

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

In the Matter of:

**AMERICAN BAPTIST HOMES OF
THE WEST d/b/a PIEDMONT
GARDENS,**

Case No. 32-CA-063475

Employer,

and

**SERVICE EMPLOYEES
INTERNATIONAL UNION, UNITED
HEALTHCARE WORKERS-WEST,**

Union.

**RESPONDENT'S BRIEF ANSWERING THE ACTING GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

ARNOLD & PORTER LLP
David S. Durham
Gilbert J. Tsai
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415.471.3100
Facsimile: 415.471.3400

Attorneys for Respondent
AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDEN

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
A. Piedmont Gardens.	2
B. The Employer Investigated A Report That Arturo Bariuad Was Repeatedly Sleeping On The Job And Gave Assurances Of Confidentiality To Three Witnesses Who Saw Mr. Bariuad's Misconduct.	3
C. The Union Requested The Names And Statements Of The Witnesses To Mr. Bariuad's Misconduct.	5
III. ARGUMENT	6
A. Well-Established Board Law Categorically Expects Witness Statements From The Employer's Duty To Provide Information Under Section 8(a)(5).	6
B. The General Counsel's Reasons For Changing Established Board Law Are Flawed.	9
C. Lynda Hutton's Statement Qualifies As A Witness Statement Under <i>Anheuser-Busch</i> .	12
IV. CONCLUSION	14

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anheuser-Busch, Inc.</i> , 237 NLRB 982 (1978)	1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 13
<i>Detroit Edison Co. v. NLRB</i> , 440 U.S. 301 (1979)	2, 6, 9, 11
<i>Fleming Cos.</i> , 332 NLRB 1086 (2000)	9, 10, 11
<i>N. Indiana Pub. Serv. Co.</i> , 347 NLRB 210 (2006)	9
<i>New Jersey Bell Tel. Co.</i> , 300 NLRB 42 (1990)	8, 9, 12, 13
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967)	7
<i>Pennsylvania Power Co.</i> , 301 NLRB 1104 (1991)	9
<i>Whirlpool Corp.</i> , 281 NLRB 17 (1986)	9, 10
Statutes	
29 U.S.C.	
§158(a)(1)	1
§158(a)(5)	1, 14

I. INTRODUCTION

In this Complaint, Counsel for the Acting General Counsel (“General Counsel”) alleges that American Baptist Homes of the West, d/b/a/ Piedmont Gardens (hereinafter “Employer”) violated Sections 8(a)(1) and (5) of the Act by refusing to provide two categories of information to the Service Employees International Union, UHW-West (hereinafter “Union”). The first category relates to three employees’ witness statements that were provided to the Employer during the course of a confidential investigation into allegations that employee Arturo Bariuad was sleeping on the job. The second category of information sought was the names and job titles of employees who submitted those witness statements.

On April 16, 2012, Administrative Law Judge Gerald M. Etchingham (the “ALJ”) issued his Decision and Recommended Order (“Decision”) as to both categories of information. The ALJ found, incorrectly in our view, that the Employer unlawfully failed to provide the Union with the second category of information, *i.e.*, the names and job titles of the witnesses. In doing so, the ALJ relied on its incorrect conclusion that the Employer did not have a legitimate and substantial interest in preserving the confidentiality of the names and job titles of these employees. The Employer is concurrently filing Limited Cross-Exceptions and a Brief in Support of Limited Cross-Exceptions to this portion of the ALJ’s Decision.

As to the first category of information, *i.e.*, the witness statements regarding Mr. Bariuad’s misconduct, the ALJ correctly found that the Employer did not violate Sections 8(a)(1) and (5) when it withheld the statements from the Union. These statements were provided under the Employer’s assurances of confidentiality, and as such, they are categorically protected from disclosure by the Board rule established in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978). The General Counsel wishes to overturn *Anheuser-Busch*, the law of the land for over thirty years, in favor of a balancing-of-interests approach

under *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Employer submits that this rule should not be overturned.

