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NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

UNION ELECTRIC COMPANY

(Callaway Plant, Units  
1 and 2)

Docket Nos. CPPR-139  
CPPR-140

ORAL ARGUMENT

Place - Washington, D. C.

Date - Wednesday, 10 January 1979

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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Moot Courtroom  
Howard University Law School  
Houston Hall  
2935 Upton Street, N. W.  
Washington, D. C.

Wednesday, 10 January 1979

Oral argument in the above-entitled matter was convened,  
pursuant to notice, at 9:30 a.m.

BEFORE:

ALAN S. ROSENTHAL, Chairman  
Atomic Safety and Licensing Appeal Board

MICHAEL C. FARRAR, Member

RICHARD S. SALZMAN, Member

APPEARANCES:

W. BRADFORD REYNOLDS, Esq., Shaw, Pittman, Potts &  
Trowbridge, 1800 M Street, N. W., Washington, D. C.;  
on behalf of the Applicant.

MICHAEL BANCROFT and DIANE COHN, Esqs., Public Citizen  
Litigation Group, 200 P Street, N. W., Washington, D. C.;  
on behalf of the Intervenor William Smart.

1 APPEARANCES (Continued:

2 JAMES P. MURRAY and STEPHEN G. BURNS, Esqs., Office  
3 of the Executive Legal Director, Nuclear Regulatory  
4 Commission, Washington, D. C.; on behalf of the  
5 Nuclear Regulatory Commission Staff.

6 ALSO PRESENT:

7 JOHN L. CARR and ALAN J. WEISBAUM, Esqs., Shaw, Pittman,  
8 Potts & Trowbridge, 1800 M Street, N. W.,  
9 Washington, D. C.  
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C O N T E N T SORAL ARGUMENT OF:PAGE

W. Bradford Reynolds,  
on behalf of the Permittee

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Michael Bancroft,  
on behalf of the Intervenor, William Smart

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James P. Murray,  
on behalf of the NRC Staff

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REBUTTAL ARGUMENT OF:

W. Bradford Reynolds,  
on behalf of the Permittee

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P R O C E E D I N G S

CHAIRMAN ROSENTHAL: This Atomic Safety and Licensing Appeal Board of the Nuclear Regulatory Commission is hearing oral argument this morning on the appeals taken by the Union Electric Company and William Smart on a different aspect of the Licensing Board's September 28th, 1978 initial decision.

This show-cause proceeding involved Union Electric's Callaway nuclear facility in Missouri. The issues presented in this proceeding are exclusively legal in character and relate to the endeavors of the Commission's Office of Inspection and Enforcement to investigate the circumstances underlying the dismissal of Mr. Smart last April from the employ of a contractor on the Callaway construction project.

More specifically, the principal issues are, one, whether the Commission has the authority to conduct an investigation for the purpose of determining if Mr. Smart's dismissal was causally related to his having brought certain alleged construction work deficiencies to the attention of the Office of Inspection and Enforcement; and second, whether the trial board correctly declined to consider an additional sought to be raised by Mr. Smart.

This represents the first occasion on which an appeal board of the Nuclear Regulatory Commission has heard oral argument on a law school campus. We are of course very grateful to the dean of the Howard Law School for

graciously making available this splendid moot courtroom for our use.

We also wish to acknowledge the attendance this morning of the members of Professor Miles' administrative law class and Professor Thornell's environmental law seminar.

We trust that they will find the argument both interesting and instructive.

Although the panel from which NRC appeal boards are drawn is comprised of both lawyers and scientists, the appeal board for this proceeding consists of three lawyers. On my right is Michael C. Farrar, and on my left is richard S. Salzman. I am Alan S. Rosenthal, the chairman of this board.

The argument is governed by the terms of our December 21, 1978 order; as therein indicated, each of the three parties will have a total of 40 minutes for the presentation of its argument. We will hear from Union Electric first to be followed by Mr. Smart and then by the Commission staff.

As our order also stressed, the board is entirely familiar with the stipulated facts as well as the positions of the respective parties.

We will expect counsel to bear this fact in mind in the presentation of their arguments. In this connection,

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1 there is no need for any counsel to present a detailed  
2 background statement at the inception of his argument.

3 I will now ask counsel to identify themselves  
4 formally for the record. I'll start with Mr. Reynolds.

5 MR. REYNOLDS: Mr. Chairman, I'm William Bradford  
6 Reynolds of the firm of Shaw, Pittman, Potts, and Trowbridge  
7 here representing the permittee, Union Electric Company.  
8 With me are Mr. John L. Carr and Mr. Alan J. Weisbar of the  
9 same firm.

10 CHAIRMAN ROSENTHAL: Thank you, Mr. Reynolds.  
11 Mr. Bancroft.

12 MR. BANCROFT: Mr. Chairman, my name is Michael  
13 Bancroft. I'm with the Public Citizen Litigation Group  
14 representing William Smart, the intervenor, and with me  
15 is Diane Cohn.

16 CHAIRMAN ROSENTHAL: Thank you, Mr. Bancroft.  
17 Mr. Murray.

18 MR. MURRAY: I'm James P. Murray, and I represent the  
19 United States Nuclear Regulatory Commission staff at this  
20 proceeding. With me today is Mr. Steven G. Burns who  
21 is a newly minted member of the bar. His appearance was  
22 entered in this proceeding yesterday.

23 CHAIRMAN ROSENTHAL: Thank you, Mr. Murray.  
24 Mr. Reynolds, you may proceed.

## 1 ORAL ARGUMENT ON BEHALF OF PERMITEE

2 BY MR. REYNOLDS:

3 Mr. Chairman, members of the board, as you have  
4 stated, the case comes to the appeal board today from an  
5 initial decision issued on September 28th by an Atomic  
6 Safety and Licensing Board growing out of a show-cause order  
7 that was issued on April 3rd by the director of the Office  
8 of Inspection and Enforcement at the Nuclear Regulatory  
9 Commission.

10 Without going into factual detail, it should be  
11 stated that this matter arose initially as the result of a  
12 firing on March 21st of 1978 by Mr. William Smart who was  
13 a construction worker at the Callaway construction site.

14 There is no dispute at all that Mr. Smart was  
15 terminated and discharged; the day after his discharge his  
16 union initiated grievance proceedings under the existing  
17 contractual arrangement that the union had with the  
18 contractor.

19 Those grievance proceedings called for a series  
20 of steps and they progressed in parallel or in tandem with  
21 the proceeding before this agency. On March 30th, I guess  
22 it's a little more than a week after Mr. Smart was  
23 terminated, the NRC sent inspectors to Daniel Construction  
24 Company, the contractor on the job, asking for access to  
25 records, personnel records, and actual personnel at the

1 work site to investigate this firing.

2 There is no dispute that the NRC inspectors  
3 were denied access to records.

4 MR. FARRAR: Is there any dispute, Mr. Reynolds,  
5 about whether your people asked if they had a warrant at that  
6 time?

7 MR. REYNOLDS: They did not ask if they had a  
8 warrant at that time. They did deny access, and I guess there's  
9 also no dispute that no warrant was presented at that time.  
10 They were refused access of the records and the personnel for  
11 the purpose of this investigation into the firing, and  
12 their response was a show-cause order that I mentioned issued  
13 on April 3rd that went to hearing before the Licensing Board  
14 and on stipulated facts, as the Chairman has stated.

