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April 3, 1998

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Gentlemen:

Donald C. Cook Nuclear Plant Units 1 and 2
COMMUNICATION OF ADDITIONAL INFORMATION
SPRAGUE v. AMERICAN NUCLEAR RESOURCES, INC.
(U.S. DEPARTMENT OF LABOR CASE NO. 92-ERA-37)

The purpose of this letter is to inform you of the Secretary of Labor's petition for rehearing to the U.S. Court of Appeals for the Sixth Ciruit, in connection with U.S. Department of Labor (DOL) Case No. 92-ERA-37, (American Nuclear Resources, Inc. v. United States Department of Labor, File No. 96-3825).

In our letter of February 12, 1998, we informed you of the January 29, 1998, decision of the Sixth Circuit Court of Appeals reversing the final decision and order of the Secretary of Labor. The Secretary of Labor has petitioned the Sixth Circuit Court to rehear the case. A copy of the petition is attached to this letter.

We will forward a copy of the court's response to this petition when it becomes available to Indiana Michigan Power Company.

Sincerely,

E. E. Fitzpatrick
Vice President

Attachment

/jen

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A. B. Beach
J. Lieberman
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COMMUNICATION OF ADDITIONAL INFORMATION
SPRAGUE v. AMERICAN NUCLEAR RESOURCES, INC.
(U.S. DEPARTMENT OF LABOR CASE NO. 92-ERA-37)

No. 96-3825

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN NUCLEAR RESOURCES, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR

Respondent,

On Petition For Review of the Final
Decision and Order of the Secretary of Labor

PETITION FOR REHEARING OF THE SECRETARY OF LABOR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 96-3825

AMERICAN NUCLEAR RESOURCES, INC.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for Review of the Final Decision
and Order of the Secretary of Labor

PETITION FOR REHEARING OF THE SECRETARY OF LABOR

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Secretary of Labor, through this petition to the panel that rendered the Court's opinion, respectfully requests this Court to rehear the case, vacate its opinion, and affirm the Secretary's decision in this "whistleblower" case arising under the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. 5851 (1988). In its opinion of January 28, 1998, the panel, in vacating the Secretary's decision, ruled that the actions of Gregory Sprague, a technician employed by American Nuclear Industries, Inc. ("ANR"), "lack[ed] a sufficient nexus to safety concerns" to come within the ERA's "protected activities." On this basis, the panel, in effect, held that the Secretary had interpreted the ERA in manner which could not permissibly be reconciled with the language of the statute.

The Secretary respectfully submits that the panel erred. Mr. Sprague's activities, viewed in the context of the specific requirements of the ERA, as interpreted by the Nuclear Regulatory Commission ("NRC"), implicate the core concerns of the ERA, including the safety of workers within the nuclear industry, their protection from exposure to radiation, and the protected expression of internal complaints by workers that bear upon the statutory and regulatory requirements pertaining to safety-related practices. Through this petition, the Secretary identifies the specific NRC requirements implicated by Mr. Sprague's complaints; demonstrates that the panel's analysis is incongruent with the precedent upon which it relies; and explains why the panel's opinion, unless modified, will both hobble the enforcement of the ERA by the NRC and the Secretary and deter employees from exercising their rights to voice internal complaints about nuclear safety practices.

STATEMENT OF THE ISSUE

Whether an employee is not engaging in protected activities under the Energy Reorganization Act when he complains to his supervisor about the work practices that caused him to be contaminated by airborne radiation at a nuclear power station.

STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

1. <u>The Whistleblower Complaint</u>

ANR employed Sprague as a tool accountability technician in

the reactor containment area in the D.C. Cook Power Plant. Sprague, who had no prior work experience at a nuclear power plant, had been working at the facility for only about two weeks when the events underlying his ERA complaint occurred.

On March 19, 1992, Sprague was exposed to radioactive contaminants while recovering tools from a work area. Following the completion of this work and upon learning that he had been contaminated, Sprague complained to his supervisor that the radiation protection personnel ("RP's"), who were charged with ensuring that radiation exposures of plant personnel will be "as low as reasonably achievable" ("ALARA"), did not know what they were doing. According to his supervisor, the RP's had waited too long to spray the cavity's walls to prevent airborne radiation.

The next day, March 20th, which was to have been his last day working at the plant before a scheduled temporary layoff, Sprague underwent the standard "full body count" to measure his radiation level. Due to Sprague's abnormally high radiation levels, the test took two hours; the tests performed on his co-workers took two minutes. Sprague became upset with the RP's during the test, and requested a copy of the report immediately after its completion. The RP's refused to provide him with a copy of the "full body count report" and gave him an "exposure report," which contained the same information in a more readable format.