Even if the Board decides to overturn the *Anheuser-Busch* rule in favor of the *Detroit Edison* approach, under this test the parties' interests in withholding or obtaining this information must be balanced in order to determine the Employer's duty to provide the information to the Union. Here, the Employer has a legitimate and substantial confidentiality interest in keeping its promise to protect the witness identities and statements of those brave enough to cooperate in the investigation from disclosure. In contrast, the Union's interest in obtaining the information from the Employer is minimal because the Union can easily determine the identities of the witnesses in this small universe of employees.¹

The Employer's arguments and evidence in support of its confidentiality interest in witnesses' identities and statements is presented in its Brief in Support of Limited Cross-Exceptions. In this Answering Brief, the Employer submits that the Board should affirm the ALJ's recommended dismissal of the witness statement allegations in the Complaint (Paragraphs 7 and 8) due to the long-standing and continuing importance of the *Anheuser-Busch* rule.

II. STATEMENT OF FACTS

A. Piedmont Gardens.

Employer American Baptist Homes of the West, d/b/a Piedmont Gardens, is a non-profit Continuing Care Retirement Community in Oakland, California, providing housing and care for over 300 seniors. (Tr. 86:21-87:4; ALJD at 4:23-25).² The

¹ To the extent that this position stands in contrast to the ALJ's incorrect finding that the Employer failed to demonstrate a legitimate and substantial confidentiality interest in the identities and job titles of the witnesses, the Employer respectfully refers the Board to the Employer's Brief in Support of its Limited Cross-Exceptions.

² References to the official transcript are referred to as "Tr. ____." References to the Decision of the ALJ are "ALJD at ____." General Counsel's Exhibits are referred to as "G.C. Exh. ____."

community operates different types of residential units, depending on the level of care required, including: independent living, assisted living, memory support, and skilled nursing care. (Tr. 86:21-24; ALJD at 4:23-25).

B. The Employer Investigated A Report That Arturo Bariuad Was Repeatedly Sleeping On The Job And Gave Assurances Of Confidentiality To Three Witnesses Who Saw Mr. Bariuad's Misconduct.

On or around June 6, 2011, a charge-nurse-in-training in the Assisted Living Department (Barbara Berg) reported to the Director of Assisted Living, Allison Tobin, that she had seen employee Arturo Bariuad sleeping during the night shift. (Tr. 99:1-11; ALJD at 5:1-3). Ms. Tobin asked Ms. Berg to provide a written statement documenting Mr. Bariuad's misconduct so that she and Human Resources could begin an investigation. Ms. Tobin assured Ms. Berg that her statement would be kept confidential. (Tr. 99:18-24; ALJD at 5:3-5).

Ms. Tobin subsequently contacted charge nurse (LVN) Lynda Hutton, who had been training Ms. Berg on the shift that night. (Tr. 100:3-9; ALJD at 5:49). Ms. Hutton informed Ms. Tobin that she had seen Mr. Bariuad sleeping on "numerous occasions," including the night in question. (ALJD at 7:3-6). However, in the past she was hesitant to document what she saw, as she had experienced threats and intimidation tactics from Mr. Bariuad in the past, and was concerned that he might threaten her safety if he knew that she had reported him. (Tr. 64:5-25; 67:4-12; 100:18-101:1). Mr. Bariuad had made statements to Ms. Hutton such as "If you do anything to take me out of here, I'm going to take you out of here with me and everybody else" (Tr. 64:13-21; ALJD at 6:11-13). Ms. Hutton enters and leaves the facility at night for her NOC shift and was worried that Mr. Bariuad could be waiting for her in the parking lot. (Tr. 100:23-101:1). Ms. Tobin assured Ms. Hutton that both her statement and identity would remain confidential, and the Employer allowed Ms. Hutton to park in a special parking spot that minimized her safety risk as she came and left work. (Tr. 67:6-12; 101:2-6). Following these

assurances of confidentiality,³ Ms. Hutton submitted her witness statement (which she subsequently revised due to a confusion about dates). (Tr. 102:14-103:10; ALJD at 7:20-22).

