9/12/75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

APPEAL

BOARD OF ATOMIC SAFETY AND LICENSING APPEAL BOARD

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In the Matter of

The Toledo Edison Company
The Cleveland Electric Illuminating
Company
(Davis-Besse Nuclear Power Station)

The Cleveland Electric Illuminating
Company, et al.
(Perry Nuclear Power Plant, Units 1 and 2)

The Toledo Edison Company, et al.
(Davis-Besse Nuclear Power Station,
Units 1, 2 and 3)

Docket No. 50-346A

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

Docket Nos. 50-346A
and 50-500A

NOTICE OF THE WITHDRAWAL OF COUNSEL
AS ATTORNEY OF RECORD
BY THE REGULAR STAFF AND APPEAL BOARD

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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The Toledo Edison Company	)	
The Cleveland Electric Illuminating Company	)	Docket No. 50-346A
(Davis-Besse Nuclear Power Station)	)	
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(Perry Plant, Units 1 and 2)	)	
	)	
The Toledo Edison Company, et al.	)	Docket Nos. 50-500A and 50-501A
(Davis-Besse Nuclear Power Station, Units 2 and 3)	)	

MEMORANDUM OF THE DEPARTMENT OF JUSTICE
ON EXCEPTIONS TO THE RULING
OF THE ATOMIC SAFETY AND LICENSING BOARD

Pursuant to the Order of the Atomic Safety and Licensing Appeal Board of August 14, 1975, the Department of Justice submits this memorandum on exceptions to the ruling of the Atomic Safety and Licensing Board. The Appeal Board has requested that the parties in their responses address several issues involving the validity of the role of the Special Master and the correctness of his decision. These issues will be discussed in the order in which they were set forth by the Appeal Board.

I. THE ATOMIC SAFETY AND LICENSING APPEAL BOARD SHOULD DIRECT CERTIFICATION OF THE QUESTION OF THE VALIDITY OF THE ROLE OF THE SPECIAL MASTER.

The Department of Justice believes that it is within the discretion of the Appeal Board to direct certification of the question of the validity of the role of the Special Master in this proceeding, and that this question is one of importance which should be decided at this time.

Section 2.718(i) of the Nuclear Regulatory Commission Rules of Practice, 10 C.F.R. §2.718(i), authorizes the Commission to direct the presiding officer to certify a question to it. Under Section 2.785(b), this authority is delegated to the Appeal Board. Clearly, the Appeal Board may direct certification of the validity of the role of the Special Master.

The question of the propriety of vesting a Special Master with the authority to make final, binding decisions on discovery matters is important both to the present hearing and to future hearings conducted by Licensing Boards.

If the role of the Special Master is found to be invalid, his decision cannot stand, and it will be necessary for the Licensing Board to reexamine the documents. 1/ If this reexamination is delayed until after the antitrust hearing is held, and it results in an order for

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1/ Since the Department required the documents for proof of its case, an erroneous denial of access to those documents will result in reversible error.

the production of documents found by the Master to be privileged, 2/ a rehearing, based upon new evidence adduced from those documents, will be necessary.

Further, prompt resolution of this question by the Appeal Board will remove the possibility of confusion by other Licensing Boards.

II. THE ROLE OF THE SPECIAL MASTER WAS NOT VALID.

As indicated in the Order of the Licensing Board dated December 10, 1974, the Department agreed in good faith to the appointment of a special master and agreed to be bound by its decision. Our subsequent examination of Chapter 6131, Section 3(a), of the Federal Regulatory Commission Rules (hereinafter referred to as "Rule") has required us to reach the conclusion that this agreement was invalid and the Order effectuating this agreement was beyond the authority of the Licensing Board.

The resolution of the issue of the validity of the Master's role involved determining: (1) whether the appointment of the Master as the sole and final arbiter of the question of privilege was an improper delegation of the Licensing Board's authority, and: (2) if the delegation of authority was improper, could that impropriety be overcome by stipulation of the parties.

2/ As discussed in Part V, Infra, the Department believes that the Master committed reversible error and that a reexamination of the documents will lead to an order requiring production of documents held privileged by the Master.

Section 1.2 of the Rules of Practice states that:

> The definitive statement of the AEC's organization, policies, procedures, assignments of responsibility and delegations of authority is in the Atomic Energy Commission Manual . . . .

