*, *supra*, requires or justifies a blanket rule exempting witness statements from an employer's duty to provide relevant information. As described, *Robbins Tire* did not involve a union's right under the Act to information relevant to its role in the collective-bargaining process. Rather, *Robbins Tire* held only that the FOIA did not require prehearing disclosure of Board affidavits, finding that the affidavits were covered under the FOIA exemption dealing with records compiled for law enforcement proceedings. In making that finding, moreover, the Court relied not only on the potential for coercion or intimidation of witnesses, as noted by the Board in *Anheuser-Busch*, but also on the absence of any evidence of Congressional intent to overturn the Board's longstanding rule against prehearing disclosure of witness statements in the interest of protecting the Board's enforcement mechanisms. *Robbins Tire*, *supra* at 242–243. That longstanding rule continues. See *Santa Barbara News-Press*, 358 NLRB No. 155, slip op. at 2 (2012) (citing cases). Where relevant information is requested in the context of a bargaining relationship, however, the Board's longstanding policy is to favor disclosure or, at a minimum, to require the parties to bargain over an accommodation in the interest of promoting collective bargaining and private resolution of disputes. See *Acme*, *supra* at 437.⁸ Thus, the policy concerns at stake pull in opposite directions, further undercutting the rationale of *Anheuser-Busch*.

As indicated, we recognize that, in some cases, there will be legitimate and substantial confidentiality interests that warrant consideration, including the risk that employers or unions will intimidate or harass those who have given statements, or that witnesses will be reluctant to give statements for fear of disclosure. But the same risks are presented by the disclosure of witness names, for which there is no exemption, even where an employer asserts good-faith concerns of confidentiality, threats, or coercion. In fact, the Board in *Anheuser-Busch* specifically affirmed the holding of *Transport of New Jersey*,⁹ in which the Board held that an employer, who claimed that the disclosure of witness names would expose the witnesses to harassment, had a duty to produce the requested information. *Supra*, 237 NLRB at 984 fn. 5.

⁸ Congressional intent regarding the application of the FOIA clearly is irrelevant in this context.

⁹ 233 NLRB 694.

The Board in *Transport of New Jersey* found that the employer's concerns were speculative and were outweighed by the union's need for the information. 233 NLRB at 695.

A review of other Board decisions involving the disclosure of witness names establishes that the flexible approach of *Detroit Edison* adequately protects the interests of the employer and witnesses, while preserving the general right of requesting unions to obtain relevant information. In *Pennsylvania Power*,¹⁰ the Board found that the employer, which operated a nuclear power generating plant, provided a legitimate and substantial confidentiality defense justifying its refusal to produce the names of informants who provided information about suspected employee drug use. In *Mobil Oil Corp.*,¹¹ the Board found that the employer's confidentiality claim prevailed in similar circumstances. There, the Board considered whether the employer unlawfully refused to disclose the identity of the person who provided information that led to the mandatory drug screening of three employees. The Board found that the employer lawfully refused to disclose the name of the person who reported the drug use, but unlawfully failed to provide a summary of the informant's report. In *Metropolitan Edison Co.*,¹² the Board distinguished *Pennsylvania Power* and *Mobil Oil* and found that the employer violated the Act by refusing to disclose names of two informants who had provided information that led to the discharge of an employee for stealing food from the plant cafeteria. The Board assumed that the employer's confidentiality claim was legitimate and substantial, but found that the employer's blanket refusal to provide any information was not justified; the Board then found that the employer had an obligation to offer an accommodation with regard to the disclosure of the information. *Id.* at 107. In the Board's view, "concerns about petty cafeteria theft, which poses no apparent threat to employee or public safety, do not carry the same unusually great weight as the interests that were found to be present in *Pennsylvania Power* and *Mobil Oil*." *Id.* at 108 (internal quotation marks omitted).¹³

Like the disclosure of witness names, the disclosure of witness statements may raise legitimate and substantial concerns of confidentiality or retaliation in some cases.

¹⁰ 301 NLRB at 1106–1107.

¹¹ 303 NLRB 780, 780–781 (1991).

¹² 330 NLRB 107 (1999).

¹³ See also *Alcan Rolled Products*, 358 NLRB No. 11, slip op. at 7–8 (2012) (adopting judge's finding that although respondent-employer established a confidentiality interest in the names of witnesses to an accident that led to an employee's discharge, the employer nevertheless had a duty to bargain over an accommodation).

Nothing in our decision today precludes appropriate consideration of those concerns.¹⁴ We find no basis, however, to assume that *all* witness statements, no matter the circumstances, warrant exemption from disclosure. Rather, we find it more appropriate to apply the same flexible approach that we apply in cases involving witness names. That test requires that if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party's need for the information. See *Detroit Edison*, 440 U.S. 301, 318–320 (1979); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). The Board considers whether the information withheld is sensitive or confidential based on the specific facts in each case. See *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006). As stated above, the party asserting the confidentiality defense may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995).

We find that this approach will effectively protect both the employer and the witnesses where the employer demonstrates a reasonable concern regarding confidentiality, harassment, or coercion, while also safeguarding the union's statutory right to obtain information relevant to grievance processing. See *Fleming Cos.*, 332 NLRB 1086, 1088–1091 (2000) (Members Fox and Liebman, concurring).

Prospective Application

The next issue that we confront is whether the foregoing principles should be applied retroactively, i.e., in this case. The propriety of retroactive application in any particular case is determined by balancing any ill effects of retroactivity against "the mischief of producing a result

¹⁴ Our colleague asserts a litany of adverse consequences that will occur if the Board applies the *Detroit Edison* test to witness statements, including an adverse impact on an employer's ability to conduct internal investigations; an inability of employers to protect employee witnesses from harassment or intimidation; employer difficulty complying with confidentiality guidelines established by the Equal Employment Opportunity Commission [EEOC] for employers' investigations of workplace harassment; and increased Board litigation. We disagree. The *Detroit Edison* balancing test is designed to take into account any legitimate and substantial confidentiality interest that an employer may have, which would include concerns about witness intimidation or compliance with EEOC guidelines. Where such concerns exist, the employer will not be required to provide the information, but will merely need to seek an accommodation from the union. It follows, then, that the *Detroit Edison* test encourages parties to a collective-bargaining agreement to work together to accommodate their competing interests.

which is contrary to a statutory design or to legal and equitable principles.” *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Pursuant to this principle, the Board will apply an arguably new rule retroactively to all pending cases, including the case in which the new rule is announced, so long as this does not work a “manifest injustice.” See *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993). In determining whether retroactive application will cause manifest injustice, the Board balances three factors: (1) “the reliance of the parties on preexisting law”; (2) “the effect of retroactivity on accomplishment of the purposes of the Act”; and (3) “any particular injustice arising from retroactive application.” *SNE Enterprises*, 344 NLRB 673, 673 (2005) (citing cases). We find that prospective application only is appropriate here.¹⁵

Our decision today marks a departure from longstanding precedent, and there is no doubt that many employers have come to rely on the *Anheuser-Busch* exemption, as demonstrated by the Respondent in this case when it denied the Union’s request for witness statements: the Respondent cited *Anheuser-Busch* in its letter to the Union in which it denied the Union’s information request. Therefore, we conclude that retroactive application of our new approach to employers, who at the time they refused to provide witness statements were following

¹⁵ Unlike his colleagues, Chairman Pearce would apply the new *Detroit Edison* balancing test retroactively and order the Respondent to provide the requested witness statements to the Union. Under *Detroit Edison*, the witness statements contain relevant information, and the Respondent has failed to establish any legitimate and substantial confidentiality interest in them, as there is no credible evidence supporting its professed concern about workplace harassment. Therefore, the statements are required to be produced under today’s decision. The Respondent’s citation of *Anheuser-Busch* in its letter denying the Union’s information request fails, in light of the Respondent’s contemporaneous conduct, to establish reliance that would make retroactive application of this decision inappropriate. The Respondent had the opportunity to act in accordance with the *Detroit Edison* standard in effect at the time of the request by providing the requested witness names and addresses. The fact that the Respondent refused to do so precludes any argument that it would have followed *Detroit Edison* with respect to witness statements had the applicability of that standard been established at the time. In short, it is apparent that the Respondent would have refused to provide the statements even if this decision had been extant at the time of the request. Therefore, it is not prejudiced by the change in law. On the other side of the balance, failing to apply the Board’s decision here will undermine the purposes of the Act. It is clear that the Respondent’s continuing refusal to provide the Union with the witness statements, which led to Bariuad’s termination, will impair the Union’s ability to investigate his grievance and ultimately to determine whether or not the Respondent had a legitimate basis for the termination. Under these circumstances, Chairman Pearce does not see a manifest injustice in simply requiring the Respondent to provide this information to the Union.

existing Board law, would work an injustice. Accordingly, we will apply *Detroit Edison* prospectively; in the present case and all other cases where the employer’s refusal to provide requested witness statements occurred before the date of this decision, we shall apply *Anheuser-Busch* in evaluating the lawfulness of the employer’s conduct.

