

February 23, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ANDREW SIEMASZKO) ASLBP No. 05-839-02-EA
)
) IA-05-021
)

NRC STAFF RESPONSE TO THE
BOARD'S POTENTIAL OPTION FOR DEPOSITIONS

INTRODUCTION

At the prehearing conference on February 16, 2006, the Board requested Staff views on a proposal to allow discovery to commence with the Staff deposing Mr. Siemaszko and whether that would lesson the need for a further stay of discovery. As stated at the prehearing conference, the Staff disputes that beginning the proceeding with the deposition of Mr. Siemaszko would lesson the need for a stay of discovery. Neither the proposal nor Mr. Siemaszko's limited waiver of the self-incrimination privilege allay the Staff's concerns regarding commencing discovery in this enforcement case.

DISCUSSION

The harm to the government's interest by allowing Mr. Siemaszko to serve interrogatories on and take depositions of prosecution witnesses is not cured by limiting the scope of his Fifth Amendment rights. Mr. Siemaszko asserts that he will waive the self-incrimination privilege for "the issues that are the subject of this enforcement proceeding." The proposal rests on the idea that if Mr. Siemaszko does not assert his Fifth Amendment privilege with respect to issues involved in this case, there is no harm in letting him serve interrogatories on and depose witnesses in this enforcement case. According to this line of

reasoning, balance is maintained and there is no need for the requested stay. As set forth below, the Staff respectfully disputes that this proposal resolves the concerns it raised in previous stay requests.

First, under this proposal, Mr. Siemaszko would retain his self-incrimination privilege with respect to many of the issues involved in both cases, and yet would be allowed to depose prosecution witnesses. This is the harm the criminal rules and established precedent are designed to prevent. Limiting the scope of the discovery to the issues involved in the enforcement case does not change this effect. If a criminal defendant decides to waive his Fifth Amendment protections, he does not earn the right to depose prosecution witnesses. Mr. Siemaszko should not be allowed to barter for that right in this case. This is the dodge of criminal discovery restrictions the *Campbell* court meant to avoid. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). *Campbell's* balancing rationale would not be furthered by allowing this defendant to depose witnesses on the issues on which he decided to testify. He has retained the privilege on those issues for which he has determined it is to his tactical advantage to not testify. This balancing factor should be examined not on an issue by issue basis, but in terms of the potential advantage gained and the overall balance of equity. To permit a criminal defendant to utilize civil discovery in a criminal case is to permit a criminal defendant to circumvent the legal framework established by the rules of criminal procedure.¹

More importantly, in the event that Mr. Siemaszko does not assert his Fifth Amendment privilege and is allowed to depose prosecution witnesses, his counsel will be free to ask questions pertaining to the criminal case, while he maintains his privilege in that sphere. There

¹ Two other defendants were also named in the same indictment. They have not waived their Fifth Amendment rights. If the proposed depositions take place, transcripts would be turned over to these other defendants as part of the open-file discovery. Any balance achieved by Mr. Siemaszko's waiver of his Fifth Amendment rights would be overshadowed by the resulting imbalance with respect to these other defendants.

is no real method to protect the integrity of the process. The Staff cannot petition the Board each time Mr. Siemaszko's counsel asks what it feels is an inappropriate question. The Staff may merely note its objection for the record, and the answer would be given. At that point, Mr. Siemaszko will have gained the information, and there would be no ground to preclude its introduction at the criminal trial.

Second, this proposal ignores the criminal system's strong policy in favor of protecting witnesses from improper influence. *Campbell* expresses this concern in terms of witness intimidation and the possibility of perjury or manufactured evidence. For important reasons, the criminal system is structured in such a way as to keep witnesses apart from defendants before trial.² The restrictions on pretrial compulsory process are a part of this procedural scheme.

Third, the proposed plan would be procedurally awkward. The discovery process normally involves two phases. The first phase involves the production of documents and answering of interrogatories. This is generally followed by depositions, which draw upon and ask about the documents produced and the answers to interrogatories. The Staff would not be in a position to depose Mr. Siemaszko until after these preliminary steps have been taken. By that point, the case will be in a different posture altogether, with much of discovery already completed, and harm to the criminal case will already have occurred.

Finally, the proposed plan appears likely to prove unworkable. As Mr. Siemaszko conceded in his letter, there is no bright line between that which is relevant for the enforcement case and that which "could only be relevant to the criminal case." Long standing agency precedent states that the standard for discovery is "if the requested discovery could reasonably

² As an example of the seriousness with which this issue is taken, see 18 U.S.C. § 1512 (b)(1). This statute makes it a crime to use intimidation, corrupt persuasion, or misleading conduct with intent to influence, prevent, or delay the testimony of any person in an official proceeding. This example is not meant to imply improper motive on the part of Mr. Siemaszko, but instead merely to demonstrate the concern about improper attempts to influence witnesses in criminal cases.

lead to obtaining evidence that would be admissible at the future evidentiary hearing on this proceeding." *Safety Light Corp.*, (Bloomsburg Site Decontamination), 35 NRC 110, 112 LBP 92-3A (1992). The test is one of general relevancy and is easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues. *Commonwealth Edison Co.*, (Zion Station Units 1 & 2), ALAB-185, 7 AEC 240 (1974). It seems likely that the Staff and Mr. Siemaszko's counsel will have different ideas about what "could only be relevant to the criminal case," as opposed to what is "generally relevant" to the enforcement proceeding.

In the instant case a relevant issue is Mr. Siemaszko's knowledge of the condition of the reactor vessel head coming out of RFO 12. Therefore an example of a permissible deposition or interrogatory question for Mr. Siemaszko is, "in preparing the responses to the NRC Bulletin in the Fall of 2001 regarding the condition of the reactor vessel head did you refer to the condition reports written during RFO 12?" This question directly relates to the events during RFO 12 and the events during the Fall of 2001. This information is generally relevant to the instant case and disallowing this question would impermissibly restrict the Staff's right to discovery in the civil case. It is unclear what Mr. Siemaszko's counsel would advise in this situation. Because it has not yet received document discovery or answers to interrogatories from Mr. Siemaszko, the Staff cannot anticipate every question that it may wish to ask or that may cause a dispute. However, it seems almost guaranteed that there will be more questions that will generate genuine disputes among the parties. Even the equities in the civil case become problematic if the decision of what is generally relevant to this civil proceeding rests entirely within the discretion of Mr. Siemaszko and his counsel.

CONCLUSION

In light of its aforementioned concerns, the Staff maintains that a complete stay of this case is the only method by which the government's interests can be adequately protected. Since Mr. Siemaszko is not harmed by a further stay, and there is a risk to the criminal case

should this case be allowed to move forward, the Staff motion to hold the proceeding in abeyance should be granted.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 23rd day of February, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO THE BOARD'S POTENTIAL OPTION FOR DEPOSITIONS" in the above captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 23rd day of February, 2006.

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