

CCASE:
IN RE CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

DDATE:
19920918
TTEXT:

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

IN RE: CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
CITATIONS

Master Docket No. 91-1

ORDER DENYING MOTION TO COMPEL

In response to a subpoena duces tecum issued at the request of Contestants represented by Jackson & Kelly (Contestants), the United States Department of Labor, Office of Inspector General (OIG) produced certain documents and withheld others based on claims of privilege. Contestants filed a motion to compel. On August 25, 1992, I issued an order granting in part and denying in part the motion to compel, and directing OIG to submit six documents for my in camera inspection. The documents were all found to come within the deliberative process privilege, and I directed that they be submitted so that I could determine whether Contestants' need for the documents in their defense outweighs OIG's interest in confidentiality. The documents were submitted on September 15, 1992, for my in camera review. For the reasons which follow, I deny the motion to compel with respect to the six documents.

The deliberative process privilege is intended to protect the decision making process of Government agencies against disclosure in order not to discourage open discussion of prospective Governmental policies. *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753 (D.C. Cir. 1978); *Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (1992). It applies to materials which are truly deliberative and does not protect purely factual material. *Id.* at 993. Material protected by the deliberative process privilege may be ordered disclosed if the Contestants' need for the documents to fairly defend their position outweighs the Government's interest in confidentiality. I have been assigned to these cases for more than a year and am in a position to understand the issues and the evidentiary needs of the parties. I believe this provides a basis to make a determination after in camera review whether Contestants' need

~1684

for disclosure of the documents outweighs OIG's interest in confidentiality, regardless of any showing of need in Contestants' motion. See Contests, 14 FMSHRC at 995.

Document 1 is an undated draft memorandum from I. A. Bassett, Jr., Assistant Inspector General for Investigations to the Administrator for Coal Mine Safety and Health. It was apparently prepared by Raymond J. Carroll, Regional Inspector General for Investigations. It contains handwritten remarks apparently inserted by Bassett. The memorandum was not sent to MSHA. Document 2 is a fax memorandum from Carroll to Bassett attached to draft document 1 and commenting on the draft. Document 3 is a memorandum from Carroll to Bassett dated March 17, 1992, commenting on and criticizing the memorandum sent by OIG to MSHA. These documents were identified in my August 25 Order as being included in paragraph 10 of the IG's Declaration. There is no indication in the documents that Contestants' need for disclosure outweighs OIG's interest in confidentiality. The motion to compel will be denied.

Document 4 (referred to in paragraph 14 of the IG's Declaration) is a portion of a letter from C. E. Elliott for Raymond J. Carroll, OIG, to an Assistant U.S. Attorney. I upheld the claim of the deliberative process privilege for the deleted portion of the letter. Nothing in the excision indicates that Contestants' need for the deleted portion of the document outweighs the OIG's interest in confidentiality. The motion to compel will be denied.

Document 5 (referred to in paragraph 16 of the IG's Declaration) is the deleted portion of a memorandum of January 10, 1990, from Carroll to the Acting Assistant IG for Investigations and two other Regional IGs. Nothing in the excision indicates that the Contestants' need for the excised words outweighs the OIG's interest in confidentiality. The motion to compel will be denied.

Document 6 (referred to in paragraph 18 of the IG's Declaration) is a draft memorandum entitled "Interim Report" from I. A. Bassett, Jr., of OIG to Jerry L. Spicer, Administrator, Coal Mine Safety and Health. The memorandum was prepared by Carroll and forwarded to OIG headquarters, but was never sent to Spicer. The document refers to investigative action which has taken place and proposes further action. It contains the names of inspectors who have been interviewed. There is no indication in the document that it is necessary for Contestants' defense so as to outweigh OIG's interest in confidentiality. The motion to compel will be denied.

~1685

ORDER

Therefore, IT IS ORDERED that the Contestants' motion to compel disclosure of documents 1 through 6 (referred to in paragraphs 10, 14, 16, and 18 of the Inspector General's Declaration) is DENIED.

James A. Broderick
Administrative Law Judge