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RECORD #154

TITLE: Selection of Appropriate Enforcement Action for Gamma Diagnostic Laboratories, Inc.

FICHE: 65312-262



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Jerry
RI
0481/81

MAR 0 4 1981

EGM-81-06

MEMORANDUM FOR: B. H. Grier, Director, RI
FROM: Dudley Thompson, Director
Enforcement and Investigations
SUBJECT: SELECTION OF APPROPRIATE ENFORCEMENT ACTION FOR
GAMMA DIAGNOSTIC LABORATORIES, INCORPORATED
Reference: Grier memo dtd January 16, 1981

still OK
See letter to file
3/11/82 regarding
discussions with
DOT
on Transp. Sec.

The following background considerations and conclusions are pertinent to this case. They are based on research of old statements of consideration, old inspection guidance and discussions with individuals in the Office of Standards Development. Your memo indicated that there did not appear to be a regulatory basis for citing the licensee for leaving the key in the truck and the motor running while making deliveries of radioactive materials.

As you know, common and contract carriers are subject to DOT regulations but are exempt from NRC regulations. Private licensee carriers are subject to all DOT regulations and 10 CFR Part 20. However, it is our current view that where DOT and NRC have overlapping requirements, we would not ordinarily take action against the NRC licensee for a violation of Part 20 if the licensee was in compliance with the DOT requirement. For example, private carriers are required to make 20.402 reports for lost or stolen radioactive materials (based on judgmental factors) no matter how the material is contained (see Interpretive Guides 20.402 and 20.402 - Transportation in 10 CFR of the IE Manual). In this case, the licensee apparently did report the stolen truck to local police. They were not required to report the stolen truck to DOT (things reportable to DOT are set forth in the second Interpretive Guide listed above).

Your memo mentioned the possible applicability of 10 CFR 20.207(a) and (b). The intent of that rule was to secure material from unauthorized removal of radioactive materials from any unrestricted area. The rule intentionally does not state how the material must be secured, only that it must be secured. Under 20.207(a) the source should be secured in such a way that it cannot (under reasonable circumstances) be removed, including removal of the containment in which the material is located, whether it be a small brick structure, vehicle or any other kind of containment. We believe a reasonable effort would have been to shut off the motor and remove the keys.

CONTACT: J. Metzger, IE
49-28188

MAR 04 1981

B. H. Grier

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In the case at hand, by stealing the vehicle, the material was obviously also stolen, even though the material was secured to the truck. The fact is, the truck was not reasonably secured. Clearly, if the truck theft had been successful, the secured container could have been breached. Therefore, in our view, 20.207 applies in this case and the licensee should be cited but no civil penalties assessed (see EGM-81-08).

There are no similar provisions to 20.207(a) and (b) in DOT regulations, except for any carrier of explosives.

You also mentioned that the license authorizes transportation under Part 71. In conjunction with this, note that Section 71.1(b) states, "The packaging and transport of these materials are also subject to other parts of this chapter...." which means Chapter 1 of Title 10, or in other words, applies to other regulations in Chapter 1 including Part 20.


Dudley Thompson, Director
Enforcement and Investigations
Office of Inspection and Enforcement

cc: G. Snyder, RI w/incoming
C. Upright, RII "
C. Norelius, RIII "
- W. Vetter, RIV "
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION I
631 PARK AVENUE
KING OF PRUSSIA, PENNSYLVANIA 19406

Tom
Boyer
7/8

January 16, 1981

Docket No. 30-8748

MEMORANDUM FOR: Dudley Thompson, Director
Enforcement and Investigation Staff, IE

FROM: Boyce H. Grier, Director
Region I

SUBJECT: SELECTION OF APPROPRIATE ENFORCEMENT ACTION FOR GAMMA
DIAGNOSTIC LABORATORIES, INCORPORATED

An inspection was conducted on October 6 and 7, 1980 to review the circumstances surrounding the theft and subsequent recovery of a truck belonging to the licensee on September 25, 1980. The truck was being used by the licensee to deliver licensed materials to various customers. At the time of the theft, the truck was parked in front of a hospital with the engine running while the driver was inside making a delivery. The truck contained packages of licensed materials in a locked container which in turn was bolted to the truck. The theft was promptly reported and the truck was recovered a short while later. There was no evidence of any attempt to steal or tamper with the licensed materials within the locked container.

In this particular situation, because the licensed materials were within a locked container which was physically secured to the bed of the truck, I do not believe that there is a violation of any requirement. Instead, I believe that this is a matter which was properly taken up with the local law enforcement agency and should be considered just as any other stolen vehicle. In this regard, unless I hear from you to the contrary by January 16, 1981, I intend to transmit the inspection report to the licensee by letter which states that further management review has resulted in the conclusion that the apparent item of noncompliance described in the inspection report is no longer considered to be noncompliance.

It should be noted that there is not unanimity in this matter. George Smith and some members of his staff do not agree. It is Smith's position that the licensee did not exercise reasonable precautions to preclude

the theft of licensed material being stored in an unrestricted area and that the licensee should be cited for noncompliance with 10 CFR 20. He believes, however, that if the keys had been removed from the vehicle and the thief had to "hot-wire" the truck in order to steal it, there would be no basis for a citation. Removing the keys would, in his view, constitute having taken reasonable precautions.

There is an additional longstanding question about which regulations apply in situations like this. Even though in this specific case I believe that there is no violation of any regulations because the licensed material was secured in a locked box which was in turn secured to the truck, my view would change if the packages of licensed material had been left unsecured in the bed of the pickup truck. For this reason, I would like to use this event as the forum to focus management attention on the problem in the hope that definitive guidance and policy will result.

The licensee is licensed under Part 30 and Part 30 states that licensees must comply with the regulations in Part 20. On the other hand, the licensee's specific license authorizes him to transport licensed materials subject to the requirements of 10 CFR 71. Part 71 states in Section 71.1 that Part 71 establishes requirements for transportation and for preparation for shipment of licensed material; and states in Section 71.2 that the regulations in Part 71 apply to each person authorized by a specific license to receive, possess, use, or transfer licensed materials; and states in Section 71.5 that a licensee must comply with the DOT regulations when transporting licensed material outside the confines of his plant or other place of use. While it is true that Part 71 does not specifically state that a licensee need not comply with Part 20 when transporting licensed materials, it clearly states that the licensee must comply with DOT regulations as well as the regulations in Part 71 when transporting licensed material outside of the confines of his plant.

One point that needs to be made with regard to this specific situation is that if the licensee had chosen to contract with some other carrier to make the deliveries of licensed material, and if that other carrier had experienced the theft of its truck under the exact same conditions, there would not be a violation charged to the licensee and most likely the carrier would also not be found in violation of DOT regulations. We believe this would be true even if the carrier had not secured the licensed material within a locked box. If, however, we say that the licensee must comply with Part 20 since he chose not to hire another carrier, and if we apply the revised enforcement policy, then the conclusion is that we should under

those conditions recommend a civil penalty because the licensee failed to keep licensed material in an unrestricted area under constant surveillance, a Level III violation. The extremes of these situations is at best, difficult to explain, and at worst, represents gross non-uniformity, unreasonableness, and lack of fairness.

If the licensee had not secured the packages of licensed material in a locked box which was secured to the truck, then I believe that the regulations in Part 20 apply and that the licensee should be issued a citation against 10 CFR 20.207(a) and (b). Enclosed is a Notice of Violation which I would propose to issue in such a case. There is not unanimity in this matter either, however, and at least one member of my staff, Gary Snyder, does not concur that Part 20 is an applicable regulation in this case. He believes that there is sufficient ambiguity in the regulations to at least argue that Part 20 is not applicable and that the DOT regulations are. His position is further supported by the lack of an NRC position on this relatively old question, and by the gross difference in the end result if the DOT requirements are applied on one hand and if the Part 20 requirements, coupled with the revised enforcement policy, are applied on the other hand.

The real issue is, of course, much broader than merely establishing the applicability of NRC regulations or DOT regulations. In the subject case, for example, it seems clear that the licensee's actions could be considered to be imprudent and not show adequate concern for the safekeeping of licensed material. This would be true, however, whether it involved the licensee acting as his own carrier or someone else hired by the licensee to make the deliveries. Other areas of concern also exist even though they do not relate to this specific case. For example, the questionable nature of radiation levels permitted by DOT regulations when trucks are temporarily parked in such areas as restaurant parking lots or motel parking lots, is a matter of significance. In some circumstances a truck carrying radioactive material could cause significant personnel exposures (children playing on a parked vehicle, for instance) even though it meets DOT regulations.

In summary, the occurrence of the theft of the truck containing the licensed material highlights two questions about which guidance and policy are needed.

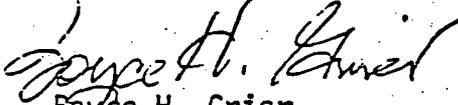
1. When a licensee is acting as a private carrier such as in the situation just described, what regulations are applicable? The regulations in part 71 and the DOT regulations? The regulations in Part 20? Some combination of these?

SELECTION OF APPROPRIATE ENFORCEMENT ACTION
FOR GAMMA DIAGNOSTIC LABORATORIES, INCORPORATED

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2. If it is assumed that a licensee acting as a private carrier must comply with the regulations in Part 20, then does storage of licensed materials in a locked box which is physically secured to a truck constitute adequate securing against unauthorized removal?

In addition to requesting answers to the two questions just asked, we again voice our support for our previous recommendation and similar recommendations from other regions, that IE vigorously pursue resolution of related matters such as those described in the previous paragraph.


Boyce H. Grier
Director

Enclosure:
As stated

cc w/enclosure:
Victor Stello, Jr., Director, IE
J. P. O'Reilly, Director, RII
J. G. Keppler, Director, RIII
K. V. Seyfrit, Director, RIV
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H. D. Thornburg, Director, SRSI
L. B. Higginbotham, Chief, RSB
A. W. Grella, SRSI

APPENDIX A

NOTICE OF VIOLATION

Gamma Diagnostic Laboratories
Attleboro, Massachusetts 02763
License No. 20-15215-02MD

Docket No. 30-8748

Based on the results of an NRC inspection conducted on October 6 and 7, 1980, it appears that one of your activities was not conducted in full compliance with NRC regulations as indicated below:

10 CFR 20.207(a) requires that licensed materials, stored in an unrestricted area, be secured against unauthorized removal from the place of storage. 10 CFR 20.207(b) requires that materials not in storage be under constant surveillance and immediate control of the licensee. As defined in 10 CFR 20.13(17), an unrestricted area is any area access to which is not controlled by the licensee for purposes of protection of individuals from exposure to radiation and radioactive materials.

Contrary to this requirement, on September 25, 1980, licensed materials were stored in your delivery vehicle which was in an unrestricted area and was neither under constant surveillance nor under your immediate control. We note that the materials were secured to the vehicle, but that the vehicle was unlocked and the engine running.

This is an infraction.