

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12836

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ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

In the Matter of

DAVID GEISEN

Docket No. IA-05-052

ASLBP No. 06-845-01-EA

January 8, 2007

ORDER

(Ruling on Staff's Preclusion Motion)

1. This enforcement proceeding against a former managerial employee of the FirstEnergy Operating Company (FENOC) stems from events of several years ago involving that company's Davis-Besse Nuclear Power Station in northwestern Ohio. Those events led to the NRC Staff's immediately-effective enforcement order (being challenged here) banning Mr. Geisen from employment in the regulated nuclear industry for five years; they also gave rise to a criminal proceeding that is now pending in federal court against Mr. Geisen. The criminal trial is scheduled to begin on April 16 in the Northern District of Ohio.

Through counsel, Mr. Geisen recently informed the Board without equivocation that he would indeed, as had previously been intimated, be asserting his Fifth Amendment right not to testify in this proceeding, either at deposition or at trial, because of the pendency of the criminal proceeding. As has been discussed extensively in previous written briefings and oral arguments, and in our oral and written rulings, Mr. Geisen's altogether-legitimate assertion of his Constitutional right against self-incrimination nonetheless raises, among other questions, the issue as to how the Staff will be able, through the discovery process, to receive fair notice of the defenses Mr. Geisen will be urging at trial, in a manner sufficient to guide the Staff in the upcoming conduct of depositions and then in the presentation of its case at trial.

In that setting, and as the written discovery phase of the proceeding was drawing to a close, the Staff put before us on December 22, in accordance with the governing prehearing schedule, a motion seeking to have the Board preclude Mr. Geisen from advancing at trial any defenses as to which he had provided insufficient notice during one aspect of the discovery process, viz, in his December 15 supplemental response to the Staff's September 1 interrogatories. Mr. Geisen's response to the motion, filed on December 29, urges that the Staff motion be denied for, among other things, advancing previously-rejected positions and discounting notice of defenses provided through other means. The response goes on to urge, in essence, that by its motion and otherwise the Staff is attempting to avoid its primary burden to put on a case-in-chief that establishes the existence of all the necessary elements of the charge it brought against Mr. Geisen, following a multi-year investigation that included interviews of him and of large numbers of his former co-workers.

2. The Staff motion is premised on one valid proposition and one invalid one. As a result, the Staff is not entitled to the relief that it seeks, but its motion does prompt us to take herein further steps in aid of our management of the discovery aspect of the ongoing prehearing process pursuant to 10 C.F.R. § 2.319; see also Fed. R. Civ. P. 16(a).

The valid proposition underlying the pending motion is that the Staff, like any party in any civil proceeding, is entitled to use the discovery process to gain information that will guide it in participating in the later phases of discovery, in preparing for trial, and in presenting evidence. This entitlement is not diminished by – but its fulfillment may have to be shaped in light of – an opponent's invocation of the privilege against self-incrimination. Of equal importance, the precedents teach that the manner of fulfillment of that entitlement in the face of a 5th Amendment privilege assertion is frequently fact-dependent, turning upon the nature of the case in which it is being exercised and the context in which the issues therein are presented.¹

¹ Compare SEC v. Graystone Nash, 25 F.3d 187, 193 (3d Cir. 1994) and Traficant v. CIR, 884 F.2d 258, 265 (6th Cir. 1989).

Although the Staff's generalized major premise is a sound one, the application of it sought here is not, because the motion's minor, fact-dependent premise does not withstand scrutiny. Here, the Staff seeks to have us preclude Mr. Geisen from raising defenses not covered in a particular discovery response. To grant that remedy would, however, fail to credit Mr. Geisen for providing, over the course of the proceeding (including in recent weeks), information about his defenses in a number of filings. As we see it, so long as Mr. Geisen has in some reasonable fashion provided the Staff fair notice of defenses, the Staff has no basis to seek, generally, preclusion of defenses that can be so categorized. At one point, the Staff seemed to recognize as much.²

The converse is true – if it turns out that Mr. Geisen later attempts to present particular defenses about which he has not provided fair notice in some reasonable manner, he should be precluded from doing so. In effect, then, the pending Staff motion – although not meritorious on its own terms – has established the predicate for a subsequent Staff motion premised on the later actual emergence of a non-noticed defense, if such an occurrence were to take place.

In this regard, the Staff's view is that Mr. Geisen should not be allowed to rely upon, for purposes of providing notice of defenses, a lengthy document prepared for FENOC when the investigation was ongoing, and submitted by it to the NRC in an effort to defend its employees from enforcement sanctions. A brief examination of that November 7, 2002 document, filed with Mr. Geisen's December 15 Statement of Defenses, indicates that it does much to lay out the nature of the defenses being raised against charges of employee willfulness in filing false information. In particular, it focuses on the details of the differing knowledge bases of different employees. With Mr. Geisen having incorporated the document's defenses by reference, its origins do not per se preclude it from serving as fair notice of certain defenses the Staff should anticipate.