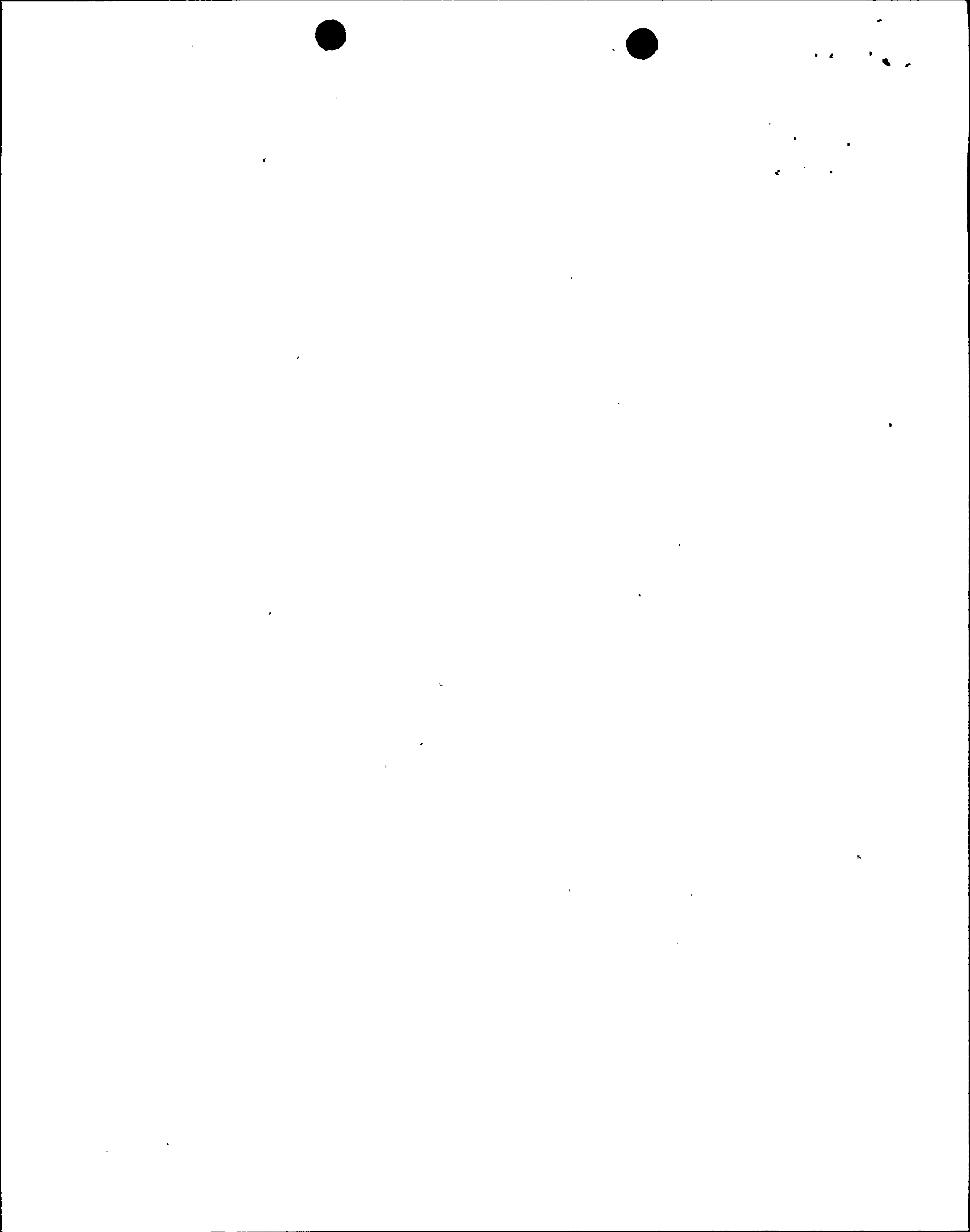
Later that day (March 20), Sprague's supervisor decided to make Sprague's layoff permanent, allegedly because of his "interpersonal problems." That same day, Sprague contacted the NRC and a representative informed him that ANR was not required to disclose the body count information in the particular form he had requested. Sprague later filed a complaint with the Department of Labor, alleging that his termination violated the ERA's employee protection provision.