Ms. Tobin also contacted a third employee, a CNA named Rhonda Burns who also regularly worked on the NOC shift with Mr. Bariuad, regarding whether she had observed Mr. Bariuad sleeping on the job. (Tr. 101:12-15; ALJD at 5:28-30). Ms. Burns informed Ms. Tobin that she had observed Mr. Bariuad sleeping on the job many times, and would be willing to draft a witness statement to that effect. (Tr. 101:22-102:2; ALJD at 5:20-21). However, Ms. Burns was concerned about confidentiality and didn't want the fact that she reported Mr. Bariuad to "get back" to the Union.⁴ (Tr. 102:4-8). Ms. Tobin assured Ms. Burns that her statement and identity would be kept confidential from the Union. (Tr. 50:5-8; 102:4-8; ALJD at 5:31-33). Ms. Burns testified that it was important to her that Ms. Tobin gave her assurances of confidentiality before she prepared her statement. (Tr. 55:4-8; ALJD at 5:34-35).

Based on the results of the Employer's investigation and the witness statements

³ There is some confusion in the testimony as to who initiated the idea of Ms. Hutton giving a statement. Ms. Hutton testified that she voluntarily wrote the witness statement without any prior prompting or assurances of confidentiality from Ms. Tobin, and that she only received assurances of confidentiality after she had already submitted her statement. (Tr. 59:19-23). Ms. Tobin testified that she first approached Ms. Hutton to obtain her written statement. (Tr. 104:7-12). However, this confusion on a collateral point is legally irrelevant. As correctly recognized by the ALJ, the *Anheuser-Busch* analysis only requires the employer to provide that the assurance was made, not that the employer provided the assurance *before* any witness statement is submitted. (ALJD at 16:31-34). In any event, Hutton testified that she was well aware of the Employer's practice and policy of keeping witnesses and statements confidential before she submitted the statement, and that this confidentiality policy was important to her. (Tr. 65:3-9; ALJD at 16:18-22). Indeed, Ms. Hutton testified that "if I thought [the witness statement] was not going to be confidential, I probably would have considered leaving Piedmont Gardens . . . [o]ut of fear." (Tr. 65:20-66:1).

⁴ At the hearing, the General Counsel elicited a response from Ms. Burns that she was not "scared" to submit a witness statement for fear of "repercussions from the Union" or Mr. Bariuad. (Tr. 50:12-51:2; ALJD at 5:35-37). Whether she was "scared" (as General Counsel put it) or merely "concerned" (as Ms. Tobin put it) about the need for confidentiality is irrelevant as the record evidence is undisputed that Ms. Tobin assured Ms. Burns that her identity and statement would remain confidential, nor do the parties dispute Ms. Burns' testimony that the Employer's assurance of confidentiality was important to her. (Tr. 55:4-8; ALJD at 5:34-35).

obtained from the three employees, the Employer terminated Mr. Bariuad for misconduct. (Tr. 28:15-19; ALJD at 4:36-37). Subsequently, the Union filed a grievance over his termination. (Tr. 28:20-29:14; ALJD at 8:38; G.C. Exh. 5).

C. The Union Requested The Names And Statements Of The Witnesses To Mr. Bariuad's Misconduct.

On June 15, 2011, the Union requested that the Employer provide the statements and identities of all employees "involved in the investigation" of Mr. Bariuad's misconduct. (Tr. 29:24-30:15; ALJD at 8:12-15; G.C. Exh. 6). On June 17, 2011, the Employer responded by providing Mr. Bariuad's statement responding to the allegation that he was sleeping on the job, and by identifying Ms. Tobin and the Acting HR Director as the employees involved with the investigation. (Tr. 32:14-33:15; ALJD at 8:21-36; G.C. Exh. 7). The Employer did not provide the statements and identities of the employees who witnessed Mr. Bariuad's misconduct and were interviewed during the investigation, citing confidentiality concerns, but expressed a willingness to "work with the Union regarding an accommodation to disclosure." (Tr. 33:13-19; ALJD at 8:30-32; G.C. Exh. 7).