Ruling on the Merits

As stated above, the judge found that the statements of Berg, Hutton, and Burns were “witness statements” within the meaning of *Anheuser-Busch*. The judge also found, applying *Pennsylvania Power*, 301 NLRB 1104 (1991), that the names of the witnesses were not confidential, and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide them to the Union.

We adopt the judge’s findings with respect to the witnesses’ names and job titles. The Respondent argues that it has demonstrated a legitimate and substantial confidentiality interest because it has a policy of keeping the names of witnesses confidential, and because revealing the names of witnesses could lead to the harassment of those witnesses. The Respondent also argues that its confidentiality interest outweighs the Union’s need for the information because the Union could have easily obtained the names of the employees working the night shift with Bariuad from the posted work schedules. We reject the Respondent’s arguments.¹⁶ First, citing *Alcan Rolled Products*, 358 NLRB No. 11 (2012), the judge properly found that an employer’s policy of keeping names and witness statements confidential does not by itself establish a legitimate and substantial confidentiality interest. Second, the credited evidence fails to establish any factual basis for the Respondent’s asserted concern regarding workplace harassment. Third, as the judge also found, the Union’s ability to obtain the requested information elsewhere does not excuse the Respondent’s obligation to provide the information. See *King Soopers, Inc.*, 344 NLRB 842, 845 (2005), *enfd.* 476 F.3d 843 (10th Cir. 2007). Moreover, the Respondent’s argument that the names of the witnesses were easily available from the posted schedule significantly undercuts its argument that the names and job titles were confidential.

¹⁶ We also reject the Respondent’s alternative request that the Board expand *Anheuser-Busch* to apply to witness names as well as witness statements.

For the foregoing reasons, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested names and job titles of the witnesses.

Turning to the statements, in the absence of exceptions, we adopt the judge's finding that the statements of Berg and Burns were "witness statements" within the meaning of *Anheuser-Busch*. We therefore affirm the judge's finding that the Respondent did not violate the Act by failing to provide the Union with their statements.

We find merit, however, in the Acting General Counsel's argument that Charge Nurse Hutton's statements were not "witness statements." Contrary to the judge, we find it significant that Hutton's statements were not provided under an assurance of confidentiality. For a statement to be exempt under *Anheuser-Busch*, the statement must be adopted by the witness, and assurances must have been given to the witness that the statement will remain confidential. *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3, 458 (2010), *enfd.* 681 F.3d 651 (5th Cir. 2012). See also *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), *enfd.* 936 F.2d 144 (3d Cir. 1991). Here, although Hutton assumed that her statements would be confidential because of the Respondent's general policy regarding such statements, she was not prompted to give the statements by any assurance of confidentiality. In fact, at no time was Hutton given any affirmative assurance that her statements would be kept confidential. Rather, the record establishes that Hutton gave the statements because it was one of her job duties to do so. Accordingly, we find that Hutton's statements were not subject to the *Anheuser-Busch* exemption and that the Respondent therefore violated Section 8(a)(5) and (1) by failing to provide her statements to the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Failing and refusing to bargain in good faith with the Union by refusing to provide requested information that is relevant and necessary to the processing of a grievance."

2. Substitute the following for paragraph 2(b) and reletter the succeeding paragraphs accordingly.

"(b) Provide the Union with the statements of Lynda Hutton."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 15, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would not overturn the longstanding and well-established rule of *Anheuser-Busch*, 237 NLRB 982 (1978), which holds that an employer's general obligation to provide relevant information in response to a union's request, as set forth in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and related cases, does not include the duty to provide witness statements obtained during an employer's investigation of employee misconduct. *Id.* at 984–985.¹ The bright-line rule of *Anheuser-Busch*, which has been applied since 1978, serves long-recognized important labor policies. The rule protects the integrity of the arbitration process, protects employee witnesses who participate in workplace investigations from coercion and intimidation, and enables employers to conduct effective investigations into workplace misconduct.

The Supreme Court has long recognized the dangers of releasing witness statements. In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Court held that the

¹ I agree with the judge and my colleagues that, under extant precedent, the Respondent unlawfully failed to provide the Union with the names and job titles of three witnesses. I favor the Respondent's argument that, rather than overruling *Anheuser-Busch*, its per se rule exempting witness statements from disclosure should be extended to witness names. However, inasmuch as my colleagues choose to eliminate that per se exemption entirely, I agree to apply dispositive extant law in deciding this case. Similarly, I agree with the majority that, under *Anheuser-Busch*, as applied in *El Paso Electric Co.*, 355 NLRB No. 71 (2010), *enfd.* 681 F.3d 651 (5th Cir. 2012), and *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), *enfd.* 936 F.2d 144 (3d Cir. 1991), Charge Nurse Lynda Hutton's statements were not witness statements exempt from disclosure because they were not provided under an assurance of confidentiality. While I do not agree that assurances of confidentiality should be required under *Anheuser-Busch*, I agree for institutional reasons to apply that precedent here.

Board was not required under the Freedom of Information Act (FOIA) to disclose, prior to an unfair labor practice hearing, statements of witnesses whom the Board anticipated would testify at the hearing. The Supreme Court cited several risks to the Board's investigation that would result from such disclosure, including the "most obvious risk" of coercion and intimidation of employees who provide statements, as well as the reluctance of witnesses to participate in Board investigations and to give truthful statements. *Id.* at 239.

Relying on *Robbins Tire*, the Board in *Anheuser-Busch* correctly recognized that the arbitration process would not be well served by requiring the prearbitration production of witness statements. The Board reasoned that mandating the disclosure of witness statements "would diminish rather than foster the integrity of the grievance and arbitration process" because witness statements are "fundamentally different from the types of information contemplated in *Acme*" and requests for their disclosure raise "critical considerations which do not apply to requests for other types of information." 237 NLRB at 984. Specifically, the Board emphasized the potential for coercion and intimidation of witnesses whose statements are disclosed prior to arbitration hearings and that "witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed at least until after the investigation and adjudication are complete." *Id.* (citing *Robbins Tire*, 437 U.S. at 240).

I agree with the Board in *Anheuser-Busch* and its progeny that the same concerns identified in *Robbins Tire* apply equally to the arbitration context. Like witnesses in an unfair labor practice proceeding, witnesses in an arbitration proceeding may face pressure to change their testimony, or not testify at all, if their statements are revealed before the hearing. Further, like unfair labor practice litigation, there is no general right to pretrial discovery in arbitration proceedings. See *California Nurses Assn.*, 326 NLRB 1362, 1362 (1998). A key benefit of labor arbitration is that it is an informal, expeditious process that is often unencumbered by prehearing discovery disputes. Further, arbitration, like unfair labor practice proceedings, is an adversarial process and can be just as contentious.²

The *Anheuser-Busch* rule protects employee witnesses who participate in workplace investigations from coercion, intimidation and retaliation by the union or co-

² See *NLRB v. Electronic Workers Local 745*, 759 F.2d 533, 534–535 (6th Cir. 1985) (enforcing order finding that union stewards unlawfully threatened union member with fines for testifying against another employee in arbitration); *Steelworkers Local 5550*, 223 NLRB 854, 855 (1976) (finding that local union president made a veiled threat to convince employee not to testify for the employer in arbitration).

workers regardless of whether the investigated misconduct issue matter goes to arbitration. In *Northern Indiana Public Service Co.*, 347 NLRB 210, 214 (2006), the Board found that the employer did not unlawfully refuse, on the basis of confidentiality, to furnish the union with a copy of notes from interviews conducted by the employer in investigating an employee's complaint about the threatening conduct of his supervisor.³ The Board recognized that "an individual's participation in such an investigation, whether as complainant or as witness, may subject the individual to intimidation and harassment by coworkers and/or supervisors." The Board explained that "treating [the] interview notes as confidential . . . protect[s] witnesses from retaliation because of their participation."

My colleagues assert that there is the same risk of coercion or intimidation of employees with the disclosure of witness names, which the Board has not categorically exempted from disclosure. As I mention above, I agree, but I believe this argument would favor extending the *Anheuser-Busch* rule to witness names, not abandoning the rule, particularly in those instances where the witnesses are identified or identifiable as those providing evidence adverse to an employee accused of wrongdoing.⁴ Nevertheless, the Board in *Anheuser-Busch* did essay a reasonable distinction between the two kinds of information by distinguishing its holding from *Transport of New Jersey*, where the Board held that an employer does have a duty to turn over to the union the names of witnesses to an incident for which the employee was disciplined. 237 NLRB at 985 fn. 5, citing *Transport of New Jersey*, 233 NLRB 694, 694–695 (1977). In sum, at

³ While *Northern Indiana* was not decided under *Anheuser-Busch*, the case addresses the important policy interests underlying the bright-line rule.

⁴ See, e.g., *Boyertown Packaging Corp.*, 303 NLRB 441, 444–445 (1991). In that case, an employee was terminated due to the inattentive driving of a forklift. The employer furnished the union with the names of all employees it interviewed, but refused to identify which of these witnesses complained about the grievant or to provide any statements. *Id.* at 444–445. The Board affirmed the findings of the judge, who explained:

Revealing the names of only those who gave evidence damaging to [the grievant] is little different from delivering the statements of identified witnesses because the employer would, by naming those who complained, in fact make a statement on their behalf in their names. Moreover, the singling out of witnesses adverse to a grievance spotlights them as opponents to the grievant's cause and, by so doing, unnecessarily enhances the possibility they may be subject to coercion or intimidation in an effort to persuade them to change or retract their oral reports previously given to the employer. It is precisely this possibility of coercion and intimidation of witnesses that the Board's decision in *Anheuser-Busch* was designed to prevent, and I perceive no logical reason why the same policy of preventing coercion and intimidation of witnesses should not apply to requests limited to the names of employee witnesses who complained.

least in some cases, the danger of harassment and intimidation if a witness statement is produced is much greater than if the union is provided only with the names of the witnesses. If a union is given a list of witness names, it may have no knowledge of what the witness told the employer. Further, the witness can decide what they choose to tell the union if subsequently interviewed. In contrast, if the witness statement is produced, the union will know if a witness informed the employer of the accused's misconduct. The union, and anyone the union tells, will learn whether a witness is for or against the accused.

The rule of *Anheuser-Busch* does not hinder a union's ability to investigate grievances or prepare for arbitration. At the very least, the Board can require an employer to provide the union with a summary of the substance of the witness statements, without producing the actual witness statements or revealing the witnesses' identity. See *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1107 (1991). Such an accommodation permits the union to assess the strength of the claim before deciding whether to arbitrate the matter. Further, although there is no general rule requiring prearbitration disclosure of information, the parties to a collective-bargaining relationship are free to agree in their bargaining agreements upon procedures for disclosure. There is no need for the Board to intrude on this private dispute resolution process, which is fundamentally a creature of contract, by imposing what is effectively an independent statutory obligation to engage in prehearing discovery.

The majority finds it sufficient to resolve confidentiality concerns with respect to witness statements under the case-by-case balancing of interests test articulated in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). I disagree. This test substitutes doubt for certainty, fettering the ability of employers to effectively conduct investigations of workplace misconduct. It also raises the prospect that expeditious resolution of misconduct issues through the grievance-arbitration process will be denied in instances where an employer refuses to provide witness statement on confidentiality ground and the parties must then take an extended detour through the Board's processes to resolve the dispute.

As to the adverse impact of the *Detroit Edison* test on employer investigations, the full and candid participation of employees in such investigations is more than ever essential to employers challenged with increasing concerns about protecting employees and avoiding liability if they fail to maintain workplace safety or to identify and address workplace violence, bullying, sexual and other types of harassment. If employee witnesses cannot be assured that their statements will remain confidential, they will be reluctant to come forward with information

that may be detrimental to their coworkers and avoid participating in the investigation. Further complicating the matter is that the majority's reliance on a *Detroit Edison* balancing-of-interests test will often put human relations officials, not generally steeped in knowledge of Board law, in the position of making a legal assessment whether their employer's confidentiality interests are legitimate, substantial, and superior to the interest of the union requesting witness statements. Bad enough that such officials already have to do this with respect to other requested investigatory information, but I fail to see in my colleague's analysis a persuasive reason for making confidentiality of witness statements, the touchstone of any investigation, a case-by-case guessing game. That is why the *Anheuser-Busch* Board created "a clear, simple, and all-encompassing rule rather than one which entails detailed examination and balancing of all the particular facts." *Whirlpool Corp.*, 281 NLRB 17, 22 (1986).

The problem created by the abandonment of a bright-line standard exempting confidential witness statements from disclosure is compounded by the prospect, noted above, that it will create unnecessary litigation before the Board. Unions will almost certainly now ask for witness statements in any instance of a represented employee's alleged misconduct. If the employer refuses to provide them based on a claim of confidentiality, a union insistent on disclosure will have to file an unfair labor practice charge. During the ensuing investigation and possible litigation, the private grievance arbitration machinery will often grind to a halt awaiting a final Board decision, even though the misconduct issue involves no statutory matter other than the information request issue.

My colleagues cite Board cases⁵ that they contend support the view that the *Detroit Edison* balancing test is effective and a superior approach to the *Anheuser-Busch* rule, making critical distinctions between competing interests on confidentiality issues with respect to requested investigatory information other than witness statements. Contrary to my colleagues, these cases actually highlight the flaws, as described above, with applying the *Detroit Edison* balancing test. First, the process is post hoc. An employer cannot give a potential witness any guarantee of confidentiality upfront. Nothing is certain until the Board, or perhaps a reviewing court, makes a final determination whether a disputed statement must be disclosed. Second, the process can be lengthy. As measured by time from the filing of a charge to Board deci-

⁵ *Metropolitan Edison*, 330 NLRB 107 (1999), *Mobil Oil Co.*, 303 NLRB 780 (1991), and *Pennsylvania Power Co.*, 301 NLRB 1104 (1991).

sion, none of the cited cases was resolved in less than 2 years. Finally, the resolution of a confidentiality claim in one case provides little or no guidance for the future. As former Member Brame observed in his dissent in *Metro-politan Edison*,

It would take the wisdom of Solomon and the time of the ages for the Board, on a case-by-case basis, to attempt to grade and classify all potential forms of employee misconduct and to determine how the gravity of the offense ranks in the majority's subjective scale of various legitimate interests. Moreover, there is no correlation between the majority's perceptions of the nature of the misconduct and the potential peril to an informer. When the informant gives up information that results in an employee's dismissal, it does not matter if the discharge is because of workplace theft or drug use. The employee's job is lost just the same and the resentment of fellow employees toward the informer is likely to be just as great.

An employee contemplating whether to provide confidential information should not be required to attempt to predict how the Board will apply its subjective balancing test Such a rule will have a chilling effect on informants and employees.⁶

Finally, I note that requiring the production of witness statements absent a proven superior confidentiality claim by the employer will also conflict with existing guidance from the Equal Employment Opportunity Commission (EEOC) regarding confidentiality. The EEOC has stated that confidentiality is a key component of an effective workplace investigation of harassment. The EEOC's "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" (the Enforcement Guidance) provides that "an antiharassment policy and complaint procedure should contain, at a minimum, the following elements: . . . Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible." The guidance continues: "An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible."⁷

Employers now will potentially violate EEOC guidelines if required to furnish a union with witness statements in connection to an employer's investigation of an

employee's harassment complaint. It is the Board's obligation to accommodate the policies of the Act to other Federal statutes expressing equally important congressional objectives.⁸ My colleagues fail to make this accommodation by abandoning the *Anheuser-Busch* rule in favor of the *Detroit Edison* test.

In sum, the bright rule of *Anheuser-Busch* has for over 30 years supported employers' efforts to assure employee participation in the employer's investigatory process, protected participating witnesses from intimidation, retaliation or harassment by the union or coworkers, enabled employers to effectively conduct investigations of workplace misconduct, and facilitated the quick resolution of misconduct in private collectively-bargained grievance-arbitration systems. The majority today rends all that asunder. I respectfully dissent.

Dated, Washington, D.C. December 15, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union by refusing to provide requested information that is relevant and necessary to the processing of a grievance.

⁶ 330 NLRB at 114-115.

⁷ EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

⁸ See *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide the Union with the requested names and job titles of informants against Arturo Bariuad.

WE WILL provide the Union with the requested statements of Lynda Hutton.

AMERICAN BAPTIST HOMES OF THE WEST D/B/A
PIEDMONT GARDENS

Noah Garber, Esq. and Amy L. Berbower, Atty., for the Acting General Counsel.

David S. Durham, Esq. and Gilbert J. Tsai, Esq. (Arnold & Porter LLP), of San Francisco, California, for the Respondent.

Yuri Gottesman, Esq. (Weinberg, Roger & Rosenfeld), of Alameda, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Oakland, California, on January 31, 2012. Service Employees International Union, United Healthcare Workers–West (the Union or the Charging Party) filed the charge on August 26, 2011,¹ and the General Counsel issued the complaint on November 22. This is a refusal to provide information case by the Union against American Baptist Homes of the West d/b/a Piedmont Gardens (Respondent or the Employer) where it is alleged that Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

At trial, all parties were afforded the right to call, examine and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs.² On March 6, 2012, the briefs were filed by counsel for the Acting General Counsel, in which counsel for the Union joined and argued separately in its own brief, and by counsel for Respondent and have been carefully considered. Accordingly, based upon the entire record,³ includ-

¹ All dates are in 2011, unless otherwise indicated.

² For ease of reference, testimonial evidence cited here will be referred to as “Tr.” (Transcript) followed by the page number(s); documentary evidence is referred to either as “GC Exh.” for a General Counsel exhibit, there are no exhibits from Respondent or the Charging Party; and reference to the General Counsel’s posttrial brief shall be “GC Br.” for the General Counsel’s brief, followed by the applicable page numbers; and the same for Respondent’s posttrial brief referenced as “R. Br.” and the Charging Party’s posttrial brief shall be “CP Br.” I reject Respondent’s March 22, 2012 letter submission citing to the recent *Alcan Rolled Products*, 358 NLRB No. 11 (2012), case on the grounds that it is untimely, improper, and irrelevant. As discussed in this decision, the case is distinguishable from the instant action.

³ I correct the transcript as follows: Tr. 50, L. 18: “case” should be “cause”; Tr. 55, L. 5: “would confidential” should be “would be confidential”; Tr. 58, L. 13: “Durham” should be “Garber”. The referencing errors between Garber and Durham continue from Tr. pp. 59–63 until cross-examination as Garber conducted his direct examination of Hutton; Tr. 94, L. 2: “periods, throughout” should be “periods. Throughout . . .”.

ing the posthearing briefs and my observation of the credibility of the several witnesses, I make the following

FINDINGS OF FACT

A. Earlier ALJ Decision and Background
Procedural Matters

This case follows on the heels of another trial involving these same parties that was conducted by now-retired Administrative Law Judge Burton Litvack last year and is pending before the Board. See *Piedmont Gardens*, Cases 32–CA–025247, 32–CA–025248, 32–CA–025266, 32–CA–025308, and 32–CA–025498, slip op. (August 9, 2011) (the earlier decision). I adopt and take administrative notice of Judge Litvack’s credibility findings with respect to Respondent’s executive director, Gayle Reynolds, Respondent’s witness who testified in both proceedings. Retired Judge Litvack found Reynolds’ testimony, in part, to be unbelievable, disingenuous, and outweighed by more reliable testimony.⁴ Thus, I find that Judge Litvack’s credibility findings as to Gayle Reynolds in the earlier decision are relevant and shall be adopted by me in this proceeding so that her testimony here will receive less weight unless substantiated by other evidence. Accordingly, my reliance on Judge Litvack’s credibility findings in the earlier decision is limited to witness Gayle Reynolds.⁵ See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000) (judge’s findings in earlier case relied upon as showing evidence of animus in present case); *Detroit Newspapers Agency*, 326 NLRB 782 fn. 3 (1998), enfd. denied 216 F.3d 109 (D.C. Cir. 2000) (judge properly relied on earlier decision of another judge in a case pending before the Board to find that a strike was an unfair labor practice strike); *Sunland Construction Co.*, 307 NLRB 1036, 1037 (1992) (Administrative notice appropriate where

⁴ “. . . While she professed to have no knowledge as to the vote, Gayle Reynolds admitted entering the breakroom sometimes on a weekly basis and having observed other bargaining-related flyers posted on the bulletin board. In these circumstances, I do not believe that she failed to notice the strike vote flyer affixed to the bulletin board and believe that Pinto entered the breakroom and engaged in his actions at Respondent’s behest.”

“. . . As to Henry, as between the employee and Reynolds, I perceived Henry as being the more reliable witness. In other circumstances, I might have believed Reynolds merely was honestly mistaken in maintaining she acted against Henry’s presence inside Respondent’s facility on the morning of June 18; however, when, despite being confronted with her own conflicting emails, she obdurately insisted her testimony was correct, I think Reynolds was being disingenuous. Thus, I credit Henry and find that Reynolds discovered her helping with the strike authorization vote in the breakroom after 6 p.m. on June 17 and promptly demanded that Henry leave the building. Finally, in these circumstances, and again noting her own conflicting email, I find that Reynolds expelled Eastman from Respondent’s facility on the morning of June 18, also because she helped with the strike authorization vote.” The earlier decision slip op. at 19–20. (Emphasis added.)

⁵ Union Representative Mapp, Respondent’s counsel, Durham, Esq., and terminated employee Arturo Bariuad are also referenced in the earlier decision but Bariuad did not testify and retired Judge Litvack did not make any other credibility findings in his case for Mapp or Durham relevant to this proceeding.

factual showing that key management witness in earlier case whose actions gave rise to an unfair labor practice was the same individual involved in the subsequent matter.)

B. Jurisdiction

At all times material, Respondent, a State of California non-profit corporation, has been engaged in the operation of continuing care retirement communities, including a facility located in Oakland, California, known as Piedmont Gardens and a separate facility also located in Oakland known as Grand Lake Gardens. The evidence establishes, the parties admit, and I find that during the 12-month period immediately preceding the issuance of the instant consolidated complaint, which period is representative, Respondent, in the normal course and conduct of its above-described business operations, derived gross revenues in excess of \$100,000 and purchased and received goods and services, valued in excess of \$5000, which originated outside the State of California. It is alleged, the parties admit, and I find that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint further alleges, the parties admit, and I find that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

C. Background Facts

It is further alleged, the parties admit, and I find that at all times material, certain employees of Piedmont Gardens and certain employees of Grand Lake Gardens, namely all employees performing work described in and covered by “Section 1.1 Union, 1.1 Recognition” of the March 1, 2007, through April 30, 2010 collective-bargaining agreement between Piedmont Gardens and Grand Lake Gardens and the Union (the Agreement); excluding all other employees, guards, and supervisors as defined in the Act (the combined unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Since at least March 1, 2007, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the combined unit, and since that date the Union has been recognized as such representative by Respondent. This recognition was embodied in the Agreement.

At all times, since at least March 1, 2007, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the combined unit. Donna Mapp (Mapp) is a union representative assigned to Respondent’s facility, Piedmont Gardens, whose job is to monitor compliance with the union contract with management and to provide assistance to union members through the grievance process. (Tr. 27.) Mapp testified that she understands that the Union represents the combined unit that is comprised basically of certified nursing assistants (CNAs) dietary workers, housekeeping workers, maintenance workers, the receptionist, and laundry activities’ workers but not the licensed vocational nurses

(LVNs) including charge nurses. (Tr. 28, 81–82.) Mapp is familiar with former Respondent CNA Arturo Bariuad (Bariuad) who was terminated by Respondent for alleged misconduct resulting in Mapp’s filing of a June 17 grievance related to Bariuad’s termination. (Tr. 28–29; GC Exh. 5.)

The parties further admit, stipulate to, and I find that Respondent’s acting human resources director at its Piedmont Gardens facility, Lynn M. Morgenroth, is a supervisor of Respondent, within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. Furthermore, the parties admit, stipulate to, and I find that Respondent’s assisted living director at its Piedmont Gardens facility, Alison Tobin (Director Tobin), is a supervisor of Respondent, within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Tr. 9–10, 80.) Director Tobin reports to Respondent’s executive director, Gayle Reynolds. (Tr. 86.)

Piedmont Gardens is a continuing care retirement community of more than 300 residents providing entire continuum care from independent living, assisted living, memory support, and skilled nursing care. (Tr. 86–87.) Of Respondent’s three-building campus, its assisted living portion is located in the Oakmont building on its 8th, 9th, and 10th floors as of last June. (Tr. 87.) Respondent has approximately 34–37 residents in its assisted living section. (Tr. 88.)

Residents at Respondent’s assisted living section generally require assistance with their activities of daily living including dressing, bathing, getting to the dining room, and taking their medications. (Tr. 87.)

D. Events Leading to the Creation of the Witness Statements

In June, Bariuad’s employment as a CNA at Respondent was terminated for allegedly sleeping on the job during his night-shift in Respondent’s assisted living facility. (Tr. 44.) Soon after the alleged incident involving Bariuad, Director Tobin participated in an investigation into the alleged incident and received five written statements from two LVN charge nurses, Bariuad, and one other CNA who observed Bariuad’s alleged misconduct.⁶ (Tr. 80–81, 83, 90.) While Director Tobin explained that she would expect a charge nurse to report threatening behavior and to include in any written statement to her an allegation of intimidating behavior if related to any alleged employee misconduct, no credible evidence of any threatening or intimidating conduct attributed to Bariuad was produced. (Tr. 81.)

Director Tobin began her investigation when she first met with a new unidentified charge nurse⁷ who was being trained by Hutton, the other charge nurse on duty the night of the alleged incident. (Tr. 60, 99–100.) As part of her investigation,

⁶ At the time of trial, only one of the two charge nurses, Lynda Hutton, was still employed at Respondent. Tr. 82–83. Also, as discussed, Hutton prepared two statements due to her clarifying dates from her first statement to her second and statements also came from an unidentified LVN charge nurse, CNA Burns, LVN Hutton, and also Bariuad.

⁷ Testimony at trial identified the LVN charge nurse in training with Hutton as Barbara Berg.

Director Tobin told the charge nurse that statements from employees are held as confidential documents and that the information was to be used internally at Respondent. (Tr. 99.) At no time prior to agreeing to prepare a statement, however, did the LVN charge nurse express any concern about Bariuad knowing that she had written a statement about him and this LVN charge nurse did not request assurances of confidentiality. (Tr. 83, 103.) While the practice of keeping employee statements confidential is not posted at Respondent, the practice is maintained regardless of whether it is actually needed. (Tr. 90, 92.)

