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MEALEY'S LITIGATION REPORTS

ASBESTOS

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PLAINTIFFS SECURE USE OF WESTINGHOUSE DOCUMENT

AUSTIN, Texas — A document discovered during Westinghouse Electric Corp.'s document production at its Industrial Hygiene Headquarters "describes a plan to commit fraud on the courts of this nation," a Travis County trial judge said Feb. 8 (Peter M. Dashko v. Fibreboard Corp., et al., No. 91-14798, 331st Jud. Dist., Travis Co., Texas).

(Text of Judge's 2-page Order in Section A [Mealey's Document #01-930219-102]; Text of the Westinghouse Documents in Section B [Mealey's Document #01-930219-103].)

Westinghouse, an asbestos litigation defendant, has been engaged in a privilege battle in at least four states — Mississippi, North Carolina, New Jersey and Texas — over the use of the document, sources indicate.

The judge concluded that the 22-page untitled document (Exhibit 1) — which mentions several self-described "potential smoking gun documents" and recommends that certain documents be "discarded" or "destroyed" — falls within the crime/fraud exception to privileged documents under the Texas Rules of Civil Procedure. Although the judge held the document would have been privileged, Westinghouse waived its claim of privilege based on the crime/fraud holding. On Feb. 16, the Texas Supreme Court vacated a Feb. 10 stay order on the document.

The Report has obtained the 22-page report prepared by Jeffrey J. Bair of Westinghouse's law department and C. Wayne Bickerstaff of Westinghouse's Industrial Hygiene Department. Additionally, **The Report** has obtained five related documents, one of which also was held to fall within the crime/fraud exception to privilege. Another document announces the implementation of a document retention program which includes policy based on the 22-page report's recommendations.

Completed Review

Bair and Bickerstaff note at the beginning of the report that they had completed a review and inventory of materials, dating back to the early 1930s, housed at the Westinghouse Industrial Hygiene Department at the Research and Development Center.

"The majority of the documents in Industrial Hygiene's files are potential 'smoking gun' documents," the report states. "This is so because of the nature, duties, obligations and responsibilities of the Industrial Hygiene Department. The approximately 57-years of Industrial Hygiene files which are in existence today are filled with technical information, safe-handling information, hazard information, recommendations and test results. The files are

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filled with documentation which criticizes, from an industrial hygiene perspective, Westinghouse manufacturing and non-manufacturing operations. This documentation often times points out deficiencies in Westinghouse operations and suggests recommendations to correct these deficiencies. Industrial Hygiene's files contain information which details the various chemical substances used at Westinghouse sites over the years and often times the inadequacies in Westinghouse's use and handling of the substances. The files contain many years of employee test results, some of them unfavorable. Industrial Hygiene, by performing its job, creates, daily, potential smoking gun documents."

The report's conclusion appears to pull no punches.

"Toxic tort litigation, including toxic tort-related workmen's compensation litigation, shows no signs of abating in the near future," says the report. "In fact, legislation such as the risk notification legislation currently being considered by Congress, will, according to many 'experts', result in an increase in such litigation. Consequently, well reasoned and conceived document retention and destruction programs for departments such as Industrial Hygiene, and in fact the entire Corporation, are imperative."

The report states specific cases of "potential smoking gun" documents pertaining to allegedly hazardous materials. They include the following:

- * A Nov. 7, 1960 letter which, according to the authors of the report, "might show early knowledge of the Corporation [of] certain health hazards associated with apoxy resin dissolving agents." The authors question what Westinghouse did with this knowledge.

- * The report states that audit and trip reports "certainly qualify as potential smoking guns." It notes that Industrial Hygiene "audits, critiques and criticizes" each company plan from its perspective. Smoking gun possibilities of these audits "are readily apparent," the report states.

- * Although there is an indication that Westinghouse has had a "very positive and active" hygiene department, prior to the mid-1970s it is "usually impossible to determine what Industrial Hygiene recommendations were implemented," the report states. "The 'smoking gun' possibilities of older plant correspondence files are great," the report states.

- * It is "readily apparent" why site and employee-specific test "documentation might present problems," the report states. "If air sampling results and/or radiation test results exceed allowable limits, the possible consequences as far as litigation is concerned are apparent," says the report. "In addition, the fact that the Corporation performed, for example, air sampling for certain substances as early as 1940 (which in fact it did) might be used to prove early knowledge on the part of the Corporation of hazards associated with such substances."