The Manual states, in Chapter 0106, Section 034, that "[t]he delegated authority of the Atomic Safety and Licensing Boards may not be further redelegated." Thus, we have a clear statement that redelegation of authority by a Licensing Board is impermissible, and this statement is contained in the Manual which is the "definitive statement" on that topic. 3/

Included in the authority delegated to the Licensing Boards is the power to make rulings on discovery matters. (Rules of Practice, §2.730). In issuing an Order empowering the Special Master to make binding rulings on questions of privilege the Licensing Board has clearly attempted to redelegate its authority to rule on discovery matters.

The question remains then, whether the parties could remove the impropriety of delegating authority to rule on questions of discovery, by agreeing to such a delegation.

Since the Licensing Board, under Chapter 0106, Section 034 of the Manual, may not redelegate its delegated authority, it could not empower the Special Master to make final, binding

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3/ The Department, of course, does not contend that the Manual is equal in authority to the Commission's Rules as to its effect upon the parties. We do maintain, however, that the Manual constitutes binding authority with respect to the powers of the Licensing Board.

decisions on questions of discovery. Nor can an agreement by the parties act to vest the Licensing Board with a power it does not already have. To allow the parties to do so would be analogous to permitting stipulations of jurisdiction in the Federal District Courts something which, it has been long settled, is impermissible. Jackson v. Ashton, 8 Pet. 148 (1834). See also, Federal Rules of Civil Procedure, Rule 12(h)(3).

III. THIS MATTER SHOULD BE REMANDED TO THE LICENSING BOARD FOR A DE NOVO EXAMINATION OF THE DOCUMENTS.

The Department believed that the role of the Special Master as the final arbiter of privilege was invalid. While we believe that as a general proposition it would be permissible to use such a report as a recommendation, with the Licensing Board entertaining objections thereto, 4/ we believe that in this case such a use is not possible.

The report of the Special Master, dated June 19, 1975, consisted of two pages of findings of fact and conclusions of law. These findings are simply brief restatements of the law of privilege, and are not applied specifically to individual documents. Because of this, we are unable to determine the correctness of the majority of these rulings. If the Master's report is to be used as a recommendation with the Licensing Board entertaining challenges to it,

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4/ One duty of a Master under the Federal Rules of Civil Procedure is to make recommendations on the matter referred to him. The Federal Rules also provide for the Special Master to make binding decisions. However, this authority is not provided by the Rules of Practice and, indeed, such delegation of authority by a Licensing Board is specifically prohibited.

the Department would be in a position of attempting to challenge ultimate conclusions on privilege without having access to any specific findings regarding specific documents. 5/ This will result in the Department being denied due process of law. Further, because of the lack of specific findings in the Master's report, there appears to be no way in which the Board could rule on that report without a complete reexamination of the documents. If the Board were to adopt the report without such an examination, it would clearly not be curing its invalid delegation of authority.

Although we are unable to challenge the findings as to large numbers of documents, because we are aware of clearly erroneous rulings made on some of the documents 6/, we question the correctness of those rulings about which we lack information. We believe that if the Master's report is adopted without a reexamination of the documents, reversible error resulting in costly delay will have been committed.

5/ For example, in finding a group of documents protected under the attorney-client privilege (Category 2) the Master failed to state that they met two elements of the privilege (that they (1) contained a confidential communication (2) between an attorney and client as defined by the Federal Courts). While the Master did state the law used to determine whether confidentiality had been maintained, he did not state how this law had been applied to the individual documents.

6/ These errors will be discussed in Section V.

IV. CERTIFICATION OF THE MERITS OF THE MASTER'S RULING SHOULD BE DIRECTED.

The presiding officer may certify questions for review by the Appeal Board during the pendency of a proceeding. 7/ Certification may also be had upon direction of the Appeal Board (Rules of Practice §§2.718(i) and 2.785(b)).