On June 17, the Union responded, proposing that the Employer make all the witnesses "available for the Union to interview." (Tr. 35:1-5; ALJD at 8:38-44; G.C. Exh. 8). On June 21, the Employer responded that the Union's proposal was not acceptable, but offered, instead, to provide the Union with a summary of the witness statements without identifying the witnesses by name. (Tr. 36:15-21; ALJD at 9:1-9; G.C. Exh. 9).

The Union never responded to the Employer's offer to provide witness statement summaries, but the Union representative testified at the hearing that this offer was unacceptable. (Tr. 36:20-37:4; ALJD at 9:11-16). The Employer remains willing to provide witness statement summaries to the Union.

In his April 16, 2012, Decision and Recommended Order, the ALJ correctly found

that the Employer was not required under the Act to turn over the witness statements to the Union, and, accordingly, recommended the dismissal of Paragraphs 7 and 8 of the Complaint. (ALJD at 16:34-36). The Employer respectfully submits that the Board should affirm this portion of the ALJ's Decision.

III. ARGUMENT

In its Brief in Support of Limited Exceptions, the General Counsel advocates the reversal of the Board's well-established decision in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), in favor of the balancing of interests test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). The General Counsel further argues that, even under the *Detroit Edison* test, the Employer was obligated to turn over the witness statements due to its alleged failure to establish a legitimate and substantial confidentiality interest in those statements.

In this Brief Answering the General Counsel's Exceptions, the Employer submits that the *Anheuser-Busch* rule should continue to apply. Further, even if the Board determines that the *Anheuser-Busch* rule should be overturned, the Employer has demonstrated a sufficient confidentiality interest in the witness statements such that they do not need to be disclosed under the *Detroit Edison* test. The Employer recognizes that some tension exists between this latter argument and the ALJ's Decision that the Employer has not demonstrated a legitimate and substantial interest in preserving the confidentiality of witness *identities*. The Employer has excepted to those portions of the ALJ's Decision, and addresses those arguments in the Employer's Brief in Support of Limited Cross-Exceptions.

A. Well-Established Board Law Categorically Excepts Witness Statements From The Employer's Duty To Provide Information Under Section 8(a)(5).

The seminal Board case of *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), holds that an employer's "general obligation" to provide relevant information in response to a

union's request does not encompass the duty to furnish witness statements. *Id.* at 984-85. This is a categorical exclusion for all witness statements gathered during investigations to misconduct that are provided under assurances of confidentiality. In *Anheuser-Busch*, company representatives obtained statements from employees who had witnessed various acts of misconduct committed by a co-worker. Based in part on the content of the statements, the company suspended the co-worker. The union filed a grievance protesting the suspension. *Id.* at 986.

The union subsequently requested the witness statements so that it could determine the merits of the grievance prior to arbitration. *Id.* at 982. The employer refused, explaining that the witnesses had been told that their identities would not be disclosed, that providing the statements to the union would give the co-worker an opportunity to harass the employees, and that because the employees who gave statements were union members, the union could obtain the requested information on their own. *Id.*

The ALJ found that the statements were needed by the Union in order to determine the merits of the co-worker's grievance over his termination. Relying principally on *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), which establishes the employer's general obligation to provide "relevant and necessary" information, the ALJ found that the employer violated Section 8(a)(5) by refusing to provide the witness statements to the Union. *Anheuser-Busch*, 237 NLRB at 984.

In a precedent-setting ruling that has been favorably cited numerous times over the past thirty years, the Board disagreed with the ALJ's conclusion. The Board found that employers do not have a statutory obligation to furnish witness statements regarding employee misconduct to the union, thereby carving out a categorical exclusion to the *Acme* rule:

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. We do not believe that the principle set forth in *Acme* and related cases dealing with the statutory obligation to furnish information may properly be extended so as to require an employer to provide a union with statements obtained during the course of an employer's investigation of employee misconduct. (*Id.* at 984)

See also New Jersey Bell Tel. Co., 300 NLRB 42, 43 (1990) (witness statements are protected from disclosure if the employee adopts the statement, and if the employee is given confidentiality assurances). The *Anheuser-Busch* Board explained that compelled disclosure of witness statements, prior to arbitration hearings, would risk exposure of witnesses to coercion or intimidation to intimidation by the union or co-workers; a chilling effect on witness participation in employer investigations into misconduct, and, therefore; would decrease the overall quality of employer investigations. *Anheuser-Busch*, 237 NLRB at 984.

As the General Counsel acknowledges, *Anheuser-Busch* represents the current state of Board law on the subject of witness statement confidentiality. *See* General Counsel's Brief in Support of Limited Exceptions ("G.C. Brief"), p. 2. Where the witness statement has been provided by the employee, and the employer has provided the witness with assurances of confidentiality, the employer is under no obligation to furnish the union with the witness' statement. *New Jersey Bell*, 300 NLRB at 43. This has been the law of the land since at least 1978, and must be applied in this case as well. The testimony at the hearing unequivocally demonstrated that the witness statements submitted by the employees were their own; that the employer assured all three witnesses that their statements and identities would remain confidential; and that the witnesses were well aware of the Employer's policy of keeping witness statements and identities confidential. Moreover, both witnesses who appeared at the hearing testified that the policy and assurances of confidentiality were important to them in their decision to report Mr. Bariudad's misconduct. One of the witnesses even explained that if she thought the Employer was going to disclose her statement and identity to the Union, she would have considered resigning from Piedmont Gardens out of fear, even though Piedmont Gardens

has been her employer for 40 years. (Tr. 57:11-13).

Thus, based on *Anheuser-Busch* and its progeny, the Employer has no statutory obligation to provide the witness statements to the Union. See *Fleming Cos.*, 332 NLRB 1086 (2000); *New Jersey Bell*, 300 NLRB at 43; *Whirlpool Corp.*, 281 NLRB 17, 25 (1986).

B. The General Counsel's Reasons For Changing Established Board Law Are Flawed.

The General Counsel proposes that the longstanding Board rule against the disclosure of witness statements should be overturned in favor of the balancing of interests approach set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), and advocated by the concurring opinion in *Fleming Cos.*, 332 NLRB at 1090.

The General Counsel's proposal to follow the *Detroit Edison* "balancing of interests" approach is flawed. This approach allows a party to refuse to furnish to the other party relevant information if: (1) the party can show that it has a "legitimate and substantial confidentiality interest"; (2) when weighed against the requester's need for the information, the balance favors the party asserting confidentiality; and (3) assuming these conditions are met, an accommodation is sought to resolve the competing need for the information and the confidentiality concerns. *N. Indiana Pub. Serv. Co.*, 347 NLRB 210, 211 (2006) (citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), and *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991)). This case-by-case balancing test should not be applied to witness statements for several reasons.

First, a case-by-case confidentiality analysis is inappropriate in the context of witness statements because employers *always* have a "legitimate and substantial" interest in keeping witness statements confidential. There is *always* the risk of the dangers identified in *Anheuser-Busch*: that exposing witness statements to the Union could lead to the intimidation of witnesses prior to arbitration, a chilling effect on witness' willingness to participate in investigations, and a decrease in the quality of employer investigations.

Regardless of the content of the witness statements, or whether the employee being investigated has made explicit threats against potential witnesses, a bright-line rule protecting witness information from disclosure is necessary in order to encourage employees to come forward with knowledge of employee misconduct. Employers *universally* have an interest in stamping out misconduct, just as all employees have an interest in knowing they are able to provide information to their employer without it being “leaked” to the union or their co-workers. Without this bright-line rule, employees will be discouraged from candidly participating in employer investigations into workplace misconduct. That is precisely the rationale behind *Anheuser-Busch*: “a desire to proclaim 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 at 25.