² See Staff Motion, p. 11, last sentence before "Conclusion."

To the extent that the FENOC document might also indicate that the Staff's case-in-chief has the potential to be a complex one, that would be a burden the Staff took on when it issued the enforcement order and would not, as we analyze the context and posture of the proceeding, be due to any now-apparent lack of notice on Mr. Geisen's part. Mr. Geisen may well simply hold the Staff to its proof, and on the facts now before us, we find it not appropriate to place on Mr. Geisen more stringent notice requirements than the circumstances of this proceeding will bear.

We note in that connection that Mr. Geisen's defense already stands to be hampered, as a practical matter, by his election not to testify on his own behalf. Moreover, that exercise of his Constitutional privilege opens it to the Staff to seek to have the Board draw particular negative inferences from his failure to testify. Given those conditions, we cannot determine from what has been presented thus far that the Staff is operating at any disadvantage that requires remediation in the manner sought.

3. We need pause only briefly to indicate that we have examined the precedents the Staff cites in support of its motion and find that they do not support the grant of any more relief than we provide herein. Again, context is everything in applying general principles to fact-driven situations, and the cases cited by Staff – each involving a long pattern of egregious behavior – will not bear the weight assigned to them in the circumstances involved here.

Specifically, the behavior the Seventh Circuit found objectionable in Thomas Consolidated Industries v. Herbst³ included a plaintiff's lying to the tribunal and refusing to include any facts at all in most of the depositions, instead repeatedly insisting that the plaintiff "could not state every fact" and "was not obligated to prepare the defendants' case for them." In another instance, the plaintiff refused to supply a critical piece of evidence needed for the

³ 456 F.3d 719 (7th Cir. 2006).

other side to prepare its defense until one week before the trial, despite having been ordered to do so by the court more than a year before.⁴ In a third, the plaintiff's agents refused to appear for depositions and failed to produce documents in defiance of the district court's reprimand.⁵

These gross derelictions by plaintiffs, depriving the respective defendants of knowledge of the claims pending against them, are – given the nature of the charge and the claim of privilege here – in no way akin to the situation before us or to Mr. Geisen's discovery responses. Nor, as we have stressed on other occasions herein, does his approach here leave the knowledge base skewed in his favor (as it did in the cited precedents). And, as indicated above, the Staff will have distinct advantages at the trial.

4. In sum, the pending Staff motion may not be granted, as such, but it – and our analysis herein – should serve as a pointed reminder to Mr. Geisen that any defenses as to which fair notice has not yet been given will be in serious jeopardy of later preclusion if the failure is not promptly remediated. We do not, however, rest there.

Rather, with the period for taking depositions looming, we find it appropriate in all the circumstances before us – including the nature of the previous discovery requests and responses, and the claims of practical difficulties reflected in the Staff Motion⁶ – to require Mr. Geisen to identify, more specifically than he has done thus far, which of the large number of his potential witnesses he now intends to place primary reliance upon. This will tend to assure that, as the Staff determines how to approach the scheduling of depositions in terms of the relatively short time available and the large universe of possible witnesses, it can do so in a manner calculated to serve the ends of justice, not to cause the waste of resources. Cf. 10 C.F.R.

⁴ Ware v. Rodale Press, 322 F.3d 218, 222-23 (3d Cir. 2003).

⁵ Curtis T. Bedwell and Sons v. International Fidelity Insurance Company, 843 F.2d 683, 692-93 (3d Cir. 1988).

⁶ Motion at 3 (quoting Board); 9 (last ¶, 1st sentence); 10 (1st ¶ under heading #2).

§ 2.332(c)(3)-(4); Fed. R. Civ. P. 16(a)(3)-(4). To that end, Mr. Geisen is directed to provide the Staff within the next two days, i.e., by Wednesday, January 10, a list of the ten witnesses who counsel in good faith believes are most central to his defense (as he now, at the end of written discovery, fairly appreciates its contours, and regardless of whether, as to a particular listed witness, he plans to conduct his own direct examination or simply to cross-examine if the witness is called by the Staff).

Accordingly, the Staff preclusion motion is DENIED except insofar as it establishes a predicate for possible future relief and provides a caution to Mr. Geisen to insure that fair notice of defenses has been provided, failing which he will be at risk of a later, specific claim of preclusion. Collateral to the specific relief sought by the Staff motion, and in order that the upcoming deposition phase may be conducted in an orderly fashion, Mr. Geisen will PROVIDE to the Staff the "ten-witness" list in accordance with the terms of this order, and will update it promptly if he later determines another witness has become similarly central.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 8, 2007

Copies of this Order were sent this date by e-mail transmission to counsel for the parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DAVID GEISEN) Docket No. IA-05-052
)
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (RULING ON STAFF'S PRECLUSION MOTION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of January 2007