

CCASE:
IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

IN RE: CONTESTS OF RESPIRABLE Master Docket No. 91-1
DUST SAMPLE ALTERATION
CITATIONS

SUPPLEMENTAL ORDER ON CONTESTANTS'
MOTION TO COMPEL PRODUCTION OF
EXCISED PORTIONS OF CERTAIN DOCUMENTS

On July 17, 1992, I issued an order granting in part and denying in part the motion of Contestants Kentucky Carbon, et al., to compel production of excised portions of certain documents. The order also directed the Secretary to submit certain documents for my in camera inspection.

On July 27, 1992, the Secretary submitted the documents referred to above for in camera inspection. She has withdrawn the claim of privilege for the calendar notes of Ronald Schell dated March 4, 1991, and will produce the document for counsel for Contestants, and place it in the Document Repository.

I. PAROBECK NOTES

The Secretary claims the deliberative process privilege and the work product doctrine for the note dated October 1, 1989 (incorrectly referred to as October 1, 1991). The note records certain tests on cassettes performed by Parobeck and plans for further tests. I conclude that it is protected by the deliberative process privilege. It does not contain opinions or conclusions and there is no indication that the document was prepared in anticipation of litigation. Therefore, it is not protected by the work product doctrine. Contestants have not shown a need for the document sufficient to override the Government's interest in non-disclosure. The motion to compel will be denied.

II. BEEMAN NOTES

Page 5, entitled Peluso AWC and not dated, records a discussion among MSHA personnel of certain AWC characteristics. The Secretary asserts that it is protected by the work product doctrine. The note does not appear to contain opinions or theories. Nothing in the document shows that it was prepared in anticipation of litigation. The claim of privilege is denied, and the Secretary will be ordered to disclose the document.

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On page 13, the Secretary excised a portion of a notation on November 28 which records an agreement among MSHA personnel concerning proposed civil penalties for AWC violations. The Secretary claims the deliberative process privilege. The document clearly records agency deliberations and proposals. Contestants have not shown a need for the document sufficient to override the Government's interest in non-disclosure. The motion to compel will be denied.

III. HUGLER 1989 CALENDAR ENTRIES

Item 7 (the entries are not dated or the dates are not legible) records MSHA's plans for expansion of the investigation and the use of MSHA staff in the investigation. The Secretary claims the deliberative process and investigative privileges. The document is clearly covered by both privileges and Contestants have not shown an overriding need for disclosure. The motion to compel will be denied.

IV. HUGLER 1990 CALENDAR ENTRIES

Item 10 (not dated) records Hugler's thoughts and plans concerning potential civil penalty strategy including the amount of proposed penalties. The Secretary asserts the deliberative process privilege. The document records the thoughts and deliberations of an MSHA official. It is protected by the privilege, and Contestants have not shown an overriding need for disclosure. The motion to compel will be denied.

Items 12 and 14 (dated Thurs. 11/29) records Hugler's thoughts concerning potential civil penalties and criminal prosecutions. The Secretary claims the deliberative process privilege for the two excisions on this page. The excised notes concern strategy for Government enforcement. They are protected by the privilege. Contestants have not shown an overriding need for the document. The motion to compel will be denied.

v. HUGLER 1991 CALENDAR ENTRIES

January 11 contains two excisions. Item 1 discusses a press conference concerning the Peabody AWC case, with suggestions for Assistant Secretary Tattersall. Item 2 concerns a press release and discusses civil penalties for other operators. The Secretary claims the deliberative process privilege for item 1, and the attorney-client, attorney work product and deliberative process privileges for item 2. I am unable to discern any deliberations or proposals for official action other than the press conference in item 1. Nor do I find any confidential communications between attorney and client or evidence of attorney work product in item 2. Item 2 does however contain some references to future civil penalties and this portion is protected by the deliberative process privilege. I will grant the motion to compel with

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respect to item 1 and with respect to the first two lines of item 2.

January 25 contains two excisions (items 4 and 5), both containing target dates for issuing citations and identifying a coal operator as a target. I conclude that both are protected by the deliberative process privilege. I do not find that item 5 is protected by the attorney-client privilege. The motion to compel will be denied.

January 31 contains an excision (item 6) of a discussion with the Solicitor's office concerning a proposed briefing of the Acting Secretary on the dust sampling program, a history of AWCs, and future proposals. I conclude that this excision is protected by the deliberative process privilege but not by the work product doctrine or the attorney-client privilege. Contestants having shown no overriding need for the excised portion of the document, the motion to compel will be denied.

February 6 contains an excision (item 8) of Hugler's deliberations on the manner of the issuance of citations. The Secretary claims the deliberative process privilege and the work product doctrine and I conclude that the excised portion of the entry is protected by both. Contestants have not shown an overriding need for the material and the motion to compel will be denied.

VI. TATTERSALL NOTES

The two excisions of this single page document have to do with the grand jury investigation of Peabody and a potential investigation of another coal company. Both are protected by the investigative privilege and the former also by the work product doctrine. Contestants have not shown an overriding need for the excised portions of the document and the motion to compel will be denied.

ORDER

In accordance with the above discussion the Secretary is ORDERED to produce on or before September 1, 1992, page 5 of the Beeman notes, excision no. 1 of the Hugler 1991 calendar entries, and the first two lines of excision no. 2 of the Hugler 1991 calendar entries. In all other cases, her claim of privilege is upheld and the motion to compel is DENIED.

James A. Broderick
Administrative Law Judge