2. The Administrative Proceedings

After a hearing, the Administrative Law Judge ("ALJ") determined that Sprague's complaints about the RP's and his request to them for the body count report was protected activity for which he was unlawfully discharged. The Administrative Review Board ("ARB"), acting for the Secretary, affirmed the ALJ's decision. The ARB held that Sprague's questions to the RP's constituted protected activity because "the RP's were responsible for Sprague's radiological safety as an ANR employee." The ARB reasoned (quoting agency precedent) that "an employee's 'questioning of the safety procedure . . . used was tantamount to a complaint that the correct safety procedure was not being observed' and thus constituted protected activity under the ERA."

3. The Panel's Decision

The panel rejected the ARB's interpretation of the scope of



"protected activities" under the ERA, although acknowledging the following actions by Sprague that "possibly implicate safety: he complained about 'the stupid RP's not knowing what they were doing' after they waited too long to spray; he grew angry at the RP's while they administered his full body count test; and, after the test, he asked the RP's for a copy of the body count, even though he received a more understandable exposure report." Yet the panel held that Sprague did not engage in protected activity, relying on Bechtel Construction Co. v. Secretary of Labor, 50 F.3d 926, 931 (11th Cir. 1995) and Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1574 (11th Cir. 1997)[1] for the proposition that courts have limited the ERA to "particular, repeated concerns about safety procedures" and not "general inquiries." The panel drew a distinction between the series of complaints in those cases and the complaint of Mr. Sprague about an "isolated incident involving a wall spraying," which was not "a procedural hazard." Although the panel conceded that a single safety inquiry might constitute protected activity, it held that a such a single inquiry "must bear a closer nexus to safety than Sprague's conduct." Alternatively, the panel held that ANR did not fire Sprague because he complained about safety, concluding

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[1] In both Bechtel and Stone & Webster, the Eleventh Circuit upheld the Secretary's interpretation of "protected conduct" to include the informal expression by complainants of concerns about the work procedures effecting safety in a nuclear power plant.

that Sprague's "interpersonal problems" provided a credible basis for his discharge.

ARGUMENT

The panel should rehear this case and issue a modified opinion, reinstating the Secretary's decision, and denying ANR's petition for review. In vacating the Secretary's decision, the panel apparently failed to recognize that Sprague's protests to his supervisor about the contamination caused by the RP's as a result of their failure to observe proper work procedures, not his intemperate remarks to the health technicians, comprised the core element of his protected activity. Viewed from this vantage, Sprague's actions readily satisfy the panel's concern that an employee's conduct must bear a close nexus to safety. Indeed, Sprague's remarks to his supervisor constitute allegations that the work practices, which resulted in his contamination, violated express requirements of the ERA.

1. Sprague's complaint to his supervisor on March 19, 1992, alerted her to the fact that he believed that his contamination and the contamination of other personnel had resulted from the RP's waiting too long to spray the cavity's walls to prevent airborne radiation. The panel acknowledged that "Sprague's complaints resulted in one set of additional body counts on the RP's." 1998 WL 29862, page 3. Yet the panel, in a departure from precedent, interpreted narrowly the scope of the statute's "protected activities," i.e., limiting its protection

to conduct which entails "concrete and continuing" complaints, where an employer is "ignoring safety procedures or assuming unnecessary risks," or conduct that is associated with a particularly egregious one-time occurrence.

Contrary to the panel's ruling, the language of 42 U.S.C. 5851(a) (1988);[2] which embraces conduct that necessarily precedes a complaint filed with the NRC,[3] clearly protects Sprague's