Second, applying a case-by-case approach is inappropriate because it will inevitably place HR practitioners in the difficult position of having to perform legal analysis every time they conduct a routine investigation into employee misconduct. A case-by-case approach would create a legal morass wherein the HR practitioner must interview witnesses *at their own risk*, without any clear guidance as to whether certain witness information would be required to be disclosed to the union. Non-attorney HR practitioners are not qualified to determine whether in any given situation the employer’s confidentiality interest is “legitimate and substantial,” whether its assurances of confidentiality to witnesses are legally credible, or whether any concerns about confidentiality expressed by witnesses are sufficient to protect the information from disclosure. In effect, the lack of guidance in a case-by-case approach would require attorneys to be involved in every run-of-the-mill HR investigation into employee misconduct, in order to assess the strength of the employer’s confidentiality interest. Such a requirement is impractical and should not be imposed.

Third, the additional reason articulated in the Board’s (*Fleming Cos.*, 332 NLRB

at 1088) concurring opinion for moving away from a bright-line test is similarly unavailing. There, Board Members Fox and Liebman advocated the reversal of the Board's decision in *Anheuser-Busch*, reasoning (without evidence we might add) that unlike in "adversarial unfair labor practice litigation" proceedings, the concern about protecting witnesses from intimidation does not "routinely exist[] to the same degree" in collectively bargained grievance proceedings because "[t]he fact that grievances are being resolved through collectively bargained procedures itself an indication that the parties have achieved a more mature and less contentious relationship than typically exists . . . in unfair labor practice cases." *Id.* at 1089. The General Counsel advances this argument in its Limited Exceptions. G.C. Brief, at pg. 4.

This argument fails because there is no basis for believing that labor arbitration proceedings are any less contentious than unfair labor practice proceedings. Indeed, arbitration is, like unfair labor practice proceedings, also between adverse parties who are expected to litigate zealously on behalf of their interests. Further, even if parties have a "mature" collective bargaining relationship, there still exists the potential for harassment and intimidation of witnesses between individuals (*e.g.*, the co-worker accused of misconduct and the adverse witnesses to the misconduct). For this reason as well, the *Detroit Edison* test should not be applied to the confidentiality of witness statements.

Fourth, General Counsel also suggests that a "general rule requiring the disclosure of witness statements would facilitate the arbitral process" because without such a rule, unions would be forced "to take a grievance to arbitration without the opportunity to evaluate the merits of the claim." G.C. Brief, at pg. 5 (citations omitted). Notwithstanding the above arguments against such a rule, the General Counsel's point overlooks the employer's obligation under current Board law to accommodate the union's need for information by offering, for example, a summary of the witness statements. Such an accommodation (which the Employer in this case has already offered) allows the Union to evaluate the merits of the claim prior to determining whether

to arbitrate the matter.

For these reasons, the Employer submits that the *Anheuser-Busch* rule should not be overturned.

C. Lynda Hutton's Statement Qualifies As A Witness Statement Under *Anheuser-Busch*.

The General Counsel concedes that the witness statements provided by CNA Rhonda Burns and LVN Charge-Nurse-in-Training Barbara Berg were properly withheld under *Anheuser-Busch*. (ALJD at 16:15-18). However, citing *New Jersey Bell*, 300 NLRB 42, 43 (1990), the General Counsel argues that even under *Anheuser-Busch*, the witness statement of Charge Nurse Lynda Hutton should be turned over to the Union because it was provided to the Employer before she received assurances of confidentiality. G.C. Brief, p. 12.