Ruth Burns (CNA Burns) also testified by subpoena that she formerly worked for Respondent at Piedmont Gardens' assisted living facility from August 2010 until October 2011 as a night-shift CNA and knew Bariuad who also worked the same night-shift location for Respondent. (Tr. 48–49, 52.) CNA Burns explained that Respondent's CNAs take care of senior citizen residents who live at the facility by answering their call pendants if they call and seek assistance, helping them with their showers and dressing activities, and assisting with other activities of daily living. (Tr. 54.) CNA Burns further explained that when she worked the night shift, there was usually one other CNA and a charge nurse or LVN working a floor with her. (Tr. 54, 88.) CNA Burns opined that everyone who worked the night shift knew that Bariuad regularly slept on the night shift. (Tr. 53.) LVN charge nurses and not CNAs were responsible for issuing and administering the residents their medications. (Tr. 54, 57, 87.) Director Tobin added that the supervising charge nurse is also responsible for responding to a resident's pendant or wall-mounted call button during the night shift so that on the night of the alleged incident, at least one charge nurse and one CNA other than Bariuad were available to respond to any emergency on the floor where they were assigned. (Tr. 96–98.)

In June, CNA Burns was asked by her supervisor, Director Tobin, via telephone, to write a statement documenting any times that she noticed Bariuad sleeping on the job. (Tr. 49–50, 80, 101–102.) Director Tobin also asked CNA Burns to put the statement under Director Tobin's office door when she finished writing it. (Tr. 50.) At no time did CNA Burns ask Director Tobin or anyone else at Respondent to keep the written statement or her identity as a witness confidential though Director Tobin told CNA Burns that the statement would be confidential. (Id.) CNA Burns believed that "it helped" and that she "was glad" that Director Tobin told her that her witness statement would be confidential. (Tr. 55.) At no time did CNA Burns ever say to Director Tobin or anyone else at Respondent that she was scared to put anything in writing that would cause repercussions from either Bariuad or the Union. (Tr. 50–51.) Similarly, Director Tobin explained that the unidentified LVN charge nurse not being Lynda Hutton on duty the night of the alleged incident, also did not express any concerns about Bariuad knowing that she gave Director Tobin a written statement about the incident. (Tr. 83.)

Further testifying at trial was Lynda Hutton (Hutton), a Respondent employee for 40 years, the last 2 or 3 years being assigned as an LVN charge nurse in Respondent's assisted living facility. (Tr. 57.) Hutton opined that her duties as an LVN charge nurse in the assisted living section include super-

vision of CNAs, medication, treatments, and to report employee misconduct such as sleeping on the job.⁸ (Tr. 57, 62, 71, 81, 94.) She also described her supervisory duties as "making the rounds to make sure that people are doing what they're suppose to be doing . . .", instructing CNAs on their tasks, and reporting employee misconduct and writing a statement about what they witness. (Id.) Hutton admitted knowing that Bariuad was an employee at Respondent who worked the night shift with her as his supervisor for close to 2 years. (Tr. 58–59, 62, 67.) Hutton did not hesitate to verify that over this almost 2-year time period, there was no incident involving Bariuad physically threatening either Hutton or threatening anyone else at Respondent. (Tr. 62.) Later on cross-examination, however, after a short break, Hutton altered this testimony to say that she did actually experience intimidation or threats from Bariuad through his alleged and undocumented statement that if she did anything to take Bariuad out of his employment with Respondent, he supposedly threatened to "take [Hutton] out of here with me and everybody else" and that he also allegedly threatened Hutton with closing down Respondent's facility. (Tr. 64.)

I find Hutton's first response—denying there being any threats from Bariuad—to be the more credible statement. Throughout the 2 years she worked the night shift with Bariuad, she did not know of any time that Bariuad ever threatened anyone at Respondent's facility. (Tr. 62.) Hutton did not hesitate with this response. I further find that threatening conduct is the same as intimidating conduct and to intimidate is "to inhibit or discourage by or as if by threats."⁹ In addition, I reject Hutton's changed testimony that she felt intimidated by Bariuad and his described intimidating statements referenced above due to its contradiction of her earlier testimony and the timing of the changed testimony directly after a trial break and a change to questioning from Respondent's lawyer.

In addition, her changed testimony is inconsistent with the record as no documentation of this alleged intimidating conduct from Bariuad was ever produced in support thereof, though requested by the General Counsel. (Tr. 78.) Hutton is required to document employee misconduct including threats and intimidating statements yet no such documentation exists. (Tr. 81.) Moreover, the parties stipulate to, and I further find, that Respondent did not have possession or control and, therefore, did not produce any documentation that relates in any way to any alleged disciplines, warnings, written memorials of verbal warnings, etc. that refer to alleged complaints received by Respondent, from its employees, regarding Bariuad's conduct with other employees while employed at Respondent. (Tr. 78.)

Mapp provided in a forthright, direct, believable manner, corroborated testimony that no employees at Respondent's facility ever expressed fear or told her they felt intimidated for

⁸ The assisted living section with its 34–37 residents is distinguishable from the independent living section at Respondent's facility with close to 200 residents which allows independent living and little or no assistance or nursing supervision for residents versus intensive care unit (ICU) or skilled nursing sections with approximately 70 residents a day which provide its residents with other LVNs and registered nursing care and supervision. Tr. 93–95.

⁹ *Webster's II New Riverside Univ. Dictionary*, The Riverside Publishing Co. (1988), p. 639.

any reason regarding Bariuad. (Tr. 41.) Mapp and CNA Burns also admitted that no employees at Respondent's facility ever complained to them that Bariuad ever threatened to sue them. (Tr. 42, 49.) In addition, Mapp admitted that in her role as the union representative who provides help to those employees who have been disciplined by Respondent, she did not know of any occasion where Bariuad had been disciplined for bullying or any other form of threatening or intimidating behavior. (Id.) CNA Burns also admitted that Bariuad never threatened her in any way when she was employed at Respondent and CNA Burns also was never told by any employee at Respondent that they were intimidated by Bariuad. (Tr. 49.) At no time has CNA Burns had any communications with the Union concerning Bariuad and allegations that he was sleeping on the job. (Tr. 52.)

In June, Hutton prepared a written statement on her own for Respondent regarding Bariuad's alleged misconduct without anyone at Respondent asking her to prepare such a statement. (Tr. 58–59.) Hutton explained how she came to draft the written statement describing how another employee had reported Bariuad and that at that point Hutton could not let Bariuad's alleged practice of sleeping on the job go any further so she reluctantly believed she needed to also report him. (Tr. 59–60.) Moreover, Hutton admitted also receiving a disciplinary writeup for not reporting Bariuad's alleged misconduct sooner. (Tr. 62.)

Hutton also recalled that she was training another LVN, Barbara Berg (Berg), at the time of the June incident involving Bariuad but she was not sure whether she consulted Berg in her preparation of the written statement. (Tr. 60.) Hutton was sure that no one from Respondent told her that her first written statement would be confidential prior to her writing it. (Tr. 60–61.) Hutton never mentioned ever being specifically told by Respondent beforehand that her statement would remain confidential but she had the belief that her *statement* would be kept confidential by Respondent after she submitted to Director Tobin. (Tr. 65.) Hutton, however, did not testify that she ever held the belief that her *identity* as a witness in Respondent's investigation would also remain confidential. Hutton further explained that she slipped her written statement about Bariuad's alleged misconduct under the door of Director Tobin's office when she finished writing it. (Tr. 60.) One or 2 days after preparing her written statement, Hutton was asked to clarify the date of the alleged incident involving Bariuad in her second written statement to Director Tobin. (Tr. 69–72, 102–103.)

Hutton also confirmed that Bariuad's alleged sleeping during his night shift did not pose a danger to the Respondent's residents because three other workers, including her, were covering his floor at the time of the incident.¹⁰ (Tr. 68–69.)

¹⁰ Reynolds opined, however, that if residents in Respondent's assisted living section are neglected, there could be potential negative ramifications if someone fell and was injured and no one responded. Tr. 87–88. I find this testimony to be self-serving in her position as Respondent's executive director and speculative and unreliable given Ms. Reynolds' noncredible testimony in the earlier decision and Hutton's uncontroverted view that on the night shift in question there was no

E. Union's Requests for Information and Employer's Responses

After reviewing the four witness' written statements, Respondent terminated Bariuad in June for allegedly sleeping on the job.¹¹ (Tr. 28, 44–45, 98–99.)

When first alerted of Bariuad's termination of employment, Mapp for the Union tried to find out for the Union who was working with him the night he was accused of sleeping on the job and who might have witnessed him that night and none of the employees interviewed by the Union said they had been interviewed by Respondent about the incident. (Tr. 44–46.) Mapp admitted finding out who was working with Bariuad the night he was accused of sleeping on the job and identified one as another nightshift CNA but did not recall the specific names of the workers at trial except to note that "Rhonda" was not one of them discovered by her or mentioned by Bariuad. (Tr. 45–47.) While the Union discovered the names of some of Bariuad's coworkers with him the night of the incident, the known coworkers denied providing witness statements to Respondent so Mapp looked to Respondent to supply the missing identities and witness statements as they may have included residents at the assisted living facility. (Tr. 45–47.) Reynolds pointed out that the identity of those employees by name and assigned shift including who worked the night shift with Bariuad was admittedly not confidential and was in fact posted in public view by the timeclock in the assisted living section for a 2-week period. The posting is removed when the 2-week period is over and the posting is replaced with the next 2-week posting prior to the next 2-week shifts. (Tr. 91–93.)

