

**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 REPLY BRIEF IN SUPPORT OF ITS LIMITED CROSS
EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

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WEST d/b/a PIEDMONT GARDEN

I. INTRODUCTION

The ALJ incorrectly found that the Employer violated the Act when it did not provide the Union with the names and job titles of witnesses to a Mr. Bariuad's misconduct. The Employer's Limited Cross-Exceptions should be affirmed for the following reasons, which were either inadequately addressed or ignored completely by the General Counsel in its Answering Brief.

First, the ALJ failed to recognize that the Employer's need to protect vulnerable residents from potential employee misconduct or neglect at a retirement community, and the corresponding need to encourage witnesses to report misconduct or neglect, creates a legitimate and substantial confidentiality interest in the names of witnesses to such misconduct. In the face of credible and undisputed testimony by the Employer's witnesses, common sense, and the General Counsel's own admissions during the hearing, the ALJ made the preposterous conclusion that a certified nursing assistant who was sleeping on the job "did not pose a danger to anyone," even though his job required him to care for infirm residents who were unable to perform tasks of daily living without assistance. (ALJD at 15:3). This incorrect conclusion should be overturned by the Board.

Second, it is undisputed that the Employer offered to provide witness statement summaries to the Union, and that the Union rejected this offer. (ALJD at 9:1-9, 11-16; G.C. Exh. 9). The General Counsel completely failed to address this critical point in its Answering Brief. Witness statement summaries would have met the Union's need to evaluate the merits of Mr. Bariuad's grievance without violating the Employer's demonstrated confidentiality interest. The Employer's offer satisfied its obligation to accommodate the Union under *Pennsylvania Power*, 301 NLRB 1105-1106 (1991). The ALJ acknowledged that the Employer had offered summaries of the witness statements, but failed to conclude that the witness statements would have provided the Union with

the information it needed to evaluate the grievance. Indeed, witness statement summaries would be *more* helpful to the Union than the names and job titles of witnesses. Armed with just the names of witnesses, the witnesses could refuse to talk to the Union, or give false information to the Union since they would not be under oath; on the other hand, summaries of witness statements taken shortly after the incident would have provided the Union with an objective basis for evaluating the grievance's merits.

Third, the General Counsel also neglected to address the undisputed fact that only two other employees besides Mr. Bariudad regularly worked the night shift in his department, the Assisted Living unit. The ALJ confirmed that Mr. Bariudad's shift coworkers consisted of one CNA and one charge nurse, and that these two coworkers had worked with Mr. Bariudad for 1 and 2 years, respectively. (ALJD at 5:12-15; 18-20). These two coworkers submitted witness statements describing Mr. Bariudad's misconduct. The Union's duty of fair representation required it to investigate Mr. Bariudad's grievance, which included (at a minimum) interviewing Mr. Bariudad and asking him who his coworkers were. *See Beverly Manor Convalescent Ct.*, 229 NLRB 692 (1977). Thus, the Union and the General Counsel's contention that the Union could not determine who these coworkers were without the Employer's assistance, defies credibility. The Board should overturn the ALJ's incorrect finding on this point.

For the reasons set forth in the Employer's Limited Cross-Exceptions, Brief in Support of Limited Cross-Exceptions, and this Reply Brief, the Employer requests that the ALJ's Decision be reversed and the Complaint dismissed as to the issues addressed therein.

II. ARGUMENT

The *Detroit Edison* balancing-of-interests test (adopted by the Board in *Pennsylvania Power*) requires that in order to justify withholding information on confidentiality grounds, "(1) [T]he party asserting a 'legitimate and substantial'

confidentiality interest has the burden of demonstrating the interest, and (2) if the burden is met, an accommodation must be sought to resolve the competing need for the information and the justified confidentiality concerns.” *Fleming Co.*, 332 NLRB 1086, 1090 (2000) (Fox and Liebman, concurring) (citing *Pennsylvania Power*, 301 NLRB at 1105-1106). The accommodation must “allow the requester to obtain the information it needs while protecting the party’s interest in confidentiality.” *N. Indiana Pub. Serv. Co.*, 347 NLRB 210, 211 (2006).

