

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



In the Matter of)	Docket No. 50-346A
)	
THE TOLEDO EDISON COMPANY and)	
THE CLEVELAND ELECTRIC ILLUMINATING)	
COMPANY)	
(Davis-Besse Nuclear Power Station,)	
Unit 1))	
)	
THE CLEVELAND ELECTRIC ILLUMINATING)	Docket Nos. 50-440A
COMPANY, ET AL.)	50-441A
(Perry Nuclear Power Plant,)	
Units 1 and 2))	

RULING OF THE BOARD WITH
RESPECT TO CITY OF CLEVELAND'S
MOTION FOR CERTIFICATION OF SPECIAL
MASTER'S DECISION ON CLAIMS OF PRIVILEGE

By Motion of July 8, 1975, the City of Cleveland (City) has moved the Board to certify to the Atomic Safety and Licensing Appeal Board the decision of the Special Master upholding certain claims of privilege asserted by Applicant Cleveland Electric Illuminating Company (CEI) in connection with discovery requests served upon it in these proceedings.

BACKGROUND

The issue of claims of privilege asserted by the parties to these proceedings in connection with discovery herein was considered prior to and ruled upon by the Board in its Order on Objections to Interrogatories and Document Requests dated October 11, 1974. In that Order at paragraph 149, the Board

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established certain procedures for the identification of documents for which privilege was asserted. On December 6, 1974, the parties discussed with the then Chairman of the Board, Mr. Farmakides, a proposal that documents asserted to be privileged be submitted to a Special Master for individual review. On December 10, 1974, the Board issued an Order Appointing Marshall E. Miller, Master which read, in part, as follows:

The above [referral] is accomplished with the express agreement of the parties to be bound by the determinations of the Master. This was discussed and agreed upon during a telephone conference call on December 6, 1974 with the Chairman of this Board.

Subsequently, the parties briefed extensively the issue of privilege to the Special Master and Applicant CEI supplied more than 700 separate documents (many of which were multi-page documents) to the Special Master for review.*

On June 20, 1975, the Special Master issued a report (hereinafter referred to as the Report) upholding in part and denying in part CEI's claims of privilege. The Chairman of the Board initiated a telephone conference call with counsel for the parties for the purpose of determining their wishes with respect to delivery of documents subject to the Report. During that

* Due to the press of other duties, Mr. Miller was unable to proceed as Special Master and, with the consent of the parties, Frederic J. Coufal of the Atomic Safety and Licensing Board Panel replaced Mr. Miller as Special Master.

conference call, the parties expressed a desire to examine the Report of the Master and to confer again via telephone conference call with respect to disposition of documents. On June 24, 1975, another telephone conference call was held and the City, the Department of Justice (Justice) and CEI requested review of certain rulings in the Report. Counsel for Applicants stated an intent to reply upon and be bound by the agreement set forth in the Board's Order of December 10, 1974 quoted above.

Counsel for the City took the position that the purpose and intent of the agreement among the parties reached in a telephone conference call of December 6, 1974 and recited in the Board's December 10 Order was not to preclude review of the decision of the Special Master but reflected only an intent to insulate the Board from exposure to the assertedly privileged documents.* The City, Justice and CEI all stated, however, that they considered the Master to have made certain errors in categorization which they wished to challenge and the Chairman authorized a limited hearing before the Special Master for the purpose of reconsidering certain of his rulings. The parties were directed to furnish the Master with written lists of documents challenged in each category set forth in the Report.

* As used herein, the term "privileged documents" refers to documents withheld on claims of work product as well as claims of attorney-client privilege. For purposes of this ruling, no distinction in the two categories is necessary.

On June 30, 1975, all concerned parties appeared before Special Master Coufal and presented arguments as to why certain of his rulings should be reversed or modified or sustained. The Special Master then adjourned the hearing for the purpose of examining each contested document in light of the parties' arguments relating thereto. As a result of this hearing, the Special Master did reverse or modify certain of his prior rulings, but adhered to his prior decision relating to the majority of challenged documents.

By Motion of July 8, 1975, the City moved the Board to certify the Special Master's Report, as supplemented, to the Atomic Safety and Licensing Appeal Board. In its Motion, the City contends that certain of the Master's decisions are erroneous; 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"; that review of the Special Master's decision by this Board necessarily would require review of specific documents; and that "there never was 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 asserts there is a latent ambiguity in the Order of December 10 setting forth the agreement of the parties reached during the December 6, 1974 telephone conference call. On July 10, 1975, Applicants filed a reply opposing the City's Motion for Certification.

THE DECEMBER 6, 1974 AGREEMENT
AND THE DECEMBER 10, 1974 ORDER

The December 10, 1974 Order of the Board does not appear ambiguous. It refers to the "express agreement of the parties to be bound by the determinations of the Master." Although the City contends that its attention was not directed to the claimed latent ambiguity until after the Master had ruled, we are not persuaded that the clear language of the December 10 Order did not require some request for clarification prior to the City's exceptions to the ruling of the Special Master.

No party other than the City has claimed that the agreement recited in the December 10 Order means anything other than what appears to be an express waiver of further review.* It is difficult to envision language expressing the concept of an agreement not to challenge the decisions of the Special Master in language more explicit than that set forth in the Order drafted by the then Chairman Farmakides.