Prior to filing the grievance related to Bariuad's termination, Mapp sent an email on June 15 to Respondent's human resources director, Lynn Morgenroth, requesting information in regards to Bariuad's termination (the first request). (Tr. 29–31; GC Exh. 6.) The first request included, among other things, a request for witness statements and the names and job titles of everyone involved in Respondent's investigation leading to Respondent's termination of Bariuad. (Id.) Mapp explained that this information was needed because the Union was told that Bariuad had been terminated for allegedly sleeping on the job and that some people gave statements to Respondent so the Union wanted to know the identity of the people who gave statements that led to Bariuad's employment termination to verify the truth of the statements.¹² (Tr. 31, 33.)

In response to the first request, Mapp received a 3-page document dated June 17 from Morgenroth (the first response) which, among other things, states that:

The employer conducted a confidential internal investigation regarding the allegations, as such disclosures of this informa-

danger to the Respondent's residents because other workers were covering the floor for Bariuad at the time of his alleged misconduct. See Tr. 68–69.

¹¹ Besides statements from CNA Burns, Hutton, and LVN Charge Nurse Berg, a fourth statement from Bariuad is referenced as being produced to the Union from Respondent as part of his HR file. See GC Exh. 7.

¹² At the time of trial, the grievance filed by the Union on Bariuad's behalf was ongoing and had progressed to a second step. Tr. 33–34.

tion would breach witness confidentiality. The Grievant (whom you [the Union] represent) was present when the incident(s) occurred, so you already have this information. The law does not require that we provide you with witness statements collected during our investigation. See, Anheiser-Busch, 237 NLRB 982 (1978); Fleming Companies, Inc., 332 NLRB 1086 (2000); Northern Indiana Public Service Company, 347 NLRB [210] (2006). However, the Company [Respondent] would like to work with the Union regarding an accommodation to disclosure. Mr. Bariuad's statement is included in his HR file, attached. [Emphasis in original.]

(Tr. 31–32; GC Exh. 7.) The first response also provided that “[t]he investigation was conducted by: Alison Tobin, Director of Assisted Living and Memory Support in consultation with Lynn Morgenroth, Acting HR Director” (Id.)

On June 17, Mapp filed a grievance over Bariuad’s termination and also sent a second email request for information to Morgenroth (the second request) repeating the Union’s initial requests for the same witness names and witness statements along with an alternative accommodation to move the grievance process along suggesting that in place of providing the requested witness statements, Respondent “mak[e] all such witnesses available for the Union to interview independently as a part of our [the Union’s] investigation at a time of mutual convenience in the next 2 weeks.” (Tr. 29, 34–35; GC Exhs. 5 and 8.) Mapp further acknowledged that at no time did Morgenroth agree to Mapp’s suggested alternative accommodation on the Union’s behalf. (Tr. 36.)

In response to the second request, Mapp received a 2-page document dated June 21 from Morgenroth (the second response) which, among other things, states that:

As stated in my letter dated June 17, 2011, we [Respondent] would like to work with the Union regarding an accommodation to disclosure of the witness statements; however what you have proposed is unacceptable. While we are not required to do so, we would however consider as an accommodation providing you with a summary of the witness statements without identifying the witnesses by name. Please let me know if this is agreeable to you.

(Tr. 35–36; GC Exh. 9.) Mapp explained that a summary of witness statements was not agreeable as an accommodation to the Union because the identity of the witnesses themselves was needed to verify the accuracy of their statements and the underlying facts leading to Bariuad’s termination. (Tr. 31, 33, 36–37.) Nonetheless, it is further stipulated and I further find that the Union never received the summaries of witness statements that Morgenroth offered to provide the Union as an accommodation. (Tr. 38–39.) Moreover, I further find that the Union never accepted Respondent’s offer to provide witness statement summaries.

Mapp met with Morgenroth in her office approximately a week after the second response and Mapp revisited the Union’s two requests for information and ways to resolve the impasse and Morgenroth maintained the Respondent’s position that it would not disclose the witness names and had turned over the only witness statement that it was going to turn over—the grievant’s, Bariuad’s, statement. (Tr. 37.)

In sum, the parties further admit, stipulate to, and I further find that on June 15 and 17 by email (GC Exhs. 6 and 8) the Union by Mapp requested information from Respondent that Respondent provide the Union with the names of witnesses who provided statements in connection with Respondent’s investigation that led to the termination of Bariuad and the statements those witnesses provided to Respondent as part of that investigation, called the Witness Names and Witness Statement, respectively.

Mapp also pointed out that also in 2011, the Union previously filed charges against Respondent for withholding the names of strike replacements and that retired Judge Litvack, in the earlier decision, ordered Respondent to provide the Union with this information. (Tr. 39–41.) Respondent, without evidence, similarly claimed it had a legitimate and substantial interest in keeping the names of striker replacements confidential.

It is stipulated and I find that the Respondent obtained a total of four written statements from three employee witnesses regarding the alleged conduct of former employee Arturo Bariuad.¹³ (Tr. 10–11.) The parties also stipulate and I find that the only subject addressed in all four witness statements pertain to the witnesses having seen Bariuad sleeping while on duty—the statements do not indicate whether the employees requested or were provided assurances of confidentiality from Respondent or whether the witnesses fear retaliation from the Union or Bariuad. (Id.)

It is alleged that the requested information is necessary for, and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of Respondent’s employees in the combined unit and that the requested information is necessary for the Union to process Bariuad’s grievance. (Tr. 39.) It is also stipulated that the Respondent has not provided the Union with the requested Witness Names or Witness Statements in response to the Union’s June 15 and 17 information requests. (Tr. 10–11, 36.)

Analysis

A. Credibility

I have outlined my credibility findings in the findings of fact above and in the analysis below. I reject Respondent executive director, Gayle Reynolds’, testimony as it is self-serving to Respondent’s side of the case, far removed from firsthand relevance, and is inconsistent with the record in that no credible evidence was produced showing that anyone was ever threatened or harassed by Bariuad or that he had any threatening or harassing tendencies. In addition, Reynolds’ credibility was impeached in the earlier decision by retired Judge Litvack who found her to be disingenuous. Furthermore, I decline to find as credible Reynolds’ testimony about Respondent’s alleged unwritten policy to maintain the confidentiality of *witness names, job titles, or identities* without any corroborating evidence. I accept the testimony of Reynolds, CNA Burns, Hutton, and Director Tobin that Respondent maintains a nonposted practice of representing to its employees at investigations of employee

¹³ It is believed that Bariuad also provided Respondent with a written statement. See GC Exh. 7.

misconduct that its witness statements will be kept confidential regardless of the subject matter or whether the practice is necessary. (Tr. 50, 55, 65, 90, 92, 99.)

With respect to Director Tobin's testimony, I do not find it credible that she first contacted Hutton about the alleged incident when Hutton credibly explained that no one asked her to provide or create her first written statement before she prepared one and slipped it under Director Tobin's door. (Tr. 59–60.) While Hutton believes she may have consulted the other charge nurse on duty that night whom she was training, Hutton was sure that she spoke to no one else before preparing her first written statement. (Id.) Moreover, I reject as noncredible and inconsistent with Hutton's credible recollection Director Tobin's description of any conversation she allegedly had with Hutton that led to Hutton's first written statement. Once again, Director Tobin's response to leading questions from Respondent's counsel that Hutton was somehow concerned about Bariuad's retaliating against her is simply an undocumented fabrication. Hutton readily admitted that she allowed Bariuad to occasionally sleep on the job and it was only the discovery and reporting of this by the other charge nurse she was training that led to the actions taken by Respondent against Bariuad.¹⁴

I also reject as untrue Director Tobin's testimony that CNA Burns was somehow "concerned again about confidentiality because she said she didn't want it to get back to the Union." (Tr. 102.) CNA Burns credibly explained that she did not express any concern about the confidentiality of her written statement and that, instead, Director Tobin spoke of it. (Tr. 50, 103.) More importantly, CNA Burns convincingly denied ever saying to Director Tobin or anyone else at Respondent that she was scared to put anything in writing that would cause repercussions from either Mr. Bariuad or the Union. (50–51.)