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* The "smoking gun possibilities" of "material cards, material safety data sheets, purchasing department specification cards, safe practice data sheets and historical safe practice data sheets" are clear, the report states. If certain information contained in the documents was not communicated to employees at a particular site, "future problems are readily apparent," says the report. Similarly, the report expresses concern with "procedure and guideline documents."

* Finally, the authors note that there is a substantial amount of technical literature which might be used to prove knowledge on the part of Westinghouse.

Recommendations

The report states that the risks of keeping certain files or discarding them in the face of potential litigation must be weighed. In coming up with their recommendations, the authors of the report note that they asked themselves six questions:

1. "What are the chances of litigation? Is it pending or imminent?"
2. "In case of litigation, which party would have the burden of proof?"
3. "When does the statute of limitations run?"
4. "What records are necessary for the continued operation of the Department?"
5. "What records is the Corporation required to maintain pursuant to law?"
6. "Do the Westinghouse records retention guidelines cover any or all of the records?"

Saying that they were taking into consideration these questions and the company's document retention guidelines, the authors of the report suggest certain documents be "discarded" and others maintained.

Plant Correspondence

The report recommends the discarding of all plant correspondence files prior to 1974. It says that most of the material was written in an "editorializing and opinionated manner." Among the reasons the material should be discarded, the report argues, is that without evidence of follow-up procedures, "these files show corporate knowledge of hazards but no actual implementation of corrective measures."

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Test Records

Based on the company's document retention guidelines, test records should be maintained, the report says. A substantial portion, according to the report, appears "favorable." The bio-assay and radiation exposure records are employee and site specific; the air sampling data, produced prior to 1970, is site specific, not employee specific.

The material has been used to respond to "Union requests for information and to defend workmen's compensation claims," the report states.

Historical Files

With the exception of a 1974 noise survey, the report recommends the discarding of all other historical files of the department because they are either outdated or available from other sources.

Material Cards, Material Safety Data Sheets . . .

The reports recommend that all of the material cards, material safety data sheets, etc., be maintained with the exception of outdated and unused cards and historical Safe Practice Data Sheets which contain "editorializing."

The report also says it should be noted that some "editorializing" documents "might also appear in the files maintained at Corporate Standards." However, other than noting the potential existence of these documents at another locale, the report does not recommend what should be done.

Procedure and Guideline Documents

Procedures and guidelines are developed by Industrial Hygiene to "assist Westinghouse plants develop appropriate occupational health programs to minimize employee exposure and corporate liability," the report notes. The report said the records were not required by state or federal law and those no longer used or outdated should be discarded.

These records, maintained in hard copy form, according to the report, included information on dioxin-furan health hazard training, radiation protection programs, radiation guidelines, noise reduction procedures, heat control procedures, asbestos removal, shipment waste procedures and ventilation procedures, "to name a few."

Miscellaneous Documents

All settled or closed workmen's compensation claims should be discarded, the report states.

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Other materials suggested to be discarded or destroyed include certain seminar and education materials, certain audit report drafts and work papers, and microfilm records at "the Mines."

Document Retention Memo

In a Jan. 29, 1988 memo, the subject of which is document retention, Bickerstaff notes that he and Bair had completed a review of the inventory in the Industrial Hygiene Department.

He also notes that the review was part of a "corporate-wide effort to update and formalize a corporate-wide records management system." Many of the recommendations suggested by Bickerstaff and Bair in the 22-page report will be implemented, Bickerstaff says.

There appears to be a difference between the report's suggestion regarding workers' compensation claims and the implementation of policy in the Jan. 29, 1988 memo. In his memo, Bickerstaff notes that in addition to pending cases, files "pertaining to asbestos-related disease" should continue to be maintained. The 22-page report had suggested that files for all closed cases be discarded.

Bickerstaff indicated that much of the "project" was expected to be completed by June 30, 1988 and totally finished by the end of the fourth quarter of that year.

Law Department

An earlier memo (Exhibit 5) dated Nov. 19, 1987 from Bair to Bickerstaff was also the subject of Judge Paul R. Davis' Feb. 9 order regarding privilege.

Bair notes that "we" — apparently the Westinghouse law department — had completed the review of documents at Industrial Hygiene. Bair also attached an inventory list for Bickerstaff's review, saying "it must now be decided what, if any, of these files should be discarded."

Bair asked Bickerstaff to provide him with as much information as possible regarding his conclusions as to what he felt "could and should be destroyed."

Apparently the 22-page report was produced a short time thereafter.

Other documents obtained by **The Report** refer to the document retention program.