If the delegation of authority to the Special Master is valid, then our agreement prevents us from objecting to his specific rulings. Nonetheless, we do not believe that the stipulation of the parties should be interpreted as preventing the Licensing Board (or the Appeals Board on review) from correcting errors in the general principles of law which the Master applied to determining the privilege of particular documents. In view of the policy stated in the Commission's Memorandum, any delegation of decision-making from the Licensing Board should be strictly limited to achieve the particular purpose for which the delegation was made. In this case, the principal purpose in the use of the Master was to eliminate the need for the Licensing Board to examine the documents. Yet consistently with that purpose, the Licensing Board plainly can and should require that the Master apply the proper standards under

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7/ Although Section 2.730(b) of the Rules of Practice prohibits interlocutory appeal by the parties to a proceeding, the section goes on to provide that a presiding officer may direct certification of a question where "prompt decision is necessary." As discussed in Section I, supra, any delay of a final determination of the validity of Applicants' claims of privilege would require a reopening of the hearing at some point after the Licensing Board has reached a decision, thereby causing unnecessary delay and expense to all the parties.

the law of privilege in determining whether particular documents or categories of documents are privileged.

V. THE DECISION OF THE SPECIAL MASTER WAS INCORRECT.

The ruling of the Special Master was, in important respects, based upon an improper application of the law of privilege. 8/ Thus, if this Board finds the delegation to the Master to be invalid, it should remand the matter to the Licensing Board with instructions to make a complete reexamination of the documents as discussed in Section III of this Memorandum. If the Appeal Board should determine that there was a valid delegation to the Master, it should remand the matter so that the Master can apply proper standards in his evaluation of particular documents.

In his decision the Master found that documents which had been claimed only under the work product exclusion were protected by the attorney-client privilege and documents which had been claimed only under the attorney-client privilege were protected by the work product exclusion. Because Applicants did not claim the privilege found they did not answer those Interrogatories of the Department of Justice which sought to elicit Applicants' basis for its claim as to each document. 9/ The Master's grant of privilege where no

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8/ The Department hereby incorporates by reference its Reply Memorandum on Applicants' Claim of Privilege, dated May 2, 1975 for a full statement of that law as we understand it.

9/ Since the elements of the work product exclusion and the attorney-client privilege are not the same the Department sought different information as to documents claimed under each privilege.

privilege was claimed has thus worked a denial of due process in that the Department had no opportunity to challenge those documents. 10/

A finding of privilege where no privilege was claimed is also in opposition to the law of privilege. In the classic statement of the attorney-client privilege, made in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), Judge Wyzanski stated that: The privilege applies only if . . . (4) the privilege has been (a) claimed and (b) not waived by the client." It is clear from this language that for the privilege to be upheld it must be specifically claimed: the mere lack of waiver of a right of privilege by a party does not constitute the positive [illegible] necessary to bring the document within the privilege. It was held in Duplan v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1975) that:

> [illegible] there has been a waiver of privilege, clearly established, the deponent cannot object to questions concerning the privileged matter. The waiver need not be evidenced by writing nor in any particular form, but the intent to waive must be expressed either by word or act or omission to speak and act. (emphasis added).

This rule, requiring a specific claim of privilege, is consistent with the theory behind its application. The purpose of the attorney-client privilege is to promote full disclosure and communication between attorney and client. 8 Wigmore, Evidence §2290 at 554 (McNaughton rev. 1961) (hereinafter cited as "Wigmore"). On

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10/ The rehearing held by the Master on June 30, 1975, did not cure the denial of due process since the Applicants were never required to provide factual support for the granting of privilege.

the other hand, the privilege acts as a bar to full examination of all the evidence bearing on the litigation. To accommodate each of these opposing interests insofar as possible, the privilege

> is worth preserving for the sake of a general policy, but it 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. Wigmore §2291 at 554.

See also, Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963); United States v. Goldfarb, 328 F.2d 289 (6th Cir.), cert. denied, 377 U.S. 978 (1964).

Because the privilege is to be narrowly applied, it follows that the party seeking to withhold evidence through use of the privilege bears the burden of establishing the existence of the privilege. Rutigliano v. Valley Forge Insurance Co., 74 F.R.D. 128 (M.D. Pa. 1977); United States v. Davison, 448 F.2d 743 (8th Cir. 1971); Honeywell, Inc. v. Piper Aircraft Co., 53 F.R.D. 117 (D.C. Pa. 1971). In order to sustain its burden of proof, the party claiming the privilege must "show sufficient facts as to bring the identified and described document within the narrow confines of the privilege." International Paper Co. v. Fibreboard Corporation, 63 F.R.D. 88, 94 (M.D. Pa. 1974). It is apparent in the present situation that if the applicants did not claim the privilege, they could not have met their burden of establishing factually that the documents were within the privilege.