15 The central legal that was raised and argued  
16 before the Licensing Board was, as stated by the Chairman,  
17 whether there was legal authority for this occasion to  
18 investigate a disciplinary action by an employer of an  
19 employee when there is a claim that the action by the  
20 employer was discriminatory or retaliatory due to the  
21 employee's statements from time to time to the Commission of  
22 safety concerns that related to the construction that was  
23 going on at the site.

24 There is no dispute here that Mr. Smart prior to  
25 his termination had from time to time spoken to the NRC,



1       voiced safety concerns about the construction work. There is  
2       no dispute that those safety claims were investigated by the  
3       NRC; I think that the record, such as it is, and there's  
4       a report, one report, that was received by the Licensing Board,  
5       indicates that some of the claims made show that there were  
6       deviations.

7               They were of an unsubstantial nature, and the  
8       NRC inspectors concluded after their investigation that  
9       nothing that was brought to their attention or that they  
10      had investigated warranted suspension of the permit. The  
11      position of Union Electric Company and Daniel Construction  
12      Company is that the investigation of disciplinary action of  
13      this sort is not within the authority of this agency.

14             There is no real argument, I believe, that the  
15      statutory framework under the Atomic Energy Act and also  
16      under the Energy Reorganization Act contains no specific  
17      authorization to the NRC to engage in investigations relating  
18      to alleged discriminatory firing of employees.

19             MR. SALZMAN: Mr. Reynolds, there's no doubt but  
20      that the NRC investigators can check into circumstances of  
21      unsafe construction practices.

22             MR. REYNOLDS: I think that's correct. There's no  
23      doubt that they can, and I think there's also no dispute  
24      that they've been fully able to do that.

25             MR. SALZMAN: Well, Mr. Reynolds, does a dismissal

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1 of an employee who has been reporting, correctly or  
2 incorrectly as the case may be, that his company may have  
3 or may be engaged in unsafe practices? Does that raise a  
4 reasonable inference that the company's dismissing of such  
5 an employee may be attempts to cover up those practices?  
6 It's not an unreasonable assumption.

7 MR. REYNOLDS: Let me accept that that's not  
8 unreasonable. I think that there could be a number of  
9 explanations why he might be dismissed.

10 MR. SALZMAN: That's true.

11 MR. REYNOLDS: I will accept that it's not  
12 unreasonable for one to assume, sitting in the Office of  
13 Inspection and Enforcement, for example, that this could  
14 perhaps indicate a coverup; I guess that if your question,  
15 your follow-on question is whether that is a sufficient  
16 predicate to inspect the firing, I think that that is a quantum  
17 leap which at least I have some difficulty making.

18 I don't think --

19 MR. SALZMAN: Well, Mr. Reynolds, what is your  
20 difficulty? The Commission has authority to investigate  
21 unsafe construction practices; the firing of someone who has  
22 been reporting the practices as possibly unsafe leaves a  
23 reasonable inference that the company may be attempting to  
24 hide its unsafe construction practices, and there's nothing  
25 in the statute that says that because some unsafe practice

1 may also arise in the context of a labor dispute, the  
2 Commission is suddenly barred from investigating it.

3 MR. REYNOLDS: I agree with that, and I really  
4 don't want to reduce this to an argument of labels; that is,  
5 it's a safety investigation versus a labor investigation.  
6 I think perhaps you've got the right question that was asked  
7 at the wrong time in the wrong place.

8 If the Office of INSpection and Enforcement had  
9 focused their inquiry or their inspection in that direction,  
10 I think that perhaps --

11 MR. SALZMAN: No, no. Let me follow -- you're  
12 assuming I've made the wrong predicate. It seems to me you  
13 made a mistake. It's now your assumption and not mine.  
14 Perhaps I'll go one step further then. Is it not reasonable  
15 for the Commission to assume that a contractor who might be  
16 engaged in the course of firing people who reported unsafe  
17 practices is not the sort of contractor that ought to be  
18 building nuclear power plants, which are dangerous if not  
19 properly constructed.

20 And why, therefore, cannot the Commission investigate  
21 this firing as a first step in determining whether this is  
22 the kind of contractor who should be engaged in this dangerous  
23 business?

24 MR. REYNOLDS: What your assumption is, as I  
25 understand it, that there may well be a policy or practice by



1 this contractor of retaliating against employees who give  
2 information of the sort Mr. Smart was giving, be it valid or  
3 invalid, to the NRC.

4 MR. SALZMAN: It may or may not be.

5 MR. REYNOLDS: My response to that is: I think  
6 that the Commission can look into that. I think it has  
7 authority to look into that. I think the proper way to do it  
8 is to issue a show-cause order, and the show-cause order would  
9 be directed, I think more appropriately, under 206 of the  
10 Energy Reorganization Act.

11 There is a reporting requirement that all the  
12 companies have and the contractors have to report defects  
13 on a regular basis to the Commission, and it seems to me that  
14 if you have some reason to believe that a contractor is  
15 undermining his reporting responsibility or jeopardizing it  
16 or not properly fulfilling it, that the proper course is  
17 to issue a show-cause order and to go to the Commission and  
18 say, "I have reason to believe that this contractor is not  
19 doing it."

20 CHAIRMAN ROSENTHAL: Wait a minute. Excuse me,  
21 Mr. Reynolds. Isn't that institution of a show-cause  
22 proceeding a little premature if the Office of Inspection and  
23 Enforcement is able at a particular point to say no more  
24 that it is possible that the dismissal was a retaliatory  
25 measure?

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1           Isn't it a responsible course for Inspection  
2 and Enforcement to conduct an investigation to determine  
3 whether there was in fact any causal relationship between the  
4 dismissal and the actions of the employee in calling to  
5 the attention of Inspection and Enforcement certain alleged  
6 safety irregularities.

7           And if that investigation suggests that a causal  
8 relationship exists and moving forward to seek the  
9 institution of a show-cause proceeding --

10           MR. REYNOLDS: I think it may be premature in  
11 this instance, but I think that really raises the  
12 authority question. I guess that I would feel that there  
13 should be some reasonable indication of a pattern of practices  
14 by the employer. It goes to a discriminatory behavior.

15           MR. SALZMAN: How would you establish the pattern  
16 here without investigating the firing?

17           MR. REYNOLDS: I think that really comes to the  
18 forefront of the issue. We had a grievance proceeding in  
19 this case. We now have legislation newly passed that says  
20 if an employee feels he's been discriminated against, he  
21 can take his claim to the Department of Labor for  
22 an investigation and a hearing. It's not that the employee  
23 now is unprotected. It seems to me --

24           CHAIRMAN ROSENTHAL: The grievance procedure may  
25 not reach the question that the Commission is interested in,

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1 which is whether there was at bottom retaliatory action  
2 involved; in this case, as I understand it, the arbitrator  
3 who didn't have before him these records that the NRC  
4 inspectors were seeking, determined simply that there was  
5 an insufficient showing that Mr. Smart heard and  
6 comprehended the foreman's order which he was allegedly  
7 dismissed for failing to comply with.

8 Now, that didn't reach this question, did it,  
9 as to whether in fact there was a retaliatory action involved  
10 here. And that's the question that the Commission is interested  
11 in.

