Closing Time for Anheuser-Busch, the NLRB Adopts a Balancing Test When Unions Request Witness Statements

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I. Introduction

Since 1978 the National Labor Relations Board has adhered to a policy of prohibiting unions from obtaining witness statements obtained by employers in the course of investigations of employee misconduct. However, the Anheuser-Busch bright-line test was rejected by the NLRB in December, 2012 in favor of the Detroit Edison balancing test. This test should not be foreign to employers, it is applied in multiple contexts, including when unions request the names of witnesses interviewed during investigations of misconduct. This paper will examine the law regarding requests for witness statements, decision which led to the rejection of the Anheuser-Busch test, and strategies which companies can implement to prevent disclosure of witness statements under the Detroit Edison test.

II. Law Regarding Requests for Witness Statements

Employers have a “general obligation” to provide a union with relevant information necessary for the union to properly perform its duties as the collective-bargaining representative of its employees. This includes information needed to decide whether to take a grievance to arbitration. The reasoning for this obligation is that by...
providing the union with information relevant to processing grievances the union to is able to effectively represent grievants, but also “sift out unmeritorious claims.”

The first inquiry under this framework is whether the information is relevant. The Board only requires that the information is of “probable” or “potential” relevance, a threshold easily met. Generally any information which will aid in the arbitral process is relevant and should be provided. Once relevance is established information must be provided unless the employer resists disclosure on the grounds the information is confidential. If the employer refuses to provide the information it has a duty to seek accommodation. Should the union insist the information be produced the Board will weigh the union’s need for the information against any legitimate and substantial confidentiality interests established by the employer. In determining whether the requested information must be provided the Board considers the specific facts of each case.

Despite this general rule the Board created an exception for witness statements in Anheuser-Busch, reasoning the “general obligation” to provide information did not include witness statements because they were “fundamentally different”. In order for the Anheuser-Busch exception to apply the witness had to adopt the statement and be given assurances the statement would remain confidential. The Board derived its reasoning from a Supreme Court case, in which the Court held the Freedom of Information Act (FOIA) did not require the Board to disclose witness statements prior to an unfair labor hearing. Concluding the same reasoning applied in the arbitration context the Board believed releasing witness statements could give rise to intimidation of potential witnesses and the possibility witnesses would be reluctant to give statements absent assurances against disclosure prior to the hearing.

Under this framework a union could potentially ascertain the names of potential witnesses, but not their statements provided to employers in the course of the employer’s investigation of the alleged misconduct. While a union could ask the potential witness what they told the employer, they could refuse to cooperate. Thus the union may only have the grievant’s account of what happened. This resulted in employers having a better understanding of the facts surrounding the inquiry.

### III. Piedmont Gardens Decision

The dispute in Piedmont Gardens arose after the operator of a continuing-care facility in California terminated a certified nursing assistant (CNA) for allegedly sleeping on the job. After receiving a report that the CNA was sleeping on the job the employer requested two co-workers prepare witness statements, promising to keep the statements confidential. Another employee, on her own volition, provided a statement by slipping it under the human resources director’s door believing it would be kept confidential. The union representative filed a grievance over the CNA’s termination and requested any statements the employer obtained during its investigation. Citing Anheuser-Busch, the employer flatly rejected the request.
In a split decision the Board overruled Anheuser-Busch, electing instead to apply the Detroit-Edison balancing test to requests for witness statements. The majority rejected the premise that witness statements are “fundamentally different” from other types of information, and determined the balancing test would provide sufficient protection of confidentiality concerns. Stating where there is a risk of intimidation or harassment, or circumstances suggesting witnesses may be reluctant to give statements knowing they may be disclosed a “legitimate and substantial confidentiality interest” may warrant nondisclosure. The Board noted similar risks exist when witness names are disclosed, however the balancing test appears to sufficiently protect against them.

While the Piedmont Gardens discussion governs refusals to provide witness statements after the date the decision was handed down, refusals before December 15, 2012 continue to be governed by Anheuser-Busch. According to the Board retroactive application would “work an injustice” on employers who had come to rely on the exception in refusing to provide witness statements. Applying Anheuser-Busch to the facts the Board held Piedmont Gardens had not committed an unfair labor practice by refusing to disclose the two witness statements which were provided after assurances of confidentiality were given, but ordered the employer to disclose the statement which was slipped under the human resource director’s door because no such assurance was given in that instance.

Member Hayes, the lone dissenter, argued the Board should continue to adhere to the Anheuser-Busch bright-line test. He maintained that in some cases the threat of harassment or intimidation may be far greater if the union is aware of both the witness’s name and statement, as opposed to just knowing their name. Further he argued that the duty to accommodate protects the union’s ability to process grievances because it was often entitled to summaries of the statements. Citing practical considerations Member Hayes pointed out that the balancing test will potentially create uncertainty and delay the resolution of grievances when a conflict arises because of an employer’s refusal to produce witness statements. He also pointed out the balancing test would place human resource officials in a position in which they would be forced to make a legal assessment regarding whether the employer’s confidentiality interests will outweigh the unions interests in obtaining the information. This argument however, seems to carry little weight given that the officials are already making the legal assessment with regard to other investigatory information, such as witness names. As a final argument against requiring production of witness statements Member Hayes noted a potential conflict with Equal Employment Opportunity Commission (EEOC) policy. The EEOC has provided guidance suggesting that when investigating allegations of harassment by a supervisor, complaining employees should be provided assurances their statements will remain confidential. This policy could potentially put an employer in a position where it cannot comply with Board precedent and EEOC guidelines.