In this case, witness credibility was pivotal in certain areas, and in particular was relevant to the events leading to Respondent's withholding of information related to the Witness Names and Witness Statements. In virtually all of the significant instances, reliable documentary evidence failed to support accounts provided by Respondent's key witnesses which weighs against such accounts being credible. For example, Mr. Bariuad's supervisor, Lynda Hutton, testified in vague terms that in addition to writing Mr. Bariuad up for sleeping on the job, she also wrote him up for verbal intimidation at the same time yet no such reference of verbal intimidation made it to the written statement prepared by Ms. Hutton and it is stipulated and I find that no such write-up was produced in response to a subpoena to Respondent seeking such documents.¹⁵ (Tr. 71,

¹⁴ Respondent argues that Hutton was afraid to report Bariuad's misconduct earlier but I find this to be speculative without record support. I find it more likely that Hutton and Bariuad were work colleagues and she simply allowed his work naps without any problems. Hutton only reported him when the new charge nurse in training blew the whistle and Hutton joined in and voluntarily submitted her own statement to avoid being disciplined more severely for ignoring Bariuad's alleged repeated misconduct.

¹⁵ When asked to locate where in her written statement Ms. Hutton wrote of Mr. Bariuad's alleged verbal intimidation, Ms. Hutton could only point to her statement that "[h]e accused me of thinking he wasn't

73–78.) Therefore, I do not find that Bariuad verbally intimidated Hutton at any time while employed by Respondent.

In addition, I found that portions of Supervisor Lynda Hutton's testimony lacked credibility because she provided testimony, sometimes in response to leading questions from Respondent's counsel, which contradicted her earlier testimony and appeared noncredible as I observed her later testimony. As found above in section D., Hutton's original testimony was that she was unaware of anyone at Respondent's facility who was threatened by Bariuad yet she later changed her testimony to say that she did actually experience intimidation or threats from Bariuad through his alleged statement that if she did anything to take Bariuad out of his employment with Respondent he supposedly threatened to "take [Hutton] out of here with me and everybody else" and that he also allegedly threatened Hutton with closing down Respondent's facility. (See Tr. 62–66, 75–76.) Unless otherwise noted, I generally credited the testimony of the other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence (including a lack of evidence documenting any alleged discipline or threatening conduct by Bariuad).

Similarly, I further reject Hutton's statements that she would have resigned out of fear of Bariuad and that she would not have prepared her first written statement about the incident involving Bariuad out of fear if Respondent had not led her to believe beforehand that the statement would be kept confidential. (Tr. 65–66.) This is inconsistent with her earlier testimony that Bariuad did not pose a threat at any time to anyone. (Tr. 62.) Furthermore, Hutton had difficulty recalling events, dates, who she spoke to, and what was said during certain allegedly important conversations, including those that she had with Bariuad and Director Tobin. (See Tr. 67–77.) I discount the veracity of her testimony when many times she would look directly at Respondent's trial representative, Gayle Reynolds, apparently for guidance or approval before remembering some fact in response to a question.

B. The Relevance of the Requested Information is not in Dispute

An employer must, upon request, provide a union with information, which is necessary and relevant to its representational role. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Relevancy is defined by a broad discovery standard, and it is only necessary to show that requested information has potential utility. (Id.) An employer must, for example, provide information connected to collective bargaining or contract administration. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

Where the information is requested in connection with a grievance, as here, the Board's test for relevance remains liberal. In *NLRB v. Acme Industrial Co.*, supra, the Supreme Court endorsed the Board's view that a "liberal" broad "discovery type" standard must apply to union information requests related to the evaluation of grievances. Analogizing the griev-

doing his work." Tr. 74. I reject Ms. Hutton's strained interpretation that Mr. Bariuad's comment amounts to verbal intimidation.

ance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in *Moore's Federal Practice* that "it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy." 385 U.S. at 437 fn. 6, quoting 4 Moore, *Federal Practice* P26.16[1], 1175-1176 (2d ed.).

The failure to provide requested relevant information is a violation of Section 8(a)(5) of the Act.¹⁶ Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), *enfd.* 603 F.2d 1310 (8th Cir. 1979).

Here, the parties stipulate that the requested Witness Names and Witness Statements are presumptively relevant so there is no dispute on relevance grounds. (R. Br. at 20.) I further find that the presumption has not been rebutted.

C. Confidentiality

Respondent asserts a confidentiality interest in protecting from disclosure the Witness Names and the Witness Statements.

1. The witness names

Even if requested information is relevant, however, in certain instances a party may assert a confidentiality defense to the demand for information. In two recent cases, the Board has summarized the requirements of this defense. In *Postal Service*, 356 NLRB No. 75, slip op. at 4 (2011), the Board explained:

A party asserting a confidentiality defense must prove a legitimate and substantial confidentiality interest in the information withheld. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Confidential information is limited to a few general categories that would reveal, contrary to promises or reasonable expectations, highly personal information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Such confidential information may include "individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits." *Id.*

In *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 3 (2011), the Board stated:

¹⁶ In addition, an employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679, *enfd.* 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

In considering union requests for relevant but assertedly confidential information, the Board balances the union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) [parallel citations omitted]. The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh its bargaining partner's need for the information. See *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (footnotes omitted).

In *Detroit Newspaper Agency*, 440 U.S. 301, the Board was clear that information accorded confidential status "is limited to a few general categories" as described above. In that case the Board rejected the employer's claim of a legitimate confidentiality interest in an internal safety audit report because it "falls outside these general categories."

More to the instant case, the Board held in *Transport of New Jersey*, 233 NLRB 694 (1977), that an employer's refusal to comply with a union's request for the names and addresses of passenger-witnesses to a bus accident, in the context of the employer's determination that the driver was at fault, violated Section 8(a)(5) and (1). And, in *Anheiser-Busch, Inc.*, 237 NLRB 982 (1978), citing *Transport of New Jersey*, the Board offered the following dictum:

An employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined.

Id. at 984 fn. 5.¹⁷ See also *Fairmont Hotel Co.*, 304 NLRB 746 (1991) (Board affirmed ALJ decision finding Respondent violated Sec. 8(a)(5) and (1) by, among other things, failing to disclose the identities of the employee-witnesses for some 3 months after the union first requested them.)

Notwithstanding this approach, the Board has held, in reference to the *Detroit Newspaper Agency* formulation, that "this description of confidential information is not intended to be exhaustive." *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006) (*NIPSCO*). Rather the Board has "considered whether the information was sensitive or confidential within the factual context of each case." *Id.* In particular, the Board has recognized, at least in some contexts, the existence of a valid confidentiality interest for employees' reporting to management on the misconduct of other employees. The recognition of a confidentiality interest in the identity of informants turns on some combination of the importance of encouraging employees to report the issue to management in terms of employee or public safety, the illegality of and/or threat posed by the underlying conduct, the potential involvement of illegal drugs, and concerns about physical or other retaliation against the informants. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1107 (1991) (legitimate interest in keeping names of informants con-

¹⁷ Contrary to Charging Party's assertion that this footnote was the holding in *Anheiser Busch*, it is simply dictum. See CP Br. 1.

fidential where employer was engaged in investigation of criminal drug activity with potential for harassment of informants); *Mobil Oil Corp.*, 303 NLRB 780, 780–781 (1991); see *Metropolitan Edison Co.*, 330 NLRB 107, 107–108 (1999) (assuming legitimate interest in confidentiality of informants' names providing information on workplace theft).

In this case, the information sought to be protected is not highly personal, proprietary, or traditionally privileged. And there is no credible record evidence of fear by employees of retaliation or physical threat from Bariudad or the Union if they were identified. See *Metropolitan Edison*, 330 NLRB at 108 (While it “would be naïve to deny any latent possibility of retaliation against informants whose information leads to an investigation and discharge of an employee, . . . this case presents no more than just that—a possibility. There is nothing in this record to indicate a likelihood or real risk of retaliation or violence.”). Moreover, I find that Respondent maintains a blanket policy of keeping *all* witness names confidential regardless of need or subject matter.

For the same reasons articulated by my colleague, Administrative Law Judge David L. Goldman, in his decision styled *Alcan Rolled Products—Ravenswood, LLC*, affirmed by the Board at 358 NLRB No. 11 (2012), I also reject any suggestion that the mere desire to ensure that employees talk more freely to management somehow establishes a legitimate confidentiality interest. Similarly, I reject the suggestion that a confidentiality interest is established in the identities of employees and their job titles by Director Tobin's assurances to employees that their discussions with her—on nearly any subject—are confidential should they want them to be. See *Alcan Rolled Products*, 358 NLRB No. 11 at 7 fn 10.

Furthermore, I reject Respondent's argument that the Union could easily have discovered the names and job titles of the witnesses to Bariudad's incident in June by simply viewing the “monthly” employee work schedule postings at Respondent. (See R. Br. 7, 20.) Contrary to Respondent's assertions, work schedules were not posted for a month but, instead, are posted for no longer than 2 weeks and when the 2 weeks expired, they were pulled and replaced by a new 2-week schedule. (Tr. 92–93.) Besides supporting the fact that the Witness Names were not confidential because they were posted, the postings may or may not have included employee job titles. It is unreasonable to expect the Union to be immediately aware of the temporary postings and to anticipate Respondent's eventual refusal to produce the Witness Names before its initial June 17 refusal response. Moreover, because various witnesses denied to the Union's inquiry that they prepared witness statements, it is reasonable for the Union to look to Respondent to supply the names as the statements could have come just as well from unidentified residents at the facility. More importantly, there is no duty on the Union to obtain the requested information on its own just because it had the fleeting ability to do so. Instead, a union's ability to obtain requested information elsewhere does not excuse an employer's obligation to provide the requested information. *King Soopers, Inc.* 344 NLRB 842, 845 (2005).