First, notwithstanding Ms. Tobin's credible testimony that she *first* approached Ms. Hutton and gave her assurances of confidentiality before Ms. Hutton submitted her statement, as pointed out in footnote 3 above, General Counsel's argument highlights a difference without a distinction. It is not legally relevant under *Anheuser-Busch* whether Ms. Hutton provided the statement before or after Ms. Tobin's assurance of confidentiality. *Anheuser-Busch* does not require the employer to prove that the employee would not have provided the statement "but-for" the employer's assurance. Indeed, such a requirement would be unworkable, leading to hearings where every single witness would have to be questioned about whether the assurance of confidentiality affected their individual decision to submit a statement, prior to any ruling regarding the employer's obligation to provide that particular statement. In any event, Ms. Hutton also testified that even before she provided her witness statement to Ms. Tobin, she knew the Employer's policy of keeping witnesses and statements confidential, and that this confidentiality policy was important to her. (Tr. 65:3-9).

Second, the *New Jersey Bell* case does not stand for the proposition advanced by

the General Counsel. In that case, one of the employer's (a telephone company) customers called to complain that she had been receiving annoying phone calls on her non-published number, and that she suspected an employee of having disclosed her number. 300 NLRB at 42. The employer's officials investigated the customer's complaint, documenting their conversations with the customer in investigate reports, and suspended the employee for misconduct. *Id.* The union filed a grievance, and requested a copy of the investigative reports, which the employer withheld as "witness statements" protected by *Anheuser-Busch*. *Id.*

The Board disagreed with the employer, finding that the information was *not* a witness statement, on the grounds that "the customer did not review the reports, have them read to her at any time, or in any manner adopt them as a reflection of any statement or complaint she may have made." *Id.* On the contrary, the investigative reports were the work product of the employer's officials. *Id.* The Board further found that its conclusion was supported by the fact that the customer "did not receive *any assurance* of confidentiality." *Id.* (emphasis added).

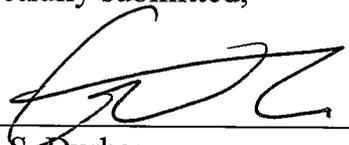
Contrary to the characterization advanced by the General Counsel, the Board in *New Jersey Bell* did not hold that in order to constitute a privileged witness statement, the witness must have *first* received assurances of confidentiality before submitting his or her statement. The Board merely pointed out that the utter *lack* of confidentiality assurances might *support* a finding that the *Anheuser-Busch* rule does not apply. Here, on the other hand, there is no dispute that Ms. Hutton received explicit assurances of confidentiality from Ms. Tobin, and no dispute that even before these assurances were given, Ms. Hutton already had the *expectation* that her witness statement would remain confidential. (Tr. 66:23-25; ALJD at 16:18-22). In fact, Ms. Hutton testified that if she had thought the Employer was going to disclose her statement and identity to the Union, she would have considered resigning from Piedmont Gardens out of fear, even though Piedmont Gardens has been her employer for 40 years. (Tr. 57:11-13).

IV. CONCLUSION

For the foregoing reasons, General Counsel has failed to prove, both factually and legally, that the Employer violated Section 8(a)(5) as alleged. Accordingly, the Employer respectfully submits that the Board should follow its well-settled precedent and uphold the ALJ's dismissal of the witness statement allegations in this case.

May 25, 2012

Respectfully submitted,



David S. Durham
Gilbert J. Tsai
ARNOLD & PORTER LLP
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Attorneys for Employer

AMERICAN BAPTIST HOMES OF THE
WEST d/b/a PIEDMONT GARDENS

31600946/F

PROOF OF SERVICE

1
2 1. I am over eighteen years of age and not a party to this action. I am employed in the County
3 of San Francisco , State of California. My business address is 3 Embarcadero Center, 7th
Floor, San Francisco, CA 94111.

4 2. On May 25, 2012, I served the following document(s):

5 RESPONDENT'S BRIEF ANSWERING THE ACTING GENERAL COUNSEL'S
6 EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE

7 The document(s) served are included in the attached List of Documents.

8 3. I served the document(s) on the following person(s):

9 Noah J. Garber
10 William A. Baudler
National Labor Relations Board - General Counsel
11 1301 Clay Street, Suite 300N
Oakland, CA 94612
noah.garber@nlrb.gov
12 william.baudler@nlrb.gov

13 Yuri Y. Gottesman
14 Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
15 Alameda, CA 94501
ygottesman@unioncounsel.net

16
17 The names, addresses, and other applicable information about the persons served is
18 included in the attached Service List.