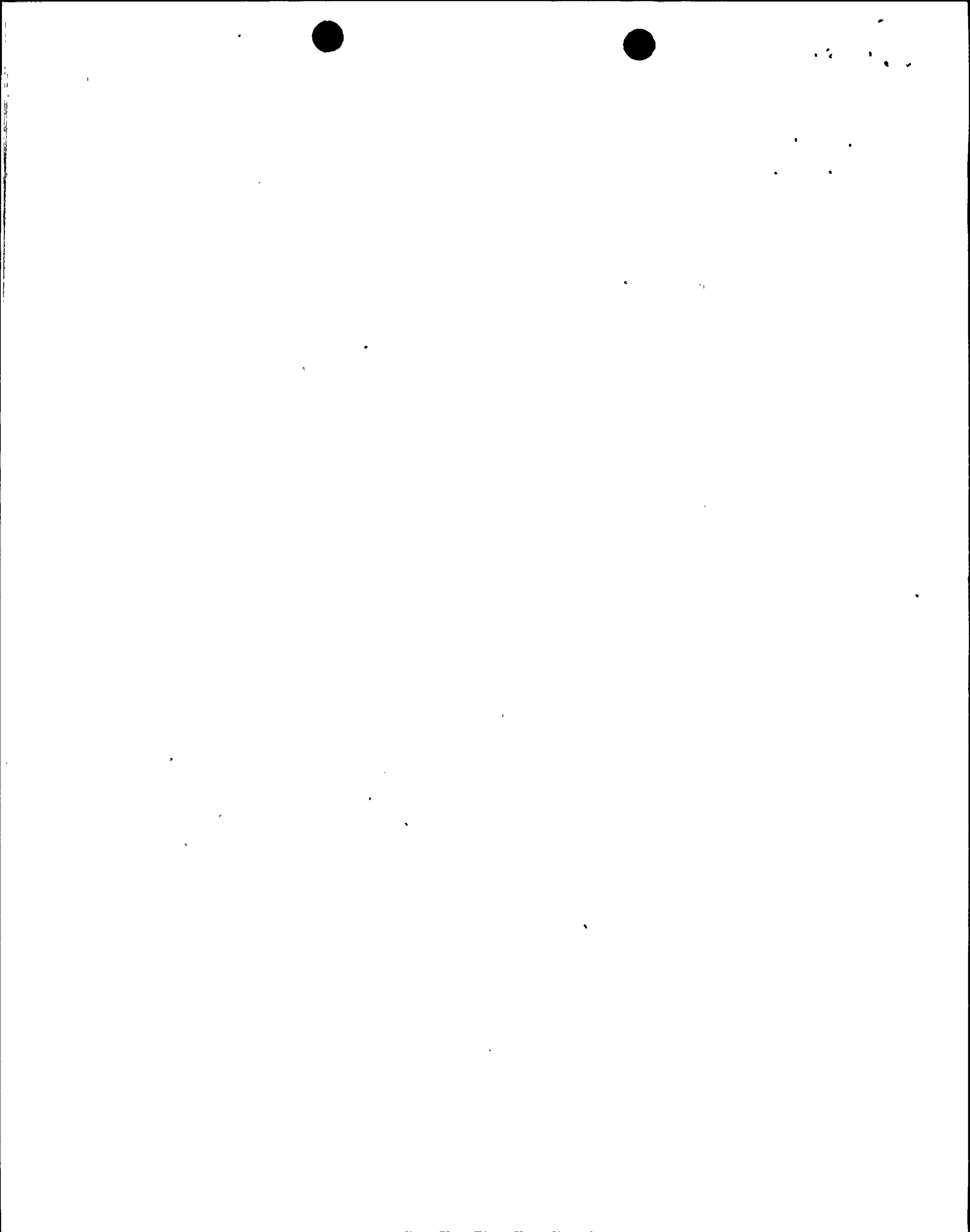
---

[2] The governing statutory provision states:

> Employee protection
> (a) Discrimination against employee
> No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a . . . proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other . . . action to carry out the purposes of this chapter or the Atomic Energy Act of 1954 . . . .

42 U.S.C. 5851 (1988).

[3] Section 50.7 of the NRC regulations provides explicit protection to actions antecedent to a NRC investigation or other proceeding, by including within "protected activities": "Assisting or participating in, or is about to assist or participate in, these activities." (10 C.F.R. 50.7(a)(1)(v)). This section continues: "These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation." (10 C.F.R. 50.7(a)(2)). *See also* 10 C.F.R. 19.20, collecting provisions regulating conduct that may be sanctioned for employer interference with



protests regarding the competence of the RP's (as well as his subsequent demand for information relating to the severity of his exposure to radiation contaminants). Moreover, Sprague's conduct certainly "notified his employer of an alleged violation" of the ERA, for purposes of the amended ERA. See 42 U.S.C. 5851(a)(1)(A) (1992). The panel correctly held that the amendments largely codified pre-existing law regarding protected activities.

The protection of workers from exposure to radioactive materials is a primary focus of the NRC's regulation of the nuclear industry. Part 20 of the NRC regulations, entitled "Standards for Protection Against Radiation," requires, in part, that licensees "shall use to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses . . . that are as low as reasonably achievable (ALARA)." 10 C.F.R. 20.1101. More specifically, the rules direct licensees "to control the concentrations of radioactive material in the air," regulating equipment and processes to be utilized (10 C.F.R. 20.1701 et seq.), and also directs licensees to maintain records of worker radiation exposure, including records when, as here, a worker is exposed accidentally to radiation (10 C.F.R. 20.2106).

