

7-8-75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



In the Matter of }
 }
The Toledo Edison Company }
The Cleveland Electric Illuminating }
Company }
(Davis-Besse Nuclear Power Station, }
Unit 1) }
 }
The Cleveland Electric Illuminating }
Company, et al. }
(Perry Plant, Units 1 and 2) }

Docket No. 50-346A

Docket Nos. 50-440A
and 50-441A

CITY OF CLEVELAND'S MOTION FOR
CERTIFICATION OF SPECIAL MASTER'S
DECISION, AS SUPPLEMENTED, ON CLAIMS
OF PRIVILEGE TO THE ATOMIC SAFETY
AND LICENSING APPEAL BOARD

The City of Cleveland, Ohio, (City) hereby requests the Atomic Safety and Licensing Board, pursuant to Section 2.718(i) of the Commission's Rules of Practice and Procedure, to certify the rulings of the Special Master, which rulings of the Special Master are the rulings of the Board, to the Atomic Safety and Licensing Appeal Board.

BACKGROUND

The Atomic Safety and Licensing Board in the above-entitled dockets, with agreement of the parties, appointed a Special Master to resolve disputes with regard to the assertions of attorney-client and work product privileges

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by The Cleveland Electric Illuminating Company (CEI). These claims of privileges were raised by CEI as a defense to the request for production of documents by the City and the Department of Justice pursuant to Section 2.741 of the Commission's Rules of Practice and Procedure. Pursuant to an agreement among the parties, memoranda of law were submitted to the Special Master for his use in determining the applicability of the Applicants' claims of privilege to the documents sought to be discovered.

On June 20, 1975, the Special Master issued a "Report of Special Master" in which he found, with minor exceptions, in favor of CEI's claims of privilege. The Board, thereafter, as a result of telephone conferences among the parties and the Chairman of the Board, required the parties to submit a list of documents as to which they challenged the Special Master's rulings and directed the Special Master to hear arguments on such challenges on June 30, 1975.

Oral argument was heard by the Special Master from 9:30 a. m. on June 30, 1975, to approximately 12:15 p. m. of that day. Thereafter, at approximately 2:00 p. m. of June 30, 1975, the Special Master issued his supplemental rulings ^{1/} in which, with minor exceptions, he adhered to his earlier rulings of June 20, 1975, for the reasons stated by him in his supplemental decision.

The City submits that the decisions of the Special Master in his Report of Special Master, as supplemented on June 30, 1975, which are the subject of this request for certification, are based on erroneous interpreta-

^{1/} The supplemental decision appears at pages 81 to 86 of the transcript of June 30, 1975.

tions of law, without evidentiary support, and are so far beyond the authority of the Special Master as to constitute a denial of due process to the City.

I

THE SPECIAL MASTER ERRED IN GRANTING
PRIVILEGED STATUS TO 110 DOCUMENTS
ON GROUNDS WHICH WERE NOT CLAIMED
BY CEI AND THEREFORE WAIVED.

In response to Interrogatory Nos. 1 and 2, CEI submitted to the Board and the parties two lists of documents. One list represented those documents with respect to which CEI asserted only a claim of attorney-client privilege. The other list represented those documents with respect to which CEI asserted only a claim of work product.

In his initial decision of June 20, 1975, the Special Master granted a privileged status to those documents but not on the privilege claim asserted by CEI. The Special Master found that another privilege which had not been asserted by CEI in its responses to Interrogatory Nos. 1 and 2 was applicable and granted that privilege which had never been asserted and was, therefore, waived. Steen v. First National Bank, 298 F. 36 (8th Cir. 1924); Hill v. Hill, 106 Colo. 492, 107 P. 2d 597 (1940). On reconsideration of his initial decision, the Special Master adhered to his initial ruling as to these documents, explaining the reason for his ruling as follows (Tr. 84):

The privileges discussed were work product of attorneys and attorney-client privilege, in some cases the claim was made of one privilege or the other, and I found the particular document or documents to be privileged under the claim of privilege not mentioned.

I sustain my finding in those instances and I find that it is within my discretion to so rule.

The Special Master erred.

The law is clear. The claim of privilege belongs to the one the privilege seeks to protect and must be claimed. If not claimed it is waived. Where claimed the law imposes a heavy burden on the claimant to prove that the privilege should be granted.

Under these established legal principles, it is clear that the Special Master had no discretion to grant a privileged status to documents on a ground not claimed and, in fact, waived. The duty of the Special Master was to determine whether the claim of privilege on the ground asserted by the claimant was valid. If the Special Master found it was not, his duty and authority were at an end and he should have denied the claim of privilege.