A. The Employer Has Demonstrated A Strong Interest In Protecting The Confidentiality Of Witnesses to Misconduct In The Assisted Living Unit.

In cases such as *Alcan Rolled Products*, 358 NLRB No. 11 (2012); *N. Indiana Pub. Serv. Co.*, 347 NLRB 210 (2006); *Metro. Edison Co.*, 330 NLRB 107 (1999); and *Detroit Newspaper Agency*, 317 NLRB 1071 (1995), the Board applied the *Pennsylvania Power* test to support the employer’s withholding of witness names and other information from the requesting union. The Board made clear that an employer can demonstrate confidentiality interests in various situations, not just in situations involving drugs or alcohol (as in *Alcan Rolled Products*), nuclear power plants (as in *Pennsylvania Power*), or workplace theft (as in *Metropolitan Edison Company*): “In these decisions, the Board did not attempt to classify the confidentiality concerns as falling within the scope of the particular examples set out in *Detroit Newspaper*, [] but rather *considered whether the information was sensitive or confidential within the factual context of each case.*” *N. Indiana Pub. Serv. Co.*, 347 NLRB at 211 (emphasis added).

General Counsel’s attempts in its Answering Brief to distinguish *Alcan Rolled Products* and *Pennsylvania Power* from the facts at hand therefore miss the point entirely. (Answering Brief, p. 7). Board law does not require an employer to shoehorn its confidentiality concerns into narrow categories before it is entitled to withhold information from the requesting union. An employer’s interests in keeping certain

information confidential can be “legitimate and substantial” without implicating substance abuse or public safety. In a passage that the Employer highlighted in its opening brief but which was not addressed by the General Counsel, the *Alcan Rolled Products* Board clearly emphasized that even where the employer’s operations do “not pose a significant risk to public safety,” an employer can have “a significant and legitimate interest in encouraging employees to report other employees who may be acting in ways that endanger themselves, their co-employees or the facility. The connection of confidentiality to the safety of . . . other employees and to job performance is plain.” *Alcan Rolled Products*, 358 NLRB at *7 (internal quotations omitted) (quoted on page 12 of the Employer’s Brief in Support of Limited Cross-Exceptions).

Where there is a danger of workplace injury, the employer has a legitimate interest in preventing it. And as pointed out by the *Alcan* Board, there is a substantial connection between the confidentiality of witness informants and workplace safety, since employees who believe that their identities will be disclosed are discouraged from reporting misconduct. *Id.*; see *Detroit Newspaper Agency*, 317 NLRB at 1073 (employers may have a confidentiality interest in information which “could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses”). Here, a certified nursing assistant sleeping on the job in the Assisted Living unit, instead of responding to infirm residents’ pages for assistance, could have easily led to serious harm. Even the General Counsel conceded the “severity of the situation in terms of people sleeping on the job” at a retirement community. (Tr. at 97:15-16).

Contrary to this common sense conclusion, the ALJ wrongly found that Mr. Bariuad sleeping on the job “did not pose a danger to anyone.” (ALJD at 15:3). It is true that, fortunately, no resident in Assisted Living fell and injured themselves on the particular night while Mr. Bariuad was caught sleeping. (Tr. 69:2-7). However, Board cases do not require a tragedy to occur before recognizing the employer’s interest in keeping information confidential. It is the *risk* of such adverse consequences that creates

the employer's confidentiality interest.

The Employer presented a second, credible reason to justify its interest in keeping witness names confidential. Witness Lynda Hutton was concerned for her safety and wanted to be sure that her identity and statement would not be disclosed to either Mr. Bariudad or the Union. (Tr. 100:17-20). She felt afraid of coming into and leaving the facility at night, and was so frightened of Mr. Bariudad and the Union finding out about her report that she would have considered "resigning" out of "fear," rather than participating in the investigation, had the Employer not enforced its policy of confidentiality.¹ (Tr. 57:9-13; 65:20-66:5; 67:4-7).

In response, the General Counsel (and the ALJ) argue that because Mr. Bariudad was never disciplined for acts of violence, there was no credible evidence that Mr. Bariudad ever intimidated Ms. Hutton. (ALJD 14:6-14; Answering Brief, p. 4). This conclusion ignores the undisputed testimony that in response to Ms. Hutton's expressed concerns about entering and leaving the facility at night from her car, the Employer allowed Ms. Hutton to park in a special location. (Tr. 67:6-12; 101:2-6; Opening Brief, pp. 13-14.).

B. Undisputed Evidence Confirms That The Union's Need To Obtain The Witnesses' Identities From The Employer Was Minimal.

The Employer has demonstrated a strong interest in keeping the identities of witnesses confidential. Under the second prong of the *Pennsylvania Power* balance-of-interest test, the parties must balance the requesting party's need for the information with the withholding party's justified confidentiality concerns.

Here, the Union's need for Employer to violate its confidentiality interests by

¹ Ms. Hutton testified, as the ALJ correctly acknowledged, that she was well aware of the Employer's practice and policy of keeping witnesses and statements confidential before she submitted her statement, and that this confidentiality policy was important to her. (ALJD at 16:31-34; Tr. 65:3-9). This testimony was undisputed, and contradicts the General Counsel's argument (without citation to authority) that "employees cannot possibly rely on an alleged [confidentiality] policy that they were never apprised of." Answering Brief, p. 4.

providing the Union with witness names is minimal because it either *already had the witness names*, or *had the independent duty to obtain the witness names on its own* through its investigation of the grievance. It is undisputed, and in fact, confirmed by the ALJ, that the witnesses who submitted statements to Mr. Bariudad's misconduct were Mr. Bariudad's co-workers on the night shift in the Assisted Living unit, that *only two employees* (a CNA and an LVN Charge Nurse) regularly worked with Mr. Bariudad on this shift, and that these two employees had worked with Mr. Bariudad for several years. (ALJD at 5:12-15;18-20; 42-44). As conceded by Union representative Donna Mapp during the hearing, the Union's duty of fair representation required her, during the course of investigating Mr. Bariudad's grievance, to ask him who his co-workers were. (Tr. 46:21-24). Assuming she did so, she would have determined who these witnesses were. The General Counsel's Answering Brief fails to address this critical fact.

Instead, the ALJ and the General Counsel cite to *King Soopers, Inc.*, 344 NLRB 842, 845 (2005) for the proposition that even assuming the Union could have obtained the witness names by asking Mr. Bariudad directly (thereby avoiding the need for the Employer to violate its confidentiality interest), there is "no duty on the Union to obtain the requested information on its own" (ALJD at 14:37-38; Answering Brief, p. 6). This general proposition misses the point. Under the Union's duty of fair representation to its members, it does, indeed, have an obligation to investigate Mr. Bariudad's grievance, which included (at a minimum) interviewing Mr. Bariudad and asking him who his coworkers were. *See Beverly Manor Convalescent Ct.*, 229 NLRB 692 (1977). Thus, assuming that the Union representative complied with the Union's duty of fair representation, it would have already obtained the names of the witness/co-workers (contrary to the unbelievable testimony of Union representative Donna Mapp at the hearing).

Columbus Prods. Co., 259 NLRB 220 (1981), cited in Employer's Brief in Support of Cross-Exceptions on page 16, illustrates the point. In that case, two employee

shop stewards were suspended for “fomenting insubordination among hourly employees,” based on information provided by other employees. *Id.* at 220. The union filed grievances on behalf of the stewards, and requested the names of the employees who had provided the information on which the stewards were suspended. *Id.* The employer refused to divulge the employees’ names due to concerns about retaliation, but gave the union the substance of their comments. The ALJ held, and the Board affirmed, that the employer was justified in withholding the employees’ names, and did not violate its duty to provide requested information under Section 8(a)(5):

It appears to me that in the instant case the Union was able to gather all the information it needed regarding the incident and was in full possession of all relevant and necessary information. *The Union also had access to all information it needed to process the grievance through arbitration without forcing Respondent to disclose the names of witnesses.* *Id.* at 223 (emphasis added).

The Board noted that the rule requiring an employer to provide relevant information to the requesting union “is not *per se*, and in each case the Board must determine with the requested information . . . *is sufficiently important or needed to invoke a statutory obligation of the other party to produce it.*” *Id.* at 220 n. 1 (emphasis added). Since the union had the ability to obtain the information it was ostensibly requesting from the employer, the employer was not statutorily obligated to violate its own confidentiality interests by providing the witness names.

Perhaps in recognition of this, the General Counsel, echoing a theory mentioned in the ALJ’s Decision, claims that the Union needed to look to the Employer to supply the witness names because it had “no way of knowing” whether the witnesses were non-employees such as residents, “or for that matter, the residents’ family/friends/visitors.” (Answering Brief, pp. 6-7; ALJD at 14:36-37). This speculative theory has no basis in the record, and was never brought up by either the General Counsel or the ALJ at the hearing. Indeed, it seems unlikely that the Union ever suspected that a resident (let alone a visitor outside of regular business hours) would have been awake and roaming the halls

in the middle of the night to witness Mr. Bariuad sleeping on the job during the night shift. In any event, the very foundation of the assumption that the Union might not have known that the witnesses were employees is belied by the fact that the Union explicitly asked for “job titles” of the witnesses to Mr. Bariuad’s misconduct. (ALJD at 8:12-15; G.C. Exh. 6). The possibility that the witnesses were not employees was neither considered, nor discussed.

C. The Union Rejected The Employer’s Offer Of Witness Statement Summaries, Which Would Have Met All Of The Union’s Stated Needs Without Compromising The Employer’s Confidentiality Interests.

The General Counsel provides just two reasons why the Union needs the witness names in order to complete its investigation into Mr. Bariuad’s grievance. (Answering Brief, p. 5). As an initial matter, as explained above, it is the Employer’s position that the Union can complete its investigation without compromising the Employer’s confidentiality interest simply by asking Mr. Bariuad who his co-workers were. Notwithstanding this fact, the General Counsel’s stated reasons for its “great” need for the witness names are either invalid, or can be satisfied by witness statement summaries.

First, the General Counsel claims that the Union cannot “verify the veracity of an employee’s testimony at arbitration” without first speaking to them. (Answering Brief, p. 5). This claimed dilemma, however, would not be cured by access to witness names, since there is no requirement that employees tell the truth unless they are under oath. Once under oath, the Union can test the credibility of witnesses through cross-examination, or by calling its own witnesses.

Second, the General Counsel claims that the Union cannot “evaluate the merits of [Mr. Bariuad’s] claim” without the Employer giving them the witness names. This need would be met by providing the Union with witness statement summaries. Indeed, witness statement summaries would be *more* helpful to the Union than the names and job titles of witnesses. Armed with just the names of witnesses, the witnesses could refuse to talk to

the Union, or give false information to the Union since they would not be under oath; on the other hand, summaries of witness statements would provide the Union with an objective basis for evaluating the grievance's merits.

Based on the foregoing, the Union has failed to demonstrate that its need for the witness names outweighs the Employer's confidentiality interest, given the Employer's continued willingness to provide witness statement summaries to the Union. *See Columbus Prods. Co.*, 259 NLRB at 223 (dismissing the Union's failure-to-provide information charge based in part on the employer's provision to the Union of "the substance of the employees' statements").