Also, I reject Respondent's argument that the issue related to production of the Witness Names has become moot by the

identifying testimony in the course of trial in this matter more than a half year after the Union first requested them.¹⁸

While there may be a significant and legitimate interest in Respondent encouraging employees to report other employees who may be acting in ways that endanger themselves, their co-employees, or the facility as, for example, where an intensive care nurse is found asleep while the sole caregiver of the unit, there is no credible evidence in this case that Bariudad endangered anyone. In fact, Hutton, his supervisor at the time, convincingly opined that Bariudad's alleged misconduct did not pose a danger to anyone given the excess staffing during the night in question. (See Tr. 68–69.) Therefore the specific facts and circumstances here are distinguishable from the facts in the cases cited by Respondent such as the *Pennsylvania Power*, 301 NLRB 1104 (1991), *Alcan Rolled Products*, supra, and *NIPSCO*, 347 NLRB 210 (2006),¹⁹ cases with facts involving unsafe conduct and concerns of substance abuse at a nuclear power plant and criminal conduct not present in this case. Moreover, this case does not present credible evidence of any fear of safety or concern of retribution. Respondent has not proven any “clear and present danger” of harassment. See *Diamond Walnut Growers*, 312 NLRB 61 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995). See also *Page Litho, Inc.*, 311 NLRB 881 (1993) (Ordering disclosure of striker replacement information reaffirming “clear and present danger” test, and finding that employer's alleged fear of harassment was no longer reasonable nearly 4 months after strike ended and last reported incidents of harassment had occurred.). Finally, there is no credible evidence that the witnesses requested anonymity or that Respondent ever promised confidentiality as to the *identities and job titles* of the witnesses who prepared statements.

Given the specific facts in this case, and the Board precedent, I find that the Respondent has not proven a legitimate and substantial interest in preserving the confidentiality of the names and job titles of the employees who complained to management about their perception of Bariudad's alleged misconduct which did not involve unsafe conduct, criminal activity, threats or harassment. Because I find there is no legitimacy of the Respondent's claimed confidentiality interest in the employees' names and job titles, I further find that the requested names and job titles must be produced and that no accommodation in its place is necessary. I therefore conclude that the Respondent violated Section 8(a)(5) and (1) by refusing to provide to the Union the names and job titles of the informants against Arturo Bariudad.

2. The witness statements

We turn now to the Witness Statements requested by the Union in this case. As with the Witness Names, I find there is no dispute that the Witness Statements are relevant to the Union's processing of Bariudad's grievance. Once again, the issue is

¹⁸ Belated compliance does not exonerate. *Interstate Food Processing*, 283 NLRB 303, 306 (1987).

¹⁹ In *NIPSCO*, the *names* of the interviewee witnesses were freely produced by the employer and the dispute in that case was over the production of interview notes taken by the employer in the course of its investigation of an employee's threatening conduct.

whether the Witness Statements are to be produced or are they protected on confidentiality or privilege grounds.

As stated above, generalized contentions that information is confidential or privileged because of business needs are usually rejected and the party asserting confidentiality has the burden of proof. *Aluminum Ore Co. v. NLRB*, 131 F.2d 485 (7th Cir. 1942); *Postal Service*, 289 NLRB 942 (1988), *enfd.* 888 F.2d 1568 (11th Cir. 1989). Information prepared in anticipation of litigation may be confidential. *Central Telephone*, 343 NLRB 987 (2004). In *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990), *enfd.* 936 F.2d 144 (3d Cir. 1991), the Board reaffirmed but found inapposite its rule of *Anheiser-Busch, Inc.*, 237 NLRB 982 (1978), that an employer need not furnish the union with witness statements for grievance proceedings. *Id.* at 43.

The Board in *Anheiser Busch*, 237 NLRB 982, 984–985 (1978), held, after discussing some of the specific facts present in the case:

In any event, without regard to the particular facts of this case, we hold that the “general obligation” to honor requests for information, as set forth in [*NLRB v. Acme [Industrial Co.]*, 385 U.S. 432 (1967)] and related cases, does not encompass the duty to furnish witness statements themselves.

The Board in *Anheiser-Busch* went out of its way to say that the privilege rule it was creating was not fact-driven and the Board did not distinguish between witness statements that are produced under a blanket policy of confidentiality with no evidence of intimidation or harassment present and those witness statements prepared in an environment of employee intimidation, harassment, or cases involving issues of public or employee safety, drug abuse, or dangerous working conditions. See, *i.e.*, *Fleming Companies, Inc.*, 232 NLRB 1082, 1088–1090 (2000) (concurring opinion).

The General Counsel concedes that as for the witness statements provided by CNA Burns and the unnamed LVN charge nurse, Respondent’s Witness Statements were properly withheld pursuant to the rule of law under the *Anheiser-Busch* case, which generally privileges Respondent from disclosing them to the Union. (GC Br. 12.) First of all, I also find that Hutton’s witness statement also falls under the *Anheiser-Bush* case rule as Hutton believed that her witness statement would remain confidential under Respondent’s blanket policy that all witness statements would remain confidential and would not be produced in response to a relevant information request. In addition, the Board, in *Anheiser Busch*, did not distinguish between witness statements provided by employees or supervisors, so I do not agree with Acting General Counsel’s argument that Hutton’s and the unidentified LVN charge nurse’s witness statements should be produced due to their supervisory roles.

Secondly, as to the Witness Statements, the General Counsel contends that the rule of privilege against producing witness statements set forth in *Anheiser-Busch* is somehow “arcane” or has become outdated, and should be overturned by me and replaced with the balancing of interests test from *Detroit Edison* referenced in section C,1, above. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board. Because the four Witness Statements at issue were submitted by the employee writers with expecta-

tions of confidentiality, applying *Anheiser-Busch*, I find that Respondent’s refusal to produce these Witness Statements does not violate Section 8(a)(1) and (5). I therefore recommend dismissal of paragraphs 7 and 8 of the complaint as to the requests for information concerning the Witness Statements.

Finally, Acting General Counsel argues that even if Respondent is privileged from disclosing the Witness Statements to the Union, “an employer must still provide a union with a summary of witness statements.” (GC Br. 22.) While conceding that Respondent offered to supply the Union these summaries, Acting General Counsel argues that Respondent “failed to fulfill that offer” and has violated Section 8(a)(5) and (1) of the Act by such failure. (*Id.*)

I find that Respondent did, in fact, offer to bargain with the Union by offering to produce the witness statement summaries to the Union. It is undisputed that the Union never responded in an accepting manner or accepted this offer at any time. I further find that the Union’s duty was to make an effort to bargain with Respondent as it had done earlier and outwardly accept the offer or submit a counterproposal rather than sitting on its hands and simply proceeding to trial. Even during trial, the Union confirmed its rejection of Respondent’s offer to provide it with witness statement summaries. (Tr. 36–37.) As a result, I find that Respondent has not violated Section 8(a)(5) and (1) of the Act for not producing the witness statement summaries rejected by the Union.

CONCLUSIONS OF LAW

1. Respondent American Baptist Homes of the West d/b/a Piedmont Gardens is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union Service Employees International Union, United Healthcare Workers-West is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union, in and after June 2011, with the names and job titles of the informants against Arturo Bariuad, Respondent violated Section 8(a)(5) and (1) of the Act.

4. Respondent’s above-described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. Unless specifically found above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in, and continues to engage in, serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to engage in certain affirmative acts. As I have found that Respondent has unlawfully failed and refused to provide the Union with the names and job titles of informants against Arturo Bariuad, I shall recommend that it be ordered to do so. In addition, I shall recommend that it be ordered to post a notice, setting forth its obligations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the Union with the requested names and job titles of informants against Arturo Bariuad, which information is presumptively relevant.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the requested names and job titles of informants against Arturo Bariuad.

(b) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 17, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(d) Within 14 days of the date of this order, the Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice will be publicly read by the responsible corporate executive, Gayle Reynolds, executive director, in the presence of a Board agent, or at Respondent's option, by a Board agent in Reynolds' presence. This remedy is appropriate here because the Respondent's violations of the Act are a repeat of another failure to produce information and are sufficiently serious that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. See *Homer D. Bronson Co.*, 349 NLRB 512, 515-516 (2007), *enfd. mem.* 273 Fed. Appx. 32 (2d Cir. 2008).

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 16, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish the Union with the requested names and job titles of informants against Arturo Bariuad, which information is presumptively relevant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the requested names and job titles of informants against Arturo Bariuad.

AMERICAN BAPTIST HOMES OF THE WEST D/B/A
PIEDMONT GARDENS