ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
PK Contractors, Inc.	)	ASBCA Nos. 53576, 53577
	)	
Under Contract No. N68711-97-C-8338	)	

APPEARANCES FOR THE APPELLANT: Jason R. Thornton, Esq.
Andrew P. Pearson, Esq.
Marks, Golia & Finch, LLP
San Diego, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Anthony K. Hicks, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY ON DISCOVERY ISSUES

At issue is a discovery dispute over documents that appellant claims are privileged, but which were inadvertently produced to the government during a document review.[*] By letters dated 24 and 31 October 2003, the government provided to the Board copies of seven documents related to the dispute. These documents are: (1) a 25 January 2000 memo from Dwayne Nelson to Larry Vance; (2) a 24 February 2000 letter from L. H. Vance, Jr. to Brent Ridge and Kurt Myron transmitted by fax; (3) a draft letter addressed to Renae Jones from Brent Ridge transmitted by fax dated 28 February 2000 from Larry Vance to Kurt Myron and Brent Ridge; (4) a 25 February 2000 fax from Brent Ridge to Larry Vance; (5) an 18 February 2000 letter from L. H. Vance, Jr. to Brent Ridge; (6) a 25 January 2000 letter from L. H. Vance, Jr. to Kurt Myron; and (7) a 27 January 2000 letter from L. H. Vance, Jr. to Kurt Myron transmitted by fax.

At the time the documents were prepared, Mr. Vance was counsel to appellant, Messrs. Myron and Ridge were employed by appellant on the project and Mr. Nelson was a consultant. Appellant asserts the attorney work product privilege for the first document, which was prepared by Mr. Nelson and contains the following statement at the top of page 1: "Note: This document is prepared for the use of Larry Vance and is confidential." The Board understands that appellant's assertion of the attorney-client privilege applies to the remaining six documents. The second, fifth, sixth, and seventh documents were written on the letterhead of the law firm Winston & Cashatt over Mr. Vance's name. The second, third

[*] This opinion was originally issued as a single-judge unpublished discovery order and is now issued as a published Board decision at the request of the government.

and seventh documents have Winston & Cashatt fax cover sheets which state that the information contained in the faxes is protected by the attorney-client and/or attorney work product privileges. The government does not dispute appellant's claim that the documents are privileged; rather, it contends that the asserted privileges were waived by the inadvertent production under *Carter v. Gibbs*, 909 F.2d 1450 (Fed. Cir. 1990) (*en banc*).

In *Carter v. Gibbs*, the government moved to strike appellant's brief in opposition to its suggestion for rehearing in banc on grounds the brief appended a memorandum which the government asserted was protected by the attorney-client privilege because it was written by the Acting Assistant Attorney General for the Civil Division, U.S. Department of Justice, and intended for the Solicitor General. The court of appeals characterized the memorandum as, at best, subject to the attorney work product privilege, and denied the motion because the government had voluntarily attached a copy of the memorandum to appellant's copy of its earlier motion for an extension of time to file a petition for rehearing. In denying the government's motion to strike, the court stated at 909 F.2d at 1451:

> . . . It is irrelevant whether the attachment was inadvertent, as the government alleges. Voluntary disclosure of attorney work product to an adversary in the litigation for which the attorney produced that information defeats the policy underlying the privilege; in theses circumstances the criteria for waiver of the work product and attorney client privileges are equivalent.

The government reads *Carter v. Gibbs* as requiring the Board to apply a rigid, per se rule that results in the automatic waiver of privileges to all documents that are inadvertently disclosed. Appellant takes the position that *Carter v. Gibbs* is not controlling and that the Board should apply *National Helium Corp. v. United States*, 219 Ct. Cl. 612 (1979), which held that a party does not waive its privileges if it did not intend to disclose the privileged documents and the documents were produced despite adequate precautionary measures. Appellant also points to two decisions by the Court of Federal Claims which looked beyond *Carter v. Gibbs* to the circumstances surrounding disclosure: *International Business Machines Corp. v. United States*, 37 Fed. Cl. 599 (1997); and *Telephonics Corp. v. United States*, 32 Fed. Cl. 360 (1994).

The Board notes that *National Helium* was also applied in *Michael Weller, Inc.*, GSBCA No. 10627-NHI, 91-3 BCA ¶ 24,335, and *Alaska Pulp Corporation, Inc. v. United States*, 44 Fed. Cl. 734 (1999). *Weller*, *Telephonics*, and *Alaska Pulp* all concluded that the asserted privileges had not been waived.

Additionally, the Board notes that, in *Genentech, Inc. v. U.S. International Trade Commission*, 122 F.3d 1409, 1415 (Fed. Cir. 1997), the court observed that "[g]enerally disclosure . . . constitutes a waiver of privilege" citing *Carter v. Gibbs*, while also acknowledging the view that inadvertent disclosure does not result in a waiver of privilege

"if a party has used reasonable effort to protect a confidence." The court went on to affirm an administrative law judge's direction to produce 12,000 pages of documents Genentech claimed were privileged based upon the finding of a United States District Court in another proceeding that Genentech had not used adequate procedures to prevent disclosure of these documents because Genentech had "presented no evidence or argument that its disclosure of the GLP documents did not constitute a waiver of privilege or that the district's [sic] ruling was incorrect." 122 F.3d at 1416. *See also Precision Pine & Timber, Inc. v. United States*, 50 Fed. Cl. 35, 69 n.41 (2001) (general rule under *Carter v. Gibbs* is that inadvertent disclosure waives the privilege; however, under *National Helium*, the privilege is not waived if a party proves that it did not intend to disclose the document and took reasonable steps to prevent the disclosure).