The U.S. Nuclear Regulatory Commission Regulatory Guide 8.8

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protected activity.

(Rev. 3, June 1978, reproduced in the addendum and referred hereto as "NRC Guide")[4] has for almost twenty years provided guidance to licensees on how they can meet the ALARA requirements. The NRC guide applies to "station personnel," defined as "all persons working at a nuclear power station, whether full-time or part-time and whether employed by the licensee or by a contractor for the licensee." NRC Guide, 8.8-1, n.1. All station personnel, such as Sprague's supervisor, who direct the activities of others "should be familiar with the licensee's radiation control program and should have authority to implement the licensee's commitment to ensure the radiation exposures of station personnel will be ALARA." Id. at 8.8-6.

The NRC Guide describes the need for design features to "provide for protection against airborne radioactive material by means of engineering controls such as process, containment, and ventilation equipment." Id. at 8.8-9. The following design control feature, described in paragraph (d)(6), is of particular relevance to the instant case: "[w]et transfer or storage of potentially contaminated components . . . by keeping contaminated surfaces wet, by spraying, or preferably, by keeping such surfaces under water." During operations in radiation areas, the NRC Guide recommends assigning a "health physics (i.e., radiation

[4] The NRC Guide describes methods, acceptable to the NRC staff, of implementing specific parts of the Commission's regulations. NRC Guide, 8.8-1.

safety or radiation protection) technician to provide radiation protection surveillance. NRC Guide, 8.8-14, b.(1). Formal or informal postoperation debriefings "of station personnel performing the services" are specifically identified as a means of providing "valuable information concerning shortcomings in preoperational briefings, planning, procedures, special tools, and other factors that contributed to the cause of doses received during the operation." Id., c.1.

In sum, when Sprague criticized the RP's to his supervisor because their untimely spraying of the cavity's walls caused airborne radiation, if not also when he confronted the RP's regarding his resultant contamination levels, he unmistakably notified his supervisor of potential violations of the NRC's regulations. This serious and well-grounded complaint constituted protected activity under the ERA.

Significantly, NRC regulations make it the "responsibility" of workers "to report promptly to the licensee any condition which may lead to or cause a violation of Commission regulations and licenses or unnecessary exposure to radiation and/or radiation material . . . ." 10 C.F.R. 19.12(a)(4). Thus, the very conduct by Sprague that the panel deemed unprotected was required by NRC regulations. Absent modification of this ruling, employees who dutifully report exposure to radiation bear the very real risk of being fired for their efforts.

2. The panel's decision departs from the Court's obligation under Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to defer to the Secretary's interpretation of a statute she is charged to administer. See Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1991) (deferring to Secretary's interpretation of coverage under the Surface Transportation Assistance Act ("STAA")). As the Ninth Circuit has noted, "[t]he Secretary's interpretation of the scope of the Act's whistleblower protection is permissible because this statutory provision has the "broad, remedial purpose of protecting workers from retaliation based on concerns for safety and quality." Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1160 (9th Cir. 1984).

The ARB, like the Secretary before it, has broadly construed the scope of protected activities under the ERA and the other employee protection statutes administered by the Labor Department.[5] The ARB's interpretation in this case promotes the remedial purposes of the statute by encouraging safety concerns to be raised and resolved promptly, at the supervisory level, and protects whistleblowers from retaliation by their employer before

[5] Numerous ERA whistleblower cases involve internal complaints to management about inattention of coworkers to proper safety practices. Many involve concerns relating to worker exposure to airborne radioactive contaminants. See e.g., Tritt v. Flour Constructors, Inc., 88-ERA-29 (Dec. by Secretary, Aug. 25, 1993); Stockdill v. Catalytic Industrial Maintenance Company, Inc., 90-ERA-43 (Dec. by ALJ, Jan. 28, 1992).

they have a chance to bring their safety concerns before an appropriate agency. <u>See</u> <u>Bechtel Construction</u>, 50 F.3d at 933. Indeed, by distinguishing Sprague's complaints -- which occurred over a two-day period -- from "continuing" complaints arguably at issue in other cases, the panel's holding would encourage employers to fire employees <u>before</u> they have an opportunity to make repeated inquiries or file more formal complaints. There is simply no basis in the statutory text or purposes only to protect individuals who file multiple complaints.

The narrow construction the panel gives the statute is not supported by the case law it cites. While the decisions the panel cites may have involved more than one complaint, nothing in those decisions suggests that a particular quantity of complaints is required to trigger the Act's protections. These decisions, instead, lend support to the ARB's conclusion that Sprague's actions were protected; and other authority recognizes that actions similar to Sprague's deserve the ERA's protection. <u>See</u> <u>Fluor Constructors, Inc. v. Reich</u>, 111 F.3d 94, n. 2 (11th Cir. 1997) (complainant's failure to observe proper procedure in connection with a perceived safety hazard posed by particles that the employee thought might be radioactive did not deny complainant the Act's protection); <u>Bechtel Construction</u>, <u>supra</u> (tool accountability technician's questioning of his foreman about correct safety procedures for handling contaminated tools

was "protected activity" and not a "general inquiry regarding safety");[6] Lockert v. U.S. Department of Labor, 867 F.2d 513 (9th Cir. 1989) (employee's actions in seeking information relating to safety procedures considered to be protected). Additionally, contrary to the panel's reading of Stone & Webster, the Eleventh Circuit's opinion cannot be distinguished from the instant case. There is no relevant difference between concerns over fire safety deemed protected in Stone & Webster, and the contamination concerns expressed by Sprague here. NRC regulations treat both worker exposure to radiation and fire safety as central to safety in the nuclear industry. See 10 C.F.R. 50.48 (fire safety) and 10 C.F.R. Part 20 (radiation protection).

3. The analysis in the panel's opinion not only departs from precedent, but it fails to provide any direction that would enable the Secretary and the regulated community accurately to predict the bounds of the ERA's protection in future situations -- an acute problem because the facts posed by the instant case cannot readily be distinguished from recurrent situations where an employee airs a complaint informally about a co-worker's failure to follow prescribed safety procedures. At a minimum, the panel's decision will invite arguments by employers that even previously uncontested safety-related activities are outside the

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[6] On facts strikingly similar to the facts of the instant case, the Eleventh Circuit in Bechtel held that the actions were protected by the ERA.

ERA's protection. This ineluctably will deter some employees from articulating concerns about unsafe practices in the workplace, a result inconsistent both with the language of the ERA (as amended in 1992 and its accepted prior interpretation), NRC regulations, and the goal to protect the safety of workers within the nuclear industry and, ultimately, the safety of the public.

4. The Secretary requests the panel, if it modifies its opinion to hold that Sprague engaged in protected conduct, also to reexamine its alternative holding that ANR had demonstrated that it had a legitimate, non-retaliatory basis upon which to discharge Sprague. In the Secretary's responsive brief, the Secretary demonstrated that substantial evidence supported the ARB's finding that this rationale for the firing was pretextual. In addition to the arguments there presented, the Secretary submits that ANR's explanation for terminating Sprague should be reconsidered by the panel because of the core safety concerns implicated by Sprague's complaint. Contrary to the panel's assumption, ANR could have reason to thwart Sprague's complaints. ANR, like all contractors, would be concerned that production at the plant would be impeded by a worker who protests any contractor's adherence to, or the adequacy of, radiation protection design controls. Finally, Sprague's remarks, while intemperate, were not so disruptive to divest him of the Act's

protection. His emotive reaction -- as someone newly hired to work at a nuclear facility who suffers abnormal radioactive contamination -- was not so unreasonable that ANR legitimately could terminate his employment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should grant the motion for panel rehearing in this case, vacate the panel's opinion, and deny ANR's petition challenging the Secretary's decision that Mr. Sprague was unlawfully terminated in violation of the ERA.

Respectfully submitted,

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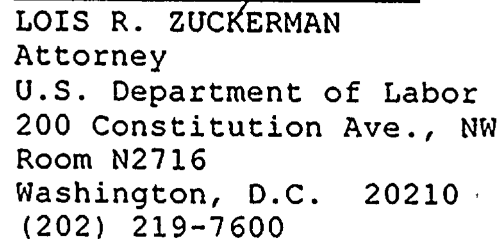

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion of the Secretary of Labor were served this 12th day of March, 1998 by first-class mail upon the following:

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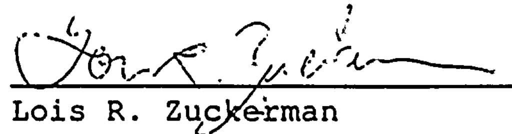

Lois R. Zuckerman