IV. Suggested Strategies to Prevent Disclosure
Employers will now have to devise response to union requests for witness statements, particularly when seeking to resist the requests. While there will inevitably be some uncertainty concerning the application of the *Detroit Edison* balancing test to the witness statement context, its application with respect to witness names should provide guidance. Employers concerned the release of witness statements may compromise confidentiality interests can take several steps to avoid disclosure.

First, employers should give qualified assurances of confidentiality to witnesses before they provide statements. As evidenced in *Piedmont Gardens*, even under the bright-line test statements given without such an assurance must be disclosed. Therefore it would be difficult to argue there is a legitimate concern about confidentiality under the balancing test if there was no expectation of confidentiality to begin with. In the interest of candor the employer should qualify its assurance of confidentiality so the witness is aware their statement may be disclosed if the Board orders it. Assuming the employer anticipates resisting disclosure, it should inform the witness it will do so.

When presented with a request the employer should inform the union of its good faith concerns about confidentiality, threats, or coercion promptly. In addition, the employer should offer to accommodate the union by providing a summary of the witness’s statement. The offer should include a summary of the substance of the statements, while withholding the actual witness statements and witnesses’ identity. The accommodation should also include a requirement that the union not distribute the summaries, limiting their disclosure as much as feasible.

Employers should also document instances in which it has been unable to obtain witness statements because of its inability to give an unqualified assurance of confidentiality. If potential witnesses are refusing to come forward because of a fear of disclosure the employer will have a valid argument it should be allowed to keep statements confidential because the NLRB is concerned with this issue. In addition, situations which indicate the witness may be subject to intimidation or harassment should be documented and communicated to the union. Such circumstances may include threats of reprisal by the grievant or other employees for aiding in the investigation. If there are threats of reprisal the company should be allowed to keep the witness statement confidential.

In the course of overturning the *Anheuser-Busch* test the Board cited investigations of criminal activity, particularly drug use, as circumstances in which employer could successfully resist a union’s attempt to discover witness names. It cited these cases to show the balancing test effectively protects confidentiality concerns. While it cannot be guaranteed, it is likely similar situations will give rise to “legitimate and substantial” confidentiality concerns with respect to requests for witness statements as well. The Board took into account that the workplace in *Pennsylvania Power Co.*, a nuclear power plant, was inherently dangerous and thus the need for a drug-free environment was both obvious and necessary. It also considered the “national policy” in favor of curbing the “drug epidemic”. Because of the circumstances and safety issues involved, the employer’s confidentiality interest garnered “unusually great weight”.

The Board
agreed with the employer that if witness names were revealed future witnesses may be reluctant to come forward and the witnesses may be subject to harassment. xlii

However, it refused to give “unusually great weight” to an employer’s decision to withhold a witness’s name when allegations of petty theft gave rise to the investigation. xlii The Board found there was no apparent threat to employee or public safety in that situation. xliv While the Board presumed the employer’s concerns were legitimate it required the employer to provide accommodation to the union and explore “all reasonable alternatives to direct disclosure of the informant’s names.”xiv

In his dissent Member Hayes noted the possibility an employer could be put in between the preverbal rock and a hard place because of conflicting policies. xlvii He cited the EEOC policy of maintaining confidentiality during harassment investigations as an example of a possible conflict should the Board order the release of statements regarding the allegations. xlvii Should this situation arise an employer should cite the “national policy” of confidentiality in such circumstances, among other concerns in resisting disclosure. Based upon the Board’s previous references to “national policy” as a factor in permitting employers to avoid disclosure this argument should be persuasive, and thus the employer should be able to avoid disclosure on these grounds.

V. Conclusion

While the Piedmont Gardens decision will result in increased uncertainty regarding whether witness statements must be disclosed employers should be familiar with Detroit Edison balancing test, and thus be prepared to respond to requests for statements. Should the employer elect to resist disclosure of the statement is should offer to accommodate the union and cite the specific confidentiality concerns justifying its refusal. In some circumstances, including criminal activity endangering employees and the public, the employer’s decision to resist will be given “unusually great weight”. Other situations involving “national policy” concerns, such as investigations of harassment, should receive similar treatment, thus protecting witness statements from disclosure.


[ii]ld. at 438.

[iii]ld.


Pennsylvania Power, 301 NLRB at 1105.

Detroit Edison Co. 440 U.S. at 318-320.


d at 984.

d.


d.

d.

d.

d.

d at *6.

d.

d.

d.

d at *7.

d.

d at *8.

d at *8 (Hayes, dissenting).

d at *11.

d at *12.

d at *13.
See Am. Baptist Homes of the W., 359 NLRB No. at *8.

(Hayes, dissenting) (discussing accommodation under the Anheuser-Busch rule).

301 NLRB at 1107; See also Mobil Oil Corp., 303 NLRB 780 (1991).


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