The government correctly points out that the Board is not bound by decisions issued by the Court of Federal Claims. This is also true of the GSBCA decision. Nor is the Board bound by the two unpublished single-judge ASBCA discovery orders relied upon by the government, both of which apply *Carter v. Gibbs* without any discussion of *National Helium.*

The inadvertent disclosure in *Carter v. Gibbs* did not occur in the context of full discovery, but rather was the result of an error that occurred at the appellate level in conjunction with a motion for an extension of time. For the reasons explained in the *Weller*, *Telephonics*, and *IBM* decisions, the Board is persuaded that *Carter v. Gibbs* did not overrule *National Helium* and that the two part test employed by the Court of Claims in that case is fully applicable here.

In this case, the following undisputed facts are associated with the disclosure of the seven documents at issue. In response to the government's broad document requests, appellant made its 86 boxes of project documents available for inspection, but objected to each of the requests to the extent it sought discovery of documents subject to the attorney-client and attorney work product privileges. Two attorneys from appellant's counsel of record were then assigned to conduct a page-by-page examination of documents bearing any relationship to the claims in these appeals and a general review of the remainder of the project documents. The examination consumed 58 hours and resulted in the removal of 22 documents which were identified on a privilege log provided to the government before the 86 boxes of documents were made available for inspection.

The seven documents now at issue in this discovery dispute were among the documents copied by the government during its inspection. The record does not reflect in which boxes these documents were found. When the government, by a letter dated 22 August 2003, inquired further about a statement contained in the 24 February 2000 letter Mr. Vance had faxed to Messrs. Ridge and Myron, appellant, in a letter dated 2 September 2003, reminded the government that its project files had been produced with a reservation of the right to exclude documents protected by the attorney-client privilege, asserted that the privilege survives inadvertent production, and requested the return of all

copies of the correspondence between appellant and its counsel that had been inadvertently produced. The government's 3 September 2003 response asserted that the privilege had been waived under *Carter v. Gibbs*.

The Board became involved in the dispute when the government presented the 25 January 2000 memo prepared by Mr. Nelson (marked as exhibit 9) to Mr. Mark Pederson, appellant's vice president, at his deposition and counsel for appellant immediately objected on grounds of privilege, requested that the document be returned and directed the witness not to answer any questions regarding it. The memo and the 24 February 2000 letter were faxed to the Board for review in conjunction with a telephone conference requested by the parties seeking a ruling on the privilege question. At the conclusion of two such conferences, the government was directed to complete the deposition without inquiry into the two documents with the understanding that the witness was subject to recall should the Board determine the asserted privileges had been waived. The government was asked to provide copies of all documents related to the dispute to the Board and both parties were asked to brief the issue.

The *National Helium* test asks two fundamental questions: "did the client wish to keep back the privileged materials and did he take adequate steps in the circumstances to prevent disclosure of such documents?" 219 Ct. Cl. at 616. As to the first question, it is apparent here that appellant wanted to withhold the seven documents at issue. It asserted the attorney-client and attorney work product privileges in response to the government's document production requests, removed privileged documents from the 86 boxes of documents and prepared a privilege log. Counsel immediately demanded the return of the documents upon learning of the inadvertent disclosures and instructed Mr. Pederson not to answer questions relating to one of the documents at his deposition. Additionally, four of the documents are written on law firm letterhead, two of these documents and one additional document include fax cover sheets which provide clear privilege protection notifications, and one document contains a note at the top of the first page which states that it was prepared for the use of counsel and is confidential.

As to adequacy of the screening examination performed by appellant, "[a]ll circumstances that surround an inadvertent disclosure must be considered." *Telephonics*, 32 Fed. Cl. at 361; *IBM*, 37 Fed. Cl. at 604. The circumstances here establish, as they did in *National Helium, Weller*, *Telephonics*, and *Alaska Pulp*, that the precautions taken by appellant were sufficiently reasonable and careful to "winnow a relatively small number of privileged materials from a very large volume of documents." *National Helium*, 219 Ct. Cl. at 615. First, like all four of the cited cases, these appeals involve a considerable volume of material; specifically, some 86 boxes of documents. Second, as in *Telephonics*, appellant's response to the document request objected to the production of privileged materials. Third, two lawyers were assigned to perform a page-by-page review of all documents bearing any relationship to the claims and a general review of the balance of the contract files. It took them 58 hours to perform this examination. The review conducted here exceeds that performed by a non-attorney in *National Helium* and is in line with the

reviews undertaken by lawyers in *Telephonics* and *Alaska Pulp*. Fourth, as in all four cases, the lawyers removed privileged documents from the files before making them available for review by the opposing party. The relatively few documents they removed were listed on a privilege log which was provided to the government. Finally, the number of documents inadvertently disclosed, seven, is not excessive given the number of documents produced and is less than the 10 documents inadvertently disclosed in *National Helium.*

For all of these reasons, the Board is satisfied that the procedures followed by appellant were not so "lax, careless, or inadequate that [it] must objectively be considered as indifferent to disclosure." *National Helium*, 219 Ct. Cl. at 614. *Accord Weller*, 91-3 BCA at 121,579; *Alaska Pulp*, 44 Fed. Cl. at 736. Appellant did not waive its attorney work product and attorney-client privileges when it inadvertently disclosed the seven documents at issue. The government is directed to return all copies of these documents under its control and in its possession.

Dated: 20 January 2004

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53576, 53577, Appeals of PK Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals