The NLRB has recently issued an invitation to interested parties to file briefs in the case of *Stephens Media*, 356 NLRB No. 63 (2011), on the proper scope of an employer's duty to provide unions with "witness statements" obtained during the course of an employer's own investigation. The Board stated that current precedent does not clearly define the scope of the category of "witness statements." In its invitation, the Board asks for comment on whether it should continue to adhere to its decision in *Anheuser-Busch*, 237 NLRB 982, 985 (1978), which held that an employer's duty to furnish information under Section 8(a)(5) of the National Labor Relations Act does not include the duty to furnish witness statements. The Board asks what standard it should apply to requests for such statements or any other statements the employer obtains during its investigation. If the statements in question are not witness statements, the Board asks whether they are still privileged from disclosure to the union as attorney work product.

The Board's call to re-examine or restrict what has actually been a very clear rule threatens to upset any balance between employers and unions. Under *Anheuser-Busch*, an employer is not required to provide any written statements of employee witnesses collected during an internal investigation. Any limitation of *Anheuser-Busch* would have broad negative implications for employer investigations. Requiring employers to provide written witness statements to the union for the purpose of grievance processing or arbitration would impose a strong chilling effect on employers' ability to conduct internal investigations. Under *Anheuser-Busch*, employers are able to offer reasonable assurances to all participants that internal investigations will be conducted confidentially. Without the ability to maintain confidentiality of such statements, at least until the witnesses have actually testified at a Board hearing or arbitration, there is a strong risk that unions or their minions may coerce or intimidate employees and others who have given statements in an effort to make them alter their testimony or to induce them not to testify at all. Investigation participants may also be subject to undue retaliation, intimidation, and harassment by unions or co-workers who learn of the substance of their testimony. As a result, both employees and non-employees may be reluctant to give candid statements and to participate in any internal investigations.

Many of the above concerns were recognized in the Supreme Court's decision in *NLRB v. Robbins Tire and Rubber Company*, 98 S.Ct. 2311 (1978), where the Court ruled that the Freedom of Information Act did not require the Board, prior to an unfair labor practice hearing, to disclose to the employer the statements of those witnesses whom the Board expected to testify at the hearing. The considerations applying to the Board in preventing the dissemination of the statements it obtains are especially applicable to the conduct of any employer's internal investigation.

Additionally, lack of premature access to witness statements does not impede a union's ability to investigate and process grievances, nor its access to relevant information in an

arbitration context. Employers are obligated to provide the union with a list of witnesses, including those from whom statements were taken. As a result, the union is free to interview or take statements from the same witnesses and to conduct its own investigation into the events at issue. Employers may also choose to provide the union with additional information, including summaries of the pertinent information from the witness statements or from the employer's investigation. Unions, on the other hand, are not required to provide any of their own investigatory information to the employer. As a result, undermining the *Anheuser-Busch* precedent would not only impede the employer's ability to conduct a thorough investigation, but would also completely tilt the playing field to favor unions.

The potential limitation of the *Anheuser-Bush* rule is alarming, especially because the current Board is acting, and making sweeping regulatory changes, through adjudication without five confirmed members. This Board has demonstrated activist, pro-union tendencies by its propensity to make serious regulatory changes through adjudication. This allows the Board to evade compliance with the notice and comment procedure required by the Administrative Procedures Act. Instead, the Board attempts to justify reversals of long-standing precedent through the adjudication process by substituting invitations to interested parties to file briefs in place of the more deliberate regulatory process.

Any change in favor of unions is likely to be harmful to small employers along with larger ones. The National Labor Relations Act has no lower limit as to size of the employer affected – it merely requires that there be two employees who can potentially act collectively. In the context of employer investigations, however, the effect is more adverse for small employers. First, small employers are less likely to have sophisticated record-keeping and monitoring systems that would provide means other than witness testimony to establish the facts of employee misconduct. Second, small employers are much more likely to have support for management within the workforce, and are thus more likely to receive cooperation from employees with investigations. A change in the *Anheuser-Bush* rule would cut off that help and drive an additional wedge between small employers and their workers.

It is therefore appropriate to urge in the *Stephens Media* case that the Board to continue to adhere to its long-standing precedent regarding witness statements in *Anheuser-Bush* and to apply its protections to other witness information like interview notes and summaries. Small businesses are especially at risk if the Board reverses its position and requires employers to provide witness statements obtained in their internal investigations to unions as a matter of course.