19 4. The documents were served by the following means:

20 **By U.S. mail.** I enclosed the document(s) in a sealed envelope or package addressed to the
person(s) at the address(es) in Item 3 and **(check one)**:

21 deposited the sealed envelope with the United States Postal Service, with the postage
22 fully prepaid.

23 placed the envelope for collection and mailing, following our ordinary business
practices. I am readily familiar with this business' practice for collecting and processing
24 correspondence for mailing. On the same day the correspondence is placed for collection
and mailing, it is deposited in the ordinary course of business with the United States Postal
25 Service, in a sealed envelope with postage fully prepaid.

26 I am employed in the county where the mailing occurred. The envelope or package was
placed in the mail at San Francisco, California.

27 **By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of
28 this declaration in a sealed envelope or package designated by
[name of delivery company or U.S. Postal Service for Express Mail] addressed to the
persons at the address(es) listed in Item 3, with

1 [Express Mail postage or, if not Express Mail, delivery fees] prepaid or provided for. I
2 placed the sealed envelope or package for collection and delivery, following our ordinary
3 business practices. I am readily familiar with this business' practice for collecting and
4 processing correspondence for express delivery. On the same day the correspondence is
5 collected for delivery, it is placed for collection in the ordinary course of business in a box
6 regularly maintained by

7 [name of delivery company or U.S. Postal Service for Express Mail] or delivered to a
8 courier or driver authorized by [name of delivery company] to receive documents.

9 **By Messenger Service.** I served the documents by placing them in an envelope or package
10 addressed to the persons at the address(es) listed in Item 3 and providing them to a
11 professional messenger service for service. (See Declaration of Messenger below.)

12 **By Facsimile Transmission.** Based on an agreement between the parties to accept service
13 by facsimile transmission, which was confirmed in writing, I faxed the document(s) and an
14 unsigned copy of this declaration to the person(s) at the facsimile numbers listed in Item 3
15 on [type date], at [type time]. The transmission was reported as complete without error by a
16 transmission report issued by the facsimile machine that I used immediately following the
17 transmission. A true and correct copy of the facsimile transmission report, which I printed
18 out, is attached hereto.

19 **By Electronic Service (E-mail).** Based on a court order or an agreement of the parties to
20 accept service by electronic transmission, I transmitted the document(s) and an unsigned
21 copy of this declaration to the person(s) at the electronic notification address(es) listed in
22 Item 3 on May 25, 2012 before 5:00 p.m. PST.

23 The transmission of the document was reported as complete and without error by
24 electronic receipt of a delivery confirmation, a true and correct copy of which is attached
25 hereto.

26 I did not receive, within a reasonable time after the transmission, any electronic
27 message or other indication that the transmission was unsuccessful.

28 **Via Court Notice of Electronic Filing.** The document(s) will be served by the court via
NEF and hyperlink to the document. On [type date], I checked the CM/ECF docket for this
case or adversary proceeding and determined that the person(s) listed in Item 3 are on the
Electronic Mail Notice List to receive NEF transmission at the email addresses indicated in
Item 3 [or on the attached service list, if applicable].

STATE: I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

FEDERAL: I declare that I am employed in the office of a member of the bar of this court
at whose direction the service was made.

Dated: _____ Signature: _____
Type or Print Name: _____

DECLARATION OF MESSENGER

By personal service. I personally delivered the envelope or package received from the
declarant above to the persons at the addresses listed in Item 3. (1) For a party represented
by an attorney, delivery was made to the attorney or at the attorney's office by leaving the
documents in an envelope or package, which was clearly labeled to identify the attorney
being served, with a receptionist or an individual in charge of the office or in a conspicuous
place in the office, between the hours of nine in the morning and five in the evening.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening. At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding. I served the envelope or package, as stated above, on **[type date]**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 5/25/12

Signature: 

Type or Print Name: Jill Hernandez