Only in a few jurisdictions has a court been allowed on its own motion to protect the privilege. Tingley v. State, 16 Okl. Cr. 639, 184 P. 574 (1919). These cases are based upon important considerations which are not present in this case. In these few jurisdictions the courts are allowed to raise the privilege only if the person entitled to assert the privilege is not present or is not a party to the proceedings, neither of which conditions applies in this case. In fact, CEI analyzed its documents and claimed specific privileges pursuant to Interrogatory Nos. 1 and 2. Then, after all the memoranda of law were filed by the parties, CEI attempted to expand its claims of privilege in its affidavit of Mr. Hauser.^{2/} In numerous cases where only one privilege had previously been asserted, CEI attempted to assert the other privilege.

^{2/} The Board ordered that the attempt to expand the claim of privilege after the briefs had been submitted to the Special Master was improper and ordered the Special Master not to consider these expanded claims. Thus the Board recognized that CEI was limited to its original claims, and if the documents were not shown to be privileged as claimed by CEI, they were not privileged at all.

In all cases except one (Document No. 110) the Special Master's finding of a privilege not claimed by CEI was even beyond those claimed by CEI in its expanded claims of privilege.

The Special Master, therefore, clearly erred in granting privilege to the documents hereinafter discussed and his decision should be reversed.

II

THE SPECIAL MASTER ERRED IN GRANTING PRIVILEGED STATUS WHERE THE IDENTITY OF THE AUTHOR, ASSISTANT, ADDRESSEE OR DISTRIBUTEE WAS UNKNOWN.

In response to Interrogatory Nos. 1 and 2, the Applicants in various instances were unable to ascertain the name of either the author, assistant, addressee or distributee. These cases were pointed out in Category II of the City's brief entitled List Of Documents, By Number, With Respect To Which Report of Special Master is Challenged.^{3/} Despite the Applicants' responses that one or more of the parties to particular documents were unknown, the Special Master erroneously found that these documents were still -

. . . communications among attorneys employed by CEI or between CEI attorneys and their consultants or between CEI officers and employees and CEI attorneys which were made for the purpose of obtaining or giving legal advice and which were intended to be confidential and were not distributed outside the CEI "control group" [Emphasis added.]

^{3/} These documents were previously listed in the City's reply brief of May 2, 1975, and the City's Motion To Strike The Affidavit Of Mr. Hauser, June 5, 1975.

The Special Master disregarded the evidence and law and stated that:

While there are too many documents to consider one by one, I drew inferences that if a legal memorandum or a memorandum that appeared on its face to be a legal memorandum was taken from Mr. Hauser's file I inferred that some lawyer associated with him prepared it. [Emphasis added.]

I inferred that legal opinions on the letterhead of a particular law firm were prepared by some member of that firm.

I inferred that some memorandum on which the carbon copy list was in doubt were distributed to persons who were usually distributees in similar documents, that CEI was responsible for. [Tr. 84-87]

The Special Master erred in making these inferences unsupported by and in most cases contrary to the evidence supplied by the Applicants. The Special Master further erred in granting privileged status based upon these inferences rather than finding that the Applicants had failed in their burden of proof.

The use of privilege has always presented the difficult situation of balancing the need for an informed court with the desire to remove any subjective fears which would hinder attorney-client relations or trial preparation. Dean Wigmore has stated that:

[T]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion of these privileges. ^{4/}

Accordingly he concluded:

Nevertheless, the privilege remains an exception to the duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general

^{4/} 8 Wigmore, Evidence, § 2192 at 73 (McNaughton rev. 1961); cited with approval in Falsone v. United States, 205 F. 2d 734 (5th Cir.), cert. denied, 346 U.S. 944 (1953).

policy but is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with its principle. ^{5/} [Emphasis added.]

For these reasons it has been held that the party hindering discovery has a heavy burden of proof. The courts have held that the party claiming the privilege has the burden of "establishing the existence of the privilege" ^{6/} and of meeting this burden by a preponderance of the evidence, not by "mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the [attorney-client] relationship, and any spurious claims could never be exposed." ^{7/}

In response to Interrogatory No. 1, CEI stated as to numerous documents that the particular author could not be ascertained. Natta v. Hogan ^{8/} is precisely in point and discloses the error of the Special Master's ruling. In that case a claim of work product was made as to "materials prepared by an attorney during his consideration of a legal problem." ^{9/} The court held that such materials might be within the work product rule but were not entitled to protection because "they were not identified as having been written by any particular attorney. The author [was] not specified" ^{10/} (emphasis added). The court specifically distinguished one document within that group as being the notes of a "named attorney." It then concluded privilege should be granted to that document as "[i]ts disclosure would invade the mental

^{5/} Wigmore, § 2291, at 554.