* We should emphasize, however, that we accept without qualification the assertion by counsel for the City that they had an unstated intent not to forego all rights to review of the Special Master's ruling by entering into the December 6 agreement. The Board has confidence in the candor and good faith of counsel for the City as well as respect for their integrity. Notwithstanding our complete acceptance of City's counsels' assertion as to what was in their minds in December of 1974, this decision reflects our judgment that (1) only counsel for City read the agreement as ambiguous, and (2) the responsibility was theirs to raise such problem of possible ambiguity in timely fashion. Surely, from date of issuance of the Order, the City was on notice that no review was contemplated by the terms of the Order.

The City protests that the right of appeal is fundamental, and that it may not be deprived of that right without its consent. We agree that unless a party is willing to waive that right, it may not be compelled to do so; but it is apparent to us that we are dealing with a question of waiver rather than compulsion. Neither are we persuaded by the argument that ambiguities are to be resolved by strictly construing them against the author. In fact, our decision is founded upon strict construction of the December 10 Order. We read the December 6 agreement as an unequivocal waiver by all parties of possible appeals in order to obtain the specific benefit of prompt and final review of the privileged documents. Since these parties repeatedly have impressed upon the Board their desire for expeditious resolution of the issues in these proceedings, the December 6 agreement is consistent with this objective.

THE BOARD'S RESPONSIBILITY

Another reason for rejecting the rationale advanced by the City is that if review were contemplated, it should be undertaken by this Board. The procedure of utilizing a Special Master to insulate the Board from documents claimed to be privileged* is

* No challenge has been made with respect to hundreds of documents determined to be privileged by the Special Master. Thus, review by an individual Master already has proven salutary with respect to the instant proceeding in that the Board has been insulated from numerous documents which apparently all parties concede should not be subject to production.

sensible but not compulsory. The procedure we adopted reflects a preference and certainly not an evidentiary mandate. Administrative tribunals are empowered to examine documents in order to determine if they should be withheld either from discovery production or from introduction into evidence. There is nothing so unique about a claim of privilege as to require that the ordinary procedures be abandoned. Thus, no error would have attached to review by the Board of the privileged documents. That being so, an unusual appellate procedure designed to bypass the Board would be unnecessary. This undercuts the City's claim that opportunity for appellate review to the exclusion of this board was a logical though unspoken condition of the December 10 Order.

Another reason for rejecting the concept of appellate review is that the announced purpose of such review - insulation of the judicial tribunal from inadmissible documents - would apply with equal force to the appellate panel. If it is undesirable (though not improper) for the Board to become exposed to privileged documents, then likewise it would be undesirable for the Appeal Board to be exposed to them.

The lack of a necessary evidentiary basis for transferring the duty of the Board to review privileged documents should have been apparent to all parties in December 1974. This reinforces our conviction that there is no latent ambiguity in the Board Order of December 10, 1974 or that if the City perceived such an ambiguity, it was its responsibility to bring it to the attention of the Board immediately.

We do not hold that the rulings of the Special Master necessarily would be upheld in the event this Board or some other tribunal were to review the Report.* Without becoming involved in a duplication of the process by which the Master made his decision, there is no way of determining whether any error exists.** We think it clear, however, that the parties on December 6, 1974 recognized or should have recognized the possibility of error.

In return for a waiver of review, the parties have benefitted from an inspection of each individual document by an independent Master acceptable to all parties. They have the assurance that the Board and the Appeal Board will not have been exposed to any of the documents for which production was not ordered. They know at this stage of the proceeding which of the documents will be available for use during remaining depositions and the hearings now scheduled to commence on October 30, 1975. Moreover, they have had the benefit of substantial discovery which has resulted in the production of tens of thousands of document pages. They have had the benefit of a deposition program involving scores of potential witnesses. We conclude that even if there were errors with respect to certain of the Master's classifications,

* Indeed, for purposes of deciding City's Motion, we may assume that error could be demonstrated.

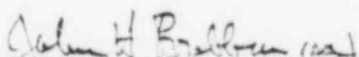
** Conversely, absent such examination, it cannot be said that the Master's decision would be subject to modification upon review.

there is little likelihood of any substantial effect upon the parties' preparation for the hearings.

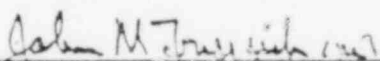
We regard the December 6 agreement as a binding waiver on behalf of all parties, and we hold that there is no latent ambiguity perceptible on the face of the Board's December 10, 1974 Order. We further find no logic in the proposition that the Board would not have been the proper authority to review the decision of the Special Master in the event any of the parties did contemplate an appeal from the Report. Finally, we hold that the burden of timely raising a problem of latent ambiguity was chargeable to the City.

For the foregoing reasons, the City's Motion of July 8, 1975 is DENIED.

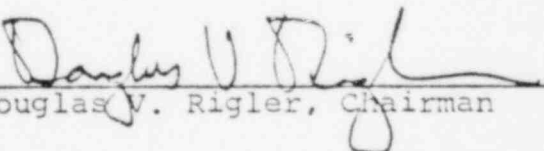
ATOMIC SAFETY AND LICENSING BOARD



JOHN H. BREBBIA, Member



JOHN M. FRYSIAK, Member



DOUGLAS V. RIGLER, Chairman

Dated at Bethesda, Maryland
this 21st day of July, 1975.

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Station, Unit No. 1; Perry))	
Nuclear Power Plant, Units 1&2)))	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s)* upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
21st day of July 1975.

Peggy A. Downing
Office of the Secretary of the Commission

- * 1 - Ruling on Motion of the City of Cleveland to Change Procedural Dates dtd 7/21/75
- 2 - Ruling of the Bd with Respect to City of Cleveland's Motion for Certification of Special Master's Decision on Claims of Privilege dtd 7/21/75

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