The elements of the "work product" exclusion differ from those of the attorney-client privilege. The "work product" exclusion is intended to promote full preparation of a case by an attorney, free from the fear that his thoughts and mental impressions will later be

discovered by his opponents. Hickman v. Taylor, 329 U.S. 495 (1947). As with the attorney-client privilege, a party claiming protection under the "work product" exclusion has the burden of proving that documents claimed as protected fall within the exclusion. McMeiss v. Oil Carriers Joint Venture, 23 F.R.D. 15 (E.D. Pa. 1958); Hazell v. Pennsylvania R. Co., 15 F.R.D. 262 (E.D. Pa. 1953). Since Applicants have failed to claim the exclusion, it is difficult to believe that they have sustained the burden of proof required for its application. Further, the fear that mental impressions would be revealed, an essential element of the privilege, cannot have been present where Applicants felt no need to make a claim of exclusion.

Since the Applicants did not make a claim of attorney-client privilege is not sufficient to bring documents under the "work product" exclusion. Although a document may meet all the elements of both privileges, it cannot be said that this is always the case. For example, a factual communication may be protected by the attorney-client privilege, while it is clearly not protected by the "work product" exclusion. Another example is that the mental impressions of an attorney, if prepared for or in anticipation of a trial or hearing, are protected by the "work product" exclusion. However, such mental impressions, unless revealing a confidential communication from a client, are not protected under the attorney-client privilege. Thus, a claim of protection under the "work product" exclusion cannot be said to be a claim under the attorney-client privilege. Where, as here, Applicants had the information and the time necessary to make all applicable claims (and, in fact, made claims under both privileges with respect to some documents), it

should be assumed that a claim not made was thought, by the party having the most information about the document, not to exist.

The Department also asserts that the Master committed error in finding the attorney-client privilege for documents where the identity of the author, addressee, or distributees was unknown. The Master's reasoning behind such findings was stated in his ruling after rehearing (Transcript of the June 30, 1975 rehearing at 64):

> Under Mr. Goldberg's Category 2 are listed a number of documents which he claims or urges, I would say, are not entitled to privilege because in response to interrogatories it has indicated that particular authors were not known or that particular assistants who helped prepare documents were not known, that specific addressees on some documents were not known, and that specific distributees on other documents were not known.
>
> I continue to find these documents privileged, though I should like to clearly state that I draw inferences from the documents themselves as well as from the circumstances and beginnings of their origin.

As stated above, it is well established that the party claiming privilege has the burden of establishing factually that all the elements of the privilege have been met. There, as here, Applicants were unable to show that the writer and recipient of a document were an attorney and his client, or that confidentiality was not destroyed by distribution of the document outside the "control group", they have not met their burden of proof. Nor can the Master meet this burden for Applicants by substituting unsupported "inferences" for established facts of record.

Even were a limited use of inference permitted, the Master has made assumptions which cannot be supported factually or legally.

For example, in finding privileged documents for which the distribution was unknown, the Master stated:

> I inferred that some memorandums on which the carbon copy list was in doubt were distributed to persons who were usually distributees in similar documents, that CDI was responsible for. (Transcript of June 30, 1976 hearing at 65).

It is clearly erroneous to infer confidentiality based on the wholly unsupported supposition that the distribution of documents remained consistent from document to document. In applying the test of confidentiality to a corporation, the Court in United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 466 (E.D. Mich. 1954), concluded that:

> One measure of their [the documents'] continuing confidentiality is the degree of care exhibited in their handling and the kind of precautions must deal with the party claiming the privilege.

Where the claimant has shown by its inability to ascertain the identities of the distributees of documents, that sufficient care has not been taken to maintain confidentiality, such care and such confidentiality cannot be assumed by inference.

CONCLUSION

In conclusion, the Department urges the Appeal Board to find that the role of the Master was invalid and to remand the matter to the Licensing Board for a reexamination of the documents.

If the role of the Master is found to be valid, we urge that the Appeal Board direct certification of the merits of the Master's ruling, so as to permit correction of the legally erroneous standards which the Master applied in evaluating the particular claims of privilege.

Respectfully submitted,

[redacted]

[redacted]

[redacted]

[redacted]
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September 12, 1975

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of [illegible] OF THE DEPARTMENT OF JUSTICE ON EXCEPTIONS BY THE BOARD OF THE ATOMIC SAFETY AND LICENSING BOARD have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand delivery, this 11th day of September 1975.

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