^{6/} 8 Wright and Miller, Federal Practice and Procedure, § 2016 at 126 (1970); United States v. Johnson, 465 F. 2d 793 (5th Cir. 1972).

^{7/} In re Bonanno, 344 F. 2d 830, 833 (2d Cir, 1965).

^{8/} 392 F. 2d 686 (10th Cir. 1968).

^{9/} Id. at 693.

^{10/} Id. at 694.

processes of an attorney working on a legal problem"^{11/} but as to the other documents the claim of privilege was denied.

In the Natta case the documents were claimed to be the work product of the claiming party's attorneys. The identical factual circumstance is presented in this case where CEI refers to "CEI legal staff" or names a law firm but not a "particular" attorney. Without regard for the law as exemplified by a case with an identical factual situation, the Special Master refused to grant discovery.

The statements made by the Special Master show that his decisions were based upon inferences rather than evidence which CEI had the burden of providing. They also show that the Special Master ignored the law and its principles which required the claimant to specify the "particular attorney" who wrote the document. Additionally, the Special Master found that many of these documents of which the authorship was unknown were not distributed by this unknown author to persons outside the CEI "control group". A determination as to the physical distribution and authorship of documents of unknown origin and control from its inception is clearly unsupportable and error. These inferences and determinations are equally questionable when they are applied to documents to which CEI has stated that the assistant to the author was unknown, and most certainly error when CEI states that either the distributees or addressees were unknown.

The question of distribution is one of the most important elements in the privileges because it goes to the very essence of the concept of confidentiality. The Applicants have been given the burden of showing that only those

^{11/}Id. at 694.

entitled under the privileges were allowed to view the documents and that this confidentiality was maintained. The Special Master's unsupported inferences undercut the essential elements of the privileges and the burden of proof required by the law.

In making inferences for the purpose of developing his own set of facts, many times in direct opposition to the statements and inferences of CEI, the Special Master transcended the role of judge in evaluating the evidence. His determinations based solely on his unfounded inferences had the effect of shifting the burden of proof to the City. This is clear error of law. Accordingly, the Special Master erred in finding that, as to documents to which the addressees and/or the distributees were unknown, they were distributed "among attorneys" or "between CEI attorneys and their consultants or between CEI officers and employees and attorneys" or were "not distributed outside the 'control group'" (Tr. 84-85). By inferring that the inferred distributees maintained confidentiality, the Special Master piled inference upon inference to reach a finding of privilege. Natta teaches beyond cavil that a privilege may not be predicated upon inferences but must be predicated upon facts which must be proved by the party claiming the privilege.

III

CERTIFICATION SHOULD BE GRANTED IN ORDER TO PROVIDE CLEVELAND WITH DUE PROCESS, ELIMINATE ERRORS AND AVOID DELAYS CAUSED BY COURT REMAND.

When the questions of discovery and privilege first arose, the City agreed with the other parties that the integrity of the Board should be maintained by shielding it from the contents of documents that might later be held to be privileged. 12/

The City believed that since an appeal of the Special Master's report to the Board would require their review of the documents and thereby compromise the Board's position, they agreed that there was to be no review by the Board of the Special Master's decision. There was never an agreement, and none was ever intended, to give up the right of review by an Appeals Board and ultimately by the courts. The City believed that such review would not jeopardize the integrity of the Board. The City would never have agreed to waive its right to review even if the Board itself had examined the documents. Indeed, it would be improper to have asked the parties to waive the right to appeal a decision of the Board.

The City, in attempting to maintain the integrity of the documents and provide a just resolution of the privilege question, assented to Chairman Farmakides' restatement of the agreement. It now appears that this statement contained a latent ambiguity of which the City had no comprehension and to which it had no reason to agree and to which it never would have agreed.

12/ Chairman Rigler recognized that this was the purpose of referral to a Special Master in his correction to the Minutes of June 24, 1975.