D. The General Counsel's Arguments Against Extending *Anheuser-Busch* To Protect Witness Identities Also Fail.

Citing numerous examples of Board support, including *Metro. Edison Co.*, 330 NLRB 107 (1999); *Detroit Newspaper Agency*, 317 NLRB 1071 (1995); and *Boyertown Packaging Corp.*, 330 NLRB 441 (1991), the Employer submitted in its Brief in Support of Limited Cross-Exceptions that a case-by-case confidentiality analysis was inappropriate in the context of witness identities, as in witness statements. Thus, the Board should extend the *Anheuser-Busch* rule to protect the pre-arbitration disclosure of identities of witnesses to employee misconduct. The same concerns that the Board identified in creating an exception for witness statements, also apply to witness identities—exposing witness information could lead to pre-arbitration intimidation of witnesses, a chilling effect on witnesses' willingness to participate in investigations, a decrease in the quality of employer investigations, and a legal morass for HR practitioners.

In response, the General Counsel expresses a "parade of horrors," including a baseless fear that a "blanket rule" would allow employers "carte blanche to intimidate and manipulate employee witnesses' statements." (Answering Brief, p. 9). What the General Counsel fails to mention is that the speculative possibility of these harms is

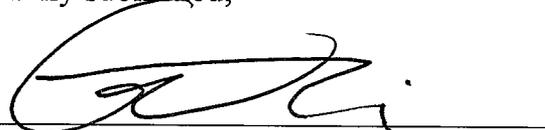
ameliorated by 1) the union's continuing duty to conduct its own investigation, including interviewing the grievant, prior to the arbitration; 2) the continuing requirement that, even under an *Anheuser-Busch* standard, employers accommodate the unions' need for information without violating its own confidentiality interest; and 3) the union's ability to cross-examine witness at an arbitration.

III. CONCLUSION

For each and all of the foregoing reasons, the Employer requests that the ALJ's Decision be reversed and the Complaint dismissed.

June 25, 2012

Respectfully submitted,



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AMERICAN BAPTIST HOMES OF THE
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1 **PROOF OF SERVICE**

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 June 25, 2012, I served the following document(s):

5 RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS LIMITED CROSS
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 Manuel A. Boigues
Weinberg, Roger & Rosenfeld
15 1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
ygottesman@unioncounsel.net
16 mboigues@unioncounsel.net

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
21 person(s) at the address(es) in Item 3 and (**check one**):

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

23 placed the envelope for collection and mailing, following our ordinary business
24 practices. I am readily familiar with this business' practice for collecting and processing
correspondence for mailing. On the same day the correspondence is placed for collection
25 and mailing, it is deposited in the ordinary course of business with the United States Postal
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
27 placed in the mail at San Francisco, California.

28 **By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of
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

1 persons at the address(es) listed in Item 3, with
2 **[Express Mail postage or, if not Express Mail, delivery fees]** prepaid or provided for. I
3 placed the sealed envelope or package for collection and delivery, following our ordinary
4 business practices. I am readily familiar with this business' practice for collecting and
5 processing correspondence for express delivery. On the same day the correspondence is
6 collected for delivery, it is placed for collection in the ordinary course of business in a box
7 regularly maintained by
8 **[name of delivery company or U.S. Postal Service for Express Mail]** or delivered to a
9 courier or driver authorized by **[name of delivery company]** to receive documents.

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

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

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

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

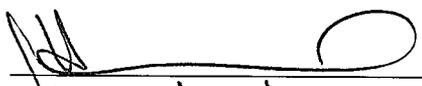
27 I did not receive, within a reasonable time after the transmission, any electronic
28 message or other indication that the transmission was unsuccessful.

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.

24 Dated: 6/25/12

Signature: 

Type or Print Name: Jill Hernandez

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

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place in the office, between the hours of nine in the morning and five in the evening.
(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: _____ Signature: _____

Type or Print Name: