

And The Hits Keep On Coming! Board Alters Approach On Witness Statements

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For the last 30 years, the NLRB has held that employers were not required to produce to a Union copies of witness statements gathered in the course of an employer's disciplinary investigation. In *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), the Board had held that witness statements were confidential material and that "an employer's duty to furnish information under Section 8(a)(5) of the National Labor Relations Act (NLRA) does not encompass the duty to furnish witness statements." The Board concluded in that case that "requiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process."

Not any more. The Board in two separate opinions this month reversed its stance on this issue and now will use a "balancing test" to determine whether

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witness statements must be disclosed.

In *Stephens Media*, 359 NLRB No. 39 (2012), and *Piedmont Gardens*, 359 NLRB No. 46 (2012), both issued in mid-December, the Board dropped *Anheuser-Busch's* categorical exemption of witness statements from the duty to furnish information and switched to the balancing test articulated in the Supreme Court's *Detroit Edison* decision . Under this balancing test, employers must conduct a fact-specific analysis that balances a union's need for the information against the employer's legitimate and substantial confidentiality interests.

Copies of the decisions are available [here](#) and [here](#).