This Board may be interpreting the agreement made by the parties as a waiver of all review by the Appeals Board or otherwise. This interpretation goes far beyond the rationale under which the City had agreed to limit review. It appears that on this issue there never was a meeting of the minds among the parties. A right of appeal, so fundamental to due process, cannot be held to be waived by an ambiguous statement. The law is clear on ambiguous statements. These statements are most strictly construed against the author, Chairman Farmakides, for the Board. While a waiver of a right to review by this Board could and should properly be construed from this ambiguous statement, a waiver of all rights of appeal is more than could reasonably be expected from the City in light of the facts and circumstances set forth above.

Irrespective of the question of review, it cannot be said that the City agreed to waive its rights to have the question of privilege considered in light of the law and evidence presented, and to be accorded due process of law by the Special Master.

The Special Master's disregard for the evidence and law presented by the parties contributed significantly to the denial of due process to the City. One important example of the Special Master's disregard of the clear dictates of law was his finding of privilege under privileges which were never claimed.

When the Applicants first claimed privilege as to specific documents, they were requested, pursuant to Interrogatory Nos. 1 and 2, to answer specific questions with regard to each document claimed under each privilege.

Based upon the responses to these interrogatories the City prepared briefs and specific arguments as to the documents in light of the answer given and the privilege claimed.

The Special Master found that certain of these documents did not come under the privilege claimed but were within the scope of privileges not claimed. He did so without availing the City of the opportunity to address the documents with respect to the privilege found and denied the City the opportunity to present interrogatories to CEI, such as Interrogatory Nos. 1 and 2, which would explore the documents in light of the specific privilege asserted.

The errors of the Special Master which the City has pointed out are by no standards harmless. They represent errors which are so fundamental to proper adjudication of the issues as to deny the City its rights under the law. The basic question in the hearing is whether the activities of the Applicants under the license would create or maintain a situation inconsistent with the antitrust laws. This question is best answered by a thorough review of the actions and policies of the Applicants to determine if they are using their enormous power in an attempt to restrict competition in violation of the antitrust laws. Such documents as No. 30, entitled "City of Cleveland's Participation in CAPCO"; No. 2108, entitled "Purchase of MELP by a Subsidiary of CEI or Some Other Corporation or Entity"; or No. 2110, entitled "Can Company Subsidiaries Charge Lower Rates Than CEI", could be essential in determining the actual policies followed by the Applicants. ^{13/}

^{13/} Document Nos. 2108 and 2110 are among those documents to which the Special Master inferred authorship and inferred confidentiality, thereby piling inference upon inference to substantiate his position which was not supported by the evidence presented by CEI.

The City has been supplied precious little information by which to challenge the assertions of privilege by CEI and the subsequent determinations by the Special Master. From the evidence presented it appears that with respect to an extremely large percentage the analysis of the Special Master was less than that required to give the City its due process of law. The City is left with the feeling that the rules of law and burdens of proof may not have been followed with respect to the analysis given documents as to which the City had insufficient information to make specific challenges. Even though the City was granted an opportunity to point out the errors to the Special Master on June 30, 1975, and did so by brief filed June 27, 1975, the record is still confused with errors. The Special Master, after another "review" of the documents, again ruled that Document No. 57 was within the privilege, stating:

The first of these is Document Number 57 which is a draft document prepared by Mr. Charnoff and I find as to that document that a work product and an attorney-client privilege should be sustained and this document should have been included in Attachment 3 of my report. [Tr. 81]

but then in response to a challenge by the Applicants, the Special Master ruled that Document No. 57 was without the privilege. (Tr. 85)

While the Board had at one point in time decided to refuse to certify this ruling to the Atomic Safety and Licensing Appeal Board, the City again urges this Board to reconsider that decision in light of the evidence of abuse of discretion and denial of due process afforded to the City. A denial of certification at this point can only mean that the ultimate decision

in this matter will be delayed by later appeals and remand. The errors and denial of due process are so evident from the face of the record and so fundamental to the main issues that subsequent review will most certainly result in remand and irreparable delays.

WHEREFORE, the City respectfully requests that this Atomic Safety and Licensing Board certify the rulings of the Special Master, which rulings of the Special Master are the rulings of the Board, to the Atomic Safety and Licensing Appeal Board.

Respectfully submitted,

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July 8, 1975

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing City of Cleveland's Motion For Certification Of Special Master's Decision, As Supplemented, On Claims Of Privilege To The Atomic Safety And Licensing Appeal Board has been made on the following parties listed on the attachment hereto this 8th day of July, 1975, by depositing copies thereof in the United States mail, first class or air mail, postage prepaid.

Michael D. Oldak
Michael D. Oldak

Attachment

ATTACHMENT

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