12 MR. REYNOLDS: I think that's right. I don't  
13 think though that that would be the case under the new  
14 legislation where the focal point for grievance procedures  
15 before the Department of Labor is discriminatory firing. I  
16 mean, that is the core of the Department of Labor's inquiry  
17 from henceforth under the new legislation.

18 I think with respect to the grievance proceeding  
19 here, you're right. And under that kind of a grievance  
20 proceeding, perhaps, it might not reach it, but what I am  
21 suggesting is you asked me whether the show-cause might be  
22 premature.

23 I still come back to the point that I think that  
24 what the NRC is telling us in this case is that there is a  
25 safety related concern with respect to activity of this sort

1 by the employers because it suggests -- I really think it's  
2 what they come down to and it's what Mr. Salzman was saying --  
3 because it suggests, perhaps, that there is a pattern of  
4 activity out there, a pattern of practices whereby the  
5 employer wants to discriminate or intends to discriminate  
6 against any workers who talk to the NRC about discrimination.

7 CHAIRMAN ROSENTHAL: There isn't a pattern. Let's  
8 say that this is an isolated instance.

9 MR. REYNOLDS: I think this is an isolated instance.

10 CHAIRMAN ROSENTHAL: Well, assume that for a  
11 moment. Why wouldn't the inspectors justifiably be  
12 interested in pursuing this as a safety matter, not as a  
13 matter of resolving a labor dispute, but as a safety matter  
14 because of, one, the possibility that even though this  
15 may be an isolated matter or instance, it nonetheless does  
16 reflect upon a managerial attitude; or two, because it --  
17 isolated though it may be, could have a chilling effect upon  
18 other employees who similarly believed there to be  
19 construction irregularities coming as did Mr. Smart to the  
20 inspectors.

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1 MR. REYNOLDS: Let me say, first, in terms of  
2 managerial attitudes, I am not sure what the link is to safety  
3 there.

4 MR. FARRAR: Mr. Reynolds, as you develop that, let  
5 me ask you, that you are not sure what the link is, or rather  
6 for you to win the case doesn't it have to be absolutely  
7 certain that there is no link? Isn't the possibility of the  
8 link enough? You say you're not sure.

9 MR. REYNOLDS: I would have to say this: that  
10 probably I would have given the licensing board a little  
11 different answer than I am now going to give you because I  
12 have new legislation that I am looking to, and I am not so  
13 sure that the absolute certainty there is not crucial in light  
14 of the fact that there is, I think, much less truism to the  
15 argument of chill.

16 When I am looking at legislation that is now in  
17 place that tells all the employees out there that if they're  
18 concerned at all about discrimination in any practices,  
19 disciplinary practices, because they're going to the NRC, they  
20 can go to the Department of Labor and it can investigate the  
21 full thing and it can have a hearing.

22 MR. SALZMAN: Mr. Reynolds, what do you make of the  
23 statements quoted in the Commission's brief in which  
24 Senator Hart indicates that this legislation is not to change  
25 any preexisting authority of the Commission to investigate

pv 1 similar matters?

2 MR. REYNOLDS: I guess I agree it doesn't change  
3 any preexisting authority. It leaves open the question of  
4 exactly what that authority was. I tend to think --

5 MR. SALZMAN: But it does undercut your reliance on  
6 the statute somewhat. This is a firing that took place before  
7 that statute existed.

8 MR. REYNOLDS: Well, I guess I disagree with  
9 Senator Hart in terms of how he read the existing statutes. I  
10 don't believe -- again, it's one man's opinion --

11 MR. SALZMAN: Senator Hart doesn't read existing  
12 statutes. He says this new statute doesn't derogate from any  
13 previously existing authority. You can't rely on this new  
14 statute to say that the Commission has no authority.

15 MR. REYNOLDS: No, I am sorry, I misunderstood you.  
16 I am saying I do not agree with Senator Hart that the existing  
17 statutes contain sufficient authority for an independent  
18 investigation of this kind of a firing by the NRC.

19 I think that where the authority is in the statute  
20 is much closer to the kind of situation that you were positing  
21 where one might assume a pattern of practices by an employer  
22 which is designed to cover up, if you will, safety matters  
23 that should be brought to the attention of the NRC.

24 MR. SALZMAN: Mr. Reynolds, your argument is  
25 interesting, but every pattern starts with the first dot, and



ov 1 in this area I think that the Commission is forever being  
2 jumped upon for not starting instantly the first time it has a  
3 suspicion.

4 MR. REYNOLDS: I think that's right, but, again, I  
5 come back to -- and I was trying to answer it -- I don't see  
6 on an isolated matter, where I have one firing, what the  
7 suggestion, what the need is to look into that firing from a  
8 safety standpoint as opposed to taking care of the labor  
9 dispute.

10 MR. FARRAR: Is the question whether you see the  
11 need or whether any rational investigator could possibly see  
12 the need?

13 MR. REYNOLDS: I will have to take on the argument  
14 in terms of "any rational investigator." I am hoping that I  
15 am acting rationally and responsibly in my argument. I am not  
16 trying to say that just because I don't that ends it.

17 I think, if there is a managerial attitude --  
18 getting back to the Chairman's question -- you've got an  
19 isolated firing and it tends to reflect a managerial attitude  
20 and they want to examine to see whether or not management is  
21 in fact firing people for going to the NRC.

22 I guess my problem is: I don't, as a reasonable  
23 advocate -- and I don't see the safety-related aspect to that;  
24 there is legislation and regulations now that are in place  
25 that impose on all the companies and all their contractors and

pv 1 everyone else to report everything that they hear about safety  
2 defects or discrepancies to the NRC.

3 I am not sure -- well, let me be a little more  
4 positive. I don't think, if the NRC is telling us that that  
5 is being done responsibly, if I have an isolated firing of  
6 somebody and it's determined that it's because he didn't go  
7 through channels of command but he went out on his own. I am  
8 not so sure that the managerial attitude there gives me any  
9 cause for concern on the safety side.

10 MR. FARRAR: Well, that may be true on merits, but  
11 remember, this poor investigator gets a report some poor  
12 fellow has been fired allegedly for whistleblowing. The  
13 investigator doesn't know anything about it.

14 MR. REYNOLDS: That's right.

15 MR. FARRAR: He doesn't know what the managerial  
16 attitude is -- good, bad, or indifferent. He wants to find  
17 out why. Now, maybe --

18 MR. REYNOLDS: I guess the question is --

19 MR. SALZMAN: Isn't the obvious reason that he wants  
20 to find out that if he turns up one case in which you fired  
21 somebody for reporting somebody to the NRC, that might be  
22 cause to start a full-scale investigation to see that there  
23 isn't a pattern in this thing. In other words, this is the  
24 first thread. Once he turns up the first thread, then there  
25 are a number of good reasons for doing what you say.



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pv 1 MR. REYNOLDS: Let me ask you this: I have now got  
2 the Department of Labor that is going to look at that.

3 MR. FARRAR: No, no, you have the Department of  
4 Labor only if Mr. Smart or people like him don't get  
5 discouraged and say, "Hey, I am going to work somewhere else.  
6 You know, I don't need any more of this hassle." Mr. Smart  
7 may now have the Department of Labor in addition to his  
8 grievance procedure.

9 Mr. Murray's people don't have the Department of  
10 Labor. Mr. Smart leaves town. The problem may be just as big  
11 in Mr. Murray's eyes. When Mr. Smart is gone, he doesn't want  
12 to prosecute. Why can't Mr. Murray's people continue to look  
13 into it? It's far more important for them than for Mr. Smart.  
14 It's a big personal hardship on Mr. Smart.

15 MR. SALZMAN: The Labor Department doesn't have  
16 inspectors on the site or regular visits to the site, that I  
17 know of.

18 MR. REYNOLDS: No, but the NRC does.

19 I guess that I come back to -- I don't want to  
20 argue in terms of isolation and pattern, but the safety link,  
21 it seems to me, is one of two things, as I have heard it from  
22 the other side, I think as the questions indicate today:  
23 Either we must investigate to find out if this was a  
24 retaliatory firing because it could give us an indication of  
25 company attitude to cover up, if you will, defects in

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pv 1 construction; or I think the alternative argument is that we  
2 must investigate because we have to do something in order to  
3 make sure there's no chill on others who would go out there  
4 and talk with us.

5 And I guess where I come out on the safety side is  
6 I think that in those, I think that if you've got a procedure  
7 in place where labor disputes are decided, that the NRC's  
8 business is to await the outcome of those and determine at  
9 that point whether it feels that it should initiate some  
10 action against the employer.

11 MR. SALZMAN: Private systems, or only public  
12 systems? In other words, a union-company grievance system is  
13 enough to oust the NRC from any reasonable right to inquire?

14 MR. REYNOLDS: I guess I am not saying that it's  
15 ousting it. I am saying that the outcome of the labor  
16 grievance proceedings should be the triggering mechanism for  
17 whatever action the NRC takes.

18 MR. SALZMAN: We have a private proceeding  
19 involving this man, and the arbitrator who, from reading his  
20 opinion, strikes me as a rather knowledgeable and intelligent  
21 fellow, makes a big point at the end of his case, saying  
22 basically, "Because the matter wasn't brought before me by the  
23 company, I am not going to go any further in what appears to  
24 be on its face to be some suggestion that the company was in  
25 fact trying to force this man out and did not in fact hire

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pv 1 him back, from which one could make a reasonable inference that  
2 in fact they were firing him because he was a whistleblower."  
3 The arbitrator simply puts it down and says, "That's not for me  
4 to decide. I decide on some other grounds."

5 But doesn't that show on its face the imperfection of  
6 any such system where the arbitrator jurisdiction is limited?  
7 If this were an NRC investigation, I doubt very much if he  
8 would have stopped from going there. He would have insisted  
9 on some explanations, I would think, of earlier statements by  
10 the company.

11 That's the real problem: The arbitrator's focus  
12 is, is it not, on whether this man ought to be put back on his  
13 job? The NRC's focus is on whether or not this is some  
14 indication of unsafe building practices in a construction firm  
15 building a plant which is potentially dangerous if not  
16 properly designed. And that seems to me, similarly, the fault  
17 in the Labor Department's investigatory problems under this  
18 new statute. It, too, is focused on putting the employee  
19 back. But the Commission's mandate isn't putting the employee  
20 back; the Commission's mandate is making sure the plants are  
21 safely built. And I don't see anything in the statute or any  
22 statement anywhere that because an unsafe practice arises in  
23 the context of a labor dispute that the labor-dispute  
24 resolution takes precedence over the safety.

25 MR. REYNOLDS: I think that's right, but I guess

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pv 1 that what that assumes is that an unsafe practice has arisen  
2 in the course of a labor dispute, and I think that's what you  
3 have to assume in order to get your argument into the broad  
4 language of the sections that are being relied upon.

5 CHAIRMAN ROSENTHAL: Mr. Reynolds, in order to  
6 determine whether there is a potential safety problem --

7 MR. REYNOLDS: No, I am not, because I have full  
8 investigating authority -- "I" being the NRC. The NRC has  
9 full investigatory authority to determine whether there is a  
10 safety problem or safety defects out of that plant. They can  
11 put people out there, as many or as few as they want, as often  
12 or as irregularly as they want --

13 MR. FARRAR: Wait, wait, Mr. Reynolds.

14 MR. REYNOLDS: -- And they can follow up on all  
15 claims.

16 MR. FARRAR: Mr. Reynolds, we would like to believe  
17 that the staff inspectors are infallible and will uncover  
18 everything, but we all know what the truth is: There aren't  
19 enough of them. Let's assume every one of them is working 110  
20 percent of capacity and is as good an inspector as you can  
21 find. There aren't enough of them to go around. They have  
22 trouble checking one or two percent of the paperwork, much  
23 less one or two percent of the physical work that's being  
24 done. So, let's not stand here and say we don't have to worry  
25 about this because the staff inspectors are so good and there

1 are so many of them that nothing will escape.

2 MR. REYNOLDS: I wasn't saying -- I didn't mean to  
3 say that.

4 MR. FARRAR: If we can't say that, aren't they  
5 entitled to say, "We need all the help we can get. We can't  
6 afford to leave any stones unturned"?

7 MR. REYNOLDS: I think they're entitled -- I mean,  
8 I guess that that really trips you over into the  
9 chilling-effect argument; I am not sure. They have a  
10 regulation that encourages everybody to come forward who's  
11 working out there. If nobody comes forward, their safety  
12 investigation of this plant is going to be -- however good it  
13 is, depending on what their manpower efforts are, and I can't  
14 and you can't and I don't think the staff can require all the  
15 people out there to come forward. They can encourage it, but  
16 it's less than an imperfect monitoring system, and it's  
17 because of the way it's set up.

18 I think at one point this board said that anybody  
19 could recommend more or other ways to do it, but that's the  
20 way the system is now structured, and the board indicated they  
21 were not going to fault it because it was not set up in a  
22 different way.

23 CHAIRMAN ROSENTHAL: Now, Mr. Reynolds, is it the  
24 case that in order to sustain your position, we must conclude  
25 that there is no rational basis for believing that there is a

pv 1 possible safety link between the dismissal and the cause of  
2 that dismissal. In other words, that in those circumstances  
3 could it be concluded that if, in fact, this employee had been  
4 dismissed as a retaliatory measure, there were safety  
5 implications to that action on the part of the employer? Is  
6 that what we have to conclude?

7 MR. REYNOLDS: Can you give it to me? I think I  
8 heard you, but I want to be sure.

9 CHAIRMAN ROSENTHAL: What I want to know is whether  
10 we have to conclude that even if Mr. Smart, in this instance,  
11 had been dismissed as a retaliatory measure, having gone to  
12 the NRC inspectors with his report of alleged construction  
13 deficiencies, there is no possible safety implication  
14 attendant upon that now assumed fact, the fact that the NRC  
15 wished to investigate to determine whether it was a fact? We  
16 have to agree with you that there is no safety link there at  
17 all in order to sustain your position that there is no  
18 authority.

19 MR. REYNOLDS: Can I ask you as opposed to what, or  
20 do you want me to fill that in?

21 CHAIRMAN ROSENTHAL: No, you're telling us that the  
22 NRC can't investigate because this is not a safety matter, and  
23 you've conceded that the NRC can look into safety matters.  
24 And I am just asking you whether you may believe there's no  
25 safety link, but I am asking you whether we have to conclude



pv    1     that a reasonable man could not find a safety link between a  
2       dismissal as a retaliatory measure and the protection of the  
3       public health and safety through a well-built plant?

4           MR. REYNOLDS: I think I would be less than candid  
5       if I didn't answer you by saying, yes, that would be what you  
6       would have to conclude, that if they were looking into this  
7       and they were to find that it was a retaliatory firing, that  
8       the authority question, as the statute is now written, I think  
9       that the authority question could be resolved in their favor,  
10      unless one could say that the retaliatory firing provided no  
11      safety.

12           Did we get it backwards, or did I say it right?

13           I think the problem I have is that this is the only  
14      legislation that I am aware of that, up until very recently,  
15      did not address this question in terms directly of  
16      discriminatory treatment of employees. Congress has not done  
17      that. And I think what we're now doing is we're trying to say  
18      can we engraft on the general provisions which Congress put in  
19      which says the responsibility of this agency is public health  
20      and safety, can we graft on that an intent or can we read into  
21      that an intent that if we have a firing where the claim is  
22      discriminatory and intend for the agency to get into that and  
23      look at it because we can run through a series of assumptions  
24      which lead us to some kind of a safety link?

25           MR. FARRAR: Mr. Reynolds, I am glad you came back

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pv 1 to that because at the very beginning of the argument you  
2 seemed to take some comfort in the fact that there were no  
3 special provisions in the Atomic Energy Act to deal with labor  
4 disputes, there was only this blanket provision. But that  
5 blanket provision says, if I may paraphrase it: "Do  
6 everything you can to protect health and safety." Now, with a  
7 blanket provision like that, who needs any specific statutory  
8 authority? There is nothing in there that excludes labor  
9 disputes; there is nothing in there that excludes, to my  
10 knowledge, any kind of safety dispute.

11 The cases you cite where the courts found the  
12 Commission's jurisdiction limited dealt with environmental  
13 matters and anti-trust matters. Never has there been a court  
14 decision that I am aware of, any sort of decision, that in any  
15 way limits the Commission's authority to protect health and  
16 safety.

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1 How then can you take any comfort at all in the  
2 terms of that statute?

3 MR. REYNOLDS: I'm not so sure how much comfort.

4 MR. FARRAR: You started out your argument saying  
5 there's nothing specific about a labor dispute.

6 MR. REYNOLDS: If there were something specific,  
7 it seems to me that we may not be here. What I'm saying is  
8 that the only reason we're here is we have very broad language  
9 in the statute.

10 The argument, it seems to me, that is before the  
11 Court is whether that broad language gives this agency the  
12 ability to step in and investigate, let's say an assumed or  
13 alleged retaliatory firing.

14 MR. SALZMAN: Mr. Reynolds, you're suggesting that  
15 Section 19.17C, or 16C, of the Commission's regulations, that  
16 read -- "No licensee shall discharge or in any manner discrimi-  
17 nate against a worker because that worker files a complaint, or  
18 institutes or causes to be instituted any proceeding."

19 That section is beyond the Commission's authority.

20 MR. REYNOLDS: I don't think it is now because of  
21 the new legislation. I think it may well have been beyond its  
22 authority at the time.

23 MR. SALZMAN: It's been on the books for five years,  
24 I understand, at least three, and no one's complained about  
25 it.

1 MR. REYNOLDS: Okay, but I'm not sure that that's  
2 a test of whether it is or is not.

3 MR. SALZMAN: It's a test in the sense that this  
4 Commission --

5 MR. REYNOLDS: I don't know if it's been tested yet.  
6 I don't even know if it's come up.

7 MR. SALZMAN: A lot of cases have pointed out that  
8 since the Commission's regulations are gone over with a  
9 proverbial fine-tooth comb, and that was in place at the  
10 time when the Joint Committee on Atomic Energy was there, and  
11 there were no debates or suggestions to the Joint Committee  
12 that that was inappropriate, I'll grant you that it may not apply  
13 to a construction situation as distinguished from an operating situation.  
14 But certainly, if that situation is valid, it indicates the  
15 existence of Commission authority.

16 I know no reason in administrative law why the  
17 Commission is required to answer any problem by a blanket  
18 regulation and can't proceed, as apparently, it's doing here  
19 on a case-by-case basis.

20 In other words, do we need a similar regulation on  
21 the side where construction is involved, rather than operating  
22 plants.

23 It can be answered by, well, let's see what experience  
24 we have. We'll see from case to case. That's lawful practice  
25 for an administrative agency. Labor law does it all the time.

gsh 3

1 I would use that citation.

2 MR. REYNOLDS: I don't argue with anything you've  
3 said. I still don't know that all of that does not suggest  
4 to me any authority for saying that that regulation is or is  
5 not authorized by the statute.

6 I think that the argument for or against that  
7 authorization of that regulation is similar to the one here.  
8 And what you come down to is whether a claimed retaliatory  
9 firing has a sufficient safety nexus to allow the NRC to  
10 investigate.

11 MR. SALZMAN: That's an old chestnut. The Commission's  
12 interpretation of its own statute is embodied in its own  
13 regulation and is usually accepted, unless you can show some  
14 really good reason why it shouldn't be.

15 MR. REYNOLDS: I know that. I just don't know that  
16 that particular regulation has ever been called into question  
17 as to whether it is or is not authorized.

18 MR. SALZMAN: It hasn't been, but the regulations  
19 were submitted to Congress. I know that. They all are. It  
20 may not be for their formal approval on paper, but surely,  
21 the Joint Committee sees every regulation, or it did, that  
22 went out. It's been noted many times.

23 CHAIRMAN ROSENTHAL: Mr. Reynolds, you have about  
24 four minutes.

25 MR. FARRAR: Let me ask Mr. Reynolds, you were talking

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1 deferring, whether or not it's a jurisdictional point. But  
2 deferring to the private arbitration, or the Secretary of  
3 Labor, under the statute, how long did the arbitration take  
4 from beginning to end in this case?

5 MR. REYNOLDS: March to November, was about six months.

6 MR. FARRAR: What's the time limit on the Secretary  
7 of Labor?

8 MR. REYNOLDS: I have no idea.

9 MR. FARRAR: It seems to me there was a 90-day  
10 period.

11 MR. REYNOLDS: I don't know.

12 MR. FARRAR: Suppose we were thinking about deferring  
13 to them. Can the staff always wait that long? A lot of  
14 concrete can be poured over a lot of defects in six months,  
15 or 90 days. I'm not saying that the staff or any government  
16 agency always moves with the speed of light, but there may  
17 be instances in which they feel they have to move very rapidly.

18 Again, isn't it possible? The investigator says,  
19 "I can't wait 30 days, or 60 days, or 6 months. Based on  
20 my judgment and experience, or intuition, or whatever, there's  
21 something serious here and I've got to get at it before a  
22 lot more work is done."

23 MR. REYNOLDS: Well, I come back to what I said at  
24 the outset, and I still think it's the right way for this  
25 agency to proceed in this matter. Maybe I haven't been

1 convincing enough.

2 I think it can be handled much more expeditiously  
3 and more properly under the existing statute. If the agency  
4 feels that the reporting is not being done, there is some  
5 undermining, there is some policy in the company, there is  
6 some practice that is not getting the information to the  
7 agency.

8 If that's what it's concerned about, whether they  
9 label it "chill" or "practice," or what have you, they have  
10 ample authority under the existing statute in the regulations  
11 to come to the company with whatever their charges are in  
12 that regard. They don't need to take an intermediate step.

13 MR. FARRAR: And then what will happen? Let's say  
14 I agree with you. They come to the company. They file a  
15 show-cause order that you talked about and the company answers.  
16 Where does it go, then? It goes to the commission. And  
17 the commissioners will sit there and they will say to Mr.  
18 Murray's people, "Here's the company's answer. What do you have  
19 on these people? Should we issue, you know, go ahead with  
20 this thing, set it up for a hearing. And Mr. Murray's people  
21 will say, we don't know what we have on it."

22 MR. REYNOLDS: They can subpoena records under that.  
23 That's exactly the way the procedure works.

24 I guess what I'm getting to is, if you're really looking  
25 for that kind of information, you're not concerned about the

gsh 6

1 records of William Smart. What you're concerned about is the  
2 practices, procedures, policies toward the employees that  
3 the employer is taking. That's what you want to get to.

4 If you're worried about a chill out there and whether  
5 or not anybody's responding, you want to get the information  
6 which goes well beyond the personnel records of William Smart.

7 MR. FARRAR: Okay, what do you want to get?

8 MR. REYNOLDS: I think what you want to get is you  
9 want to get what the employer practices are of the company  
10 vis-a-vis anybody who may have talked.

11 MR. FARRAR: Can you ask the employees, for one  
12 thing?

13 MR. REYNOLDS: That is one way to do it, I think  
14 for the purposes of determining a chill.

15 MR. FARRAR: Okay. Ask the employees.

16 MR. REYNOLDS: I think you can also ask the employer.

17 MR. FARRAR: Well, if you ask the employees and they  
18 say, wait a minute. I'm not going to come over to your house  
19 or your office to talk to you, because the last guy who came  
20 over there, you promised him you would take full steps to  
21 protect him in his job, and now, without even pushing it,  
22 you've said you don't have any authority.

23 MR. REYNOLDS: Let me just say something about the  
24 process, because I think it's really wrong for this board to  
25 rest on that or put any credence on that at all. That's not



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1 part of this record. I don't know whether a promise of  
2 that sort was made or was not made, but it's certainly not an  
3 element of this particular case.

4 MR. FARRAR: I was going to ask other people that.

5 MR. REYNOLDS: We have a stipulation of facts and  
6 it came up for the first time in briefing of counsel. I  
7 didn't know about the promise and I don't think it's really a  
8 part of this case.

9 All I'm saying is I think that the safety link goes  
10 to whether or not sources of information are being dried up  
11 because there's a monitoring factor which everybody recognizes  
12 cannot be done solely by the inspectors out there as  
13 effectively as it can be done if they had the assistance  
14 of workers.

15 That's a legitimate concern.

16 MR. SALZMAN: Mr. Reynolds, let me follow up my  
17 previous line of inquiry.

18 Suppose Mr. Murray's people had come forth with a  
19 subpoena which requested the same information which they  
20 now seek to demand by inspection. Wouldn't your company have  
21 resisted that subpoena on an identical ground? Wouldn't it  
22 just throw the agency into the courts and put it into the  
23 position of insisting that some courts should enforce the  
24 subpoena?

25 MR. REYNOLDS: To be honest with you --

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1 MR. SALZMAN: If they had issued an administrative  
2 subpoena, would the battle be over?

3 MR. REYNOLDS: I think we could have gotten a  
4 protective order and an arrangement similar to the one this  
5 board entered into.

6 MR. SALZMAN: Mr. Murray is not willing to agree to  
7 any protective order in this case? Does that sort of  
8 argument fall back on that?

9 MR. REYNOLDS: You asked me a hypothetical and I'm  
10 not sure. They might have resisted. I won't say they wouldn't.  
11 But I think that the chances are, the real concern here from  
12 day 1 was an overlapping investigation with one that was  
13 already going on under the union grievance proceeding. And  
14 I don't think that if things had been handled under the  
15 subpoena route --

16 I think, well, I go back --

17 MR. SALZMAN: Let me ask you another one. Your time  
18 is short. You've given us a list of statutes similar to the  
19 one just enacted by the NRC. Under that list of statutes --  
20 I've gone through them all -- I haven't been able to come up  
21 with any case that holds that because that statute is being  
22 utilized, any other authority to investigate similar firings  
23 is barred.

24 In other words, is there any authority for suggesting --

25 MR. REYNOLDS: No. I can't say -- my argument here is



7sh 9 1 not that that statute precludes this argument, or moots --  
2 because it says that's the only way that authority rests.

3 What I'm saying is that I don't eliminates it in  
4 either respect. I still think there is the responsibility  
5 for this board to find that under the existing statutory  
6 frame-work, there's a sufficient nexus to safety that the  
7 NRC can go ahead and go forward on a parallel course. And  
8 I recognize that.

9 Under the new statute, I'm not saying that that  
10 new statute takes away any authority that might otherwise  
11 exist.

12 That's why I'm saying I really wasn't at issue with  
13 Mr. Hart, except as he reads the existing statute. Unfortunately,  
14 my time is up.

15 CHAIRMAN ROSENTHAL: Your time has expired. We'll  
16 give you a few minutes for rebuttal, but I think that's  
17 covered in your brief.

18 Mr. Bancroft?

19 ORAL ARGUMENT ON BEHALF OF INTERVENOR

20 MR. BANCROFT: Mr. Chairman, members of the board,  
21 William Smart appeals the decision of the licensing board not  
22 to decide the question of whether the NRC has the authority to  
23 protect a construction worker who provides safety information  
24 to the NRC.

25 CHAIRMAN ROSENTHAL: Why isn't that question moot in

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1 the context of Mr. Smart? The arbitrator has ordered him  
2 restored to his employment. I assume that he has been so  
3 restored.

4 MR. BANCROFT: No.

5 CHAIRMAN ROSENTHAL: He has not been restored?

6 MR. BANCROFT: He is back working on the site at  
7 the Callaway plant, but not in a government job. He is still  
8 suffering from the effects of his firing. He's on a job which  
9 is not consistent with his previous job, or with his seniority.

10 CHAIRMAN ROSENTHAL: Is this consistent with the  
11 relief which the arbitrator gave him?

12 MR. BANCROFT: No, it's not. The arbitration  
13 decision, in Mr. Smart's view, has not been fulfilled.

14 MR. FARRAR: That's neither here nor there.

15 MR. BANCROFT: That's right. But from that point  
16 of view of whether Mr. Smart has been completely satisfied --

17 CHAIRMAN ROSENTHAL: Well, no, that's not the point  
18 I'm making. If the arbitrator ordered him restored to his  
19 position with back pay, why, then, isn't it, so far as we're  
20 concerned, this issue moot? Because if the arbitrator's award  
21 has not been fully observed by the employer, it seems to me  
22 that Mr. Smart has his remedies there.

23 MR. BANCROFT: But it should still be of concern to  
24 the NRC that an example is still being made of Mr. Smart that  
25 he's a marked man on the project and he's out in a job where he's

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1 exposed to below zero weather and can only work two days a  
2 week.

3 MR. FARRAR: But let's make the case simpler for  
4 us. Suppose he was back doing exactly what the arbitrator  
5 told him. The arbitrator gave him his award, he's back at his  
6 old job, got back pay.

7 In that instance, why should we be concerned?

8 MR. BANCROFT: The other reason for concern is that  
9 the statements that were made by the council for the NRC staff  
10 during the argument of this case before the licensing board --

11 CHAIRMAN ROSENTHAL: Statements aren't blessed,  
12 with all due respect to Mr. Murray, with any presidential or  
13 other significance, are they?

14 MR. BANCROFT: No. But I think they were widely  
15 publicized, if the appeal board is concerned.

16 MR. SALZMAN: Mr. Bancroft, you're making statements  
17 of fact that are not in the record. As counsel, what authority  
18 do you have to make such statements? You agreed to a stipulation  
19 as to what the facts were here. Your going beyond the  
20 stipulation of facts strikes me as inconsistent with what  
21 you agreed upon.

22 MR. BANCROFT: I was talking about matters which  
23 have occurred since the stipulation of fact whether the case  
24 was moot or not. As the facts occur, the board has to rely.

25 MR. SALZMAN: As facts occur, the board only has to

12 1 rely on affidavits and evidence.

2 MR. FARRAR: Let him answer the question. Go ahead,  
3 Mr. Bancroft.

4 MR. BANCROFT: The statements of the position of the  
5 NRC staff, that it could do nothing to help Mr. Smart, were  
6 reported in the newspapers in Missouri.

7 CHAIRMAN ROSENTHAL: You raised an issue as to  
8 whether that is so or not. And the licensing board declined  
9 to consider that issue. And let us assume that, for present  
10 purposes, the issue, in a real sense, is now moot.

11 MR. BANCROFT: Is now moot.

12 CHAIRMAN ROSENTHAL: Assuming that. That's what  
13 Mr. Farrar asked you to assume, hypothetically.

14 MR. FARRAR: Wait. I asked him to assume that the  
15 man was back on the job where he was.

16 CHAIRMAN ROSENTHAL: All right. Well --

17 MR. FARRAR: That was my question: Does that make  
18 it moot?

19 MR. BANCROFT: From the point of view of Mr. Smart,  
20 it would make -- from the point of view of Mr. Smart, as he  
21 had intervened in this case, it would.

22 I would say from the point of view of him being on  
23 the job at Callaway and wondering who he could rely on for  
24 help. The stated position of the staff, unless that's reversed  
25 by this appeal board, would --

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1 CHAIRMAN ROSENTHAL: Do you think it's our function  
2 to render advisory opinions simply to cope with statements  
3 that a lawyer may have made during the course of the proceedings?

4 It seems to me that, offhand, we have a fairly heavy  
5 docket. It seems to me we could better utilize our time than  
6 engaging in that kind of exercise.

7 MR. BANCROFT: The point is it's not just a party,  
8 but it is the NRC staff. And there's no other way for Mr.  
9 Smart in this case to get that misapprehension corrected.

10 MR. SALZMAN: Why can't he write the commission and  
11 ask the commission if this is, indeed, their position? Either do  
12 it through Jim Murray, a counsel of the Commission -- write the  
13 General Counsel of the Commission and ask the General Counsel  
14 about it. It's certainly not true that there are no other  
15 avenues.

16 MR. BANCROFT: There's no other avenue for him to  
17 seek a formal ruling and to get one. I mean, he can write  
18 a letter and ask for an opinion. He may or may not get it.

19 MR. SALZMAN: That's true. He may or may not get it.

20 MR. BANC. FT: I agree, he may or may not get it  
21 from this board.

22 MR. SALZMAN: What problems would the licensing give  
23 you for not reaching the question?

24 MR. BANCROFT: It wasn't completely clear whether it  
25 was on grounds of rightness or on --

jsh 14

1 CHAIRMAN ROSENTHAL: I thought they concluded it  
2 was not within the four corners of the mandate which the  
3 board had received from the commission.

4 Wasn't that it?

5 MR. FARRAR: Isn't that a serious point, because while  
6 we can fool with the outer contours of mootness and prematurity,  
7 if the commission tells the licensing board, here is your job,  
8 maybe it was wrong to make it that narrow. Maybe it was right  
9 to make it that narrow.

10 But the commission says to a licensing board,  
11 here is your job. Do X, Y, and Z. Can the licensing board  
12 go beyond that?

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1 MR. BANCROFT: No, but the Licensing Board  
2 can address questions which would apply. If you look at  
3 the questions that were stated --

4 MR. FARRAR: Let's take this step by step. So  
5 you agree, if we can't find it in the Commission's order,  
6 express or implied, then the Licensing Board was right?

7 MR. BANCROFT: Yes.

8 MR. FARRAR: It was not expressed.

9 MR. BANCROFT: That's right.

10 CHAIRMAN ROSENTHAL: Okay, where do you find the  
11 implication?

12 MR. BANCROFT: The whole discussion that you had  
13 with Mr. Reynolds was likewise not expressly contained in  
14 the Board's order. The three questions that were stated  
15 were: was the investigation refused --

16 MR. FARRAR: That's not implied in that one.

17 MR. BANCROFT: Should the construction permit  
18 be suspended until the investigation is allowed; and,  
19 should the investigation be postponed pending the grievance  
20 procedure?

21 CHAIRMAN ROSENTHAL: Which of those three issues  
22 contains, in your judgment, the implication that the licensing  
23 board was free to go on to consider whether the Commission  
24 had the authority to order the reinstatement of Mr. Smart  
25 or it's to be determined that dismissal was a retaliatory

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1 measure?

2 MR. BANCROFT: Before I answer your question, I  
3 just wanted to say that the discretion of the authority of  
4 the NRC to conduct the investigation must have arisen  
5 by implication in one of those questions; I assume the  
6 second one.

7 CHAIRMAN ROSENTHAL: Maybe it did; maybe it  
8 didn't. But this is an entirely different question that  
9 you're trying to bring into the proceeding by way of  
10 implication. And I would be interested to know precisely  
11 where you find that implication.

12 MR. BANCROFT: I wouldn't find it in the three  
13 questions that were asked, but in the statement of the  
14 purposes of the investigation.

15 CHAIRMAN ROSENTHAL: But the Commission was very  
16 specific. They said: "The issues before the Atomic Safety  
17 and Licensing Board to be considered and be decided shall  
18 be" one, two, and three.

19 MR. FARRAR: Stating the purposes; they didn't  
20 state them as the Commission's own purposes. They stated  
21 that the staff gave these as the purposes, and then they went  
22 on to state them.

23 MR. BANCROFT: Well --

24 CHAIRMAN ROSENTHAL: Don't you have to find it  
25 really in the four corners of the Commission's statement of

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1 what the issues are?

2 MR. BANCROFT: I can only ask did the Commission  
3 ask the Licensing Board and the Appeal Board to consider the  
4 authority of the NRC to conduct the investigation?

5 MR. FARRAR: That may be the right track; is  
6 the question, issue one, everyone agrees?

7 MR. BANCROFT: The answer is yes.

8 MR. FARRAR: The investigation was thwarted or  
9 denied.

10 Then, number two, should you suspend the  
11 construction permits, turns in large measure on whether  
12 the investigation was authorized.

13 Obviously, if the investigation wasn't authorized,  
14 then you don't suspend the construction permits. So, I take  
15 it you have to tie your claim somehow into the authorization  
16 for the investigation. Is there any way that you can do that?

17 CHAIRMAN ROSENTHAL: Bearing in mind that the  
18 second question is in terms of whether the construction  
19 permit should be suspended, not whether certain other  
20 action should be taken, if the investigation is conducted  
21 and leads to a particular conclusion.

22 MR. FARRAR: Let me give you a hypothetical,  
23 Mr. Bancroft. If the Commission has the authority to reinstate  
24 workers who it finds, as may or may not be in this case, whom  
25 it finds were fired for retaliatory purposes, would that

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1 justify the investigation?

2 MR. BANCROFT: Yes, I think that that is a  
3 broader classification. Certainly, if it has the authority  
4 to order the reinstatement of a worker who was fired for  
5 retaliatory reasons, it has to conduct an investigation  
6 first as a necessary part of that.

7 MR. FARRAR: Then if we decided the question you'd  
8 like us to decide, that would go a long way, if we decided  
9 it in your favor.

10 Wouldn't that go a long way to deciding the  
11 question of question number two because the predicate for  
12 question number two, should the permits be suspended, I think  
13 we agreed was, was the investigation authorized.

14 Is the investigation authorized if they have the  
15 authority to reinstate the worker?

16 MR. BANCROFT: Yes. I would ask --

17 MR. FARRAR: Is that link too tenuous?

18 MR. BANCROFT: I would ask in considering  
19 this narrow question of whether the investigation can be  
20 conducted, what is the purpose of the investigation. If  
21 the purpose is to find out whether the safety functions of  
22 the NRC are being impaired by closing off their access to  
23 work resources.

24 MR. FARRAR: Suppose we concluded they couldn't  
25 do anything about that? What good is an investigation that

1 says, gee, we found all these terrible things, but there's  
2 nothing we can do about it?

3 MR. BANCROFT: That's the point I was trying to  
4 make; the --

5 MR. FARRAR: Let me follow that up. You never  
6 got to finish answering me on whether this case was moot  
7 as far as Mr. Smart was concerned, again, assuming that he's  
8 being given everything the arbitrator ordered.

9 MR. BANCROFT: Which is not the case; but you're  
10 asking that as a hypothetical. In that case, it would only  
11 be the reason for the Appeal Board to decide the question, is  
12 for its concern for the chilling effect and the appearance  
13 given to other workers at the Callaway site who see the  
14 example of William Smart.

15 Accounts were given that he was promised protection  
16 by the NRC. Then the NRC staff in the course of these  
17 proceedings --

18 CHAIRMAN ROSENTHAL: The stipulated fact is that  
19 was given --

20 MR. FARRAR: Before we go off on that, could I  
21 follow up on this? Is that you're saying, you're conceding  
22 it is moot as far as Mr. Smart is concerned, but it's not  
23 moot as far as the NRC staff is concerned?

24 MR. BANCROFT: It would be moot as far as Mr. Smart  
25 was concerned for the discrimination that he suffered last

1 year, but it is still of concern to him if we want to  
2 take Mr. Smart as a representative of the workers who are  
3 still working at the Callaway plant.

4 MR. FARRAR: Speaking of today or tomorrow?

5 MR. BANCROFT: Yes. Despite the passage of the  
6 new Section 210, the NRC and the NRC staff are the ones  
7 whom the workers have to deal with, and it's important  
8 for them to know that whatever the Department of Labor may  
9 do in the future -- and that is still an untried question  
10 mark -- the Department of Labor hasn't done anything yet  
11 to show its presence that that statute exists.

12 CHAIRMAN ROSENTHAL: Are you suggesting that  
13 the Department of Labor isn't going to carry out the  
14 statutory mandate? It clearly gives the employees a  
15 remedy, doesn't it?

16 MR. BANCROFT: Yes, but from the point of view  
17 of Mr. Smart and other workers who are asked to approach the  
18 NRC and it's the NRC inspectors who are around all the time  
19 and have the general regulatory authority over the licensee.  
20 The workers would like to know --

21 CHAIRMAN ROSENTHAL: I'm sure the workers would  
22 like to know a lot of things. I still don't see why it  
23 would not, again, on the assumption that Mr. Smart has been  
24 adequately taken care of, an assumption, which I grant you  
25 say is not the case. The record doesn't indicate one way or



id7 1 the other.

2 But on that assumption, why isn't it appropriate  
3 to wait until the Department of Labor mechanism comes into  
4 full force and effect for determining whether it is necessary  
5 for an advisory opinion by an adjudicatory tribunal of the  
6 Commission on the Commission's powers in that area?

7 MR. BANCROFT: Just because the stated position  
8 of the staff --

9 CHAIRMAN ROSENTHAL: The stated position of the  
10 staff -- and again, I don't want at all to deprecate  
11 Mr. Murray's importance in the scheme of things around the  
12 Nuclear Regulatory Commission -- but I haven't seen a  
13 regulation yet that enables him to speak generically on  
14 matters of this kind.

15 MR. FARRAR: There is a regulation, I believe,  
16 that says only the general counsel can.

17 CHAIRMAN ROSENTHAL: And Mr. Murray, unless I  
18 am mistaken, has not as yet been clothed or annointed in  
19 that position, and he represented the staff, and he could,  
20 I dare say, bind the staff insofar as this particular  
21 proceeding is concerned.

22 But he cannot bind the Commission on any generic  
23 position.

24 MR. BANCROFT: I assume that as counsel for the  
25 staff, he was taking the staff's position.

1 MR. FARRAR: But the staff, like us, works for  
2 the benefit of the audience. The staff is not the  
3 Commission. The staff is an arm of the Commission.

4 MR. BANCROFT: Assume with me that the NRC staff  
5 has this authority to protect, to take action, to order  
6 the reinstatement of a worker; unless the staff is willing  
7 to exercise that authority --

8 MR. FARRAR: No, Mr. Murray says we don't have  
9 that authority. Let's say he's dead wrong; the general  
10 counsel or the Commission, either prompted by you or  
11 somebody else or whatever, can say to Mr. Murray: "Mr. Murray,  
12 in fact, you're not doing your job properly. We think you  
13 do have that authority. Please go exercise it."

14 And he's then required to do it.

15 MR. BANCROFT: Excuse me. How is he required to  
16 do it? Just because Bill Smart says --

17 MR. FARRAR: Because he works for the Commission.  
18 It's Mr. Salzman's suggestion that somebody get the message  
19 to the general counsel. You can do it by letter and ask  
20 him for a ruling. You have a client who was injured, you  
21 say, by Mr. Murray's claim or Mr. Murray's statement that  
22 the staff has no authority to protect him.

23 That bothers you in this case, and it's dangerous  
24 for the future. Please, Mr. General Counsel, would you  
25 give us a ruling. I assume to will either get or not get

d9  
1 a ruling.

2 If you get one, it will be binding on Mr. Murray  
3 and on the rest of us.

4 MR. BANCROFT: And if I don't?

5 CHAIRMAN ROSENTHAL: And if you don't we'll see  
6 where we are. There's a lot of, it seems to me, there's  
7 a lot of speculation underlying your insistence that we  
8 consider this.

9 Let me ask you another question: what is  
10 Mr. Smart's standing to assert the interests of other  
11 workmen? Is this a class action?

12 MR. BANCROFT: NO, it is not a class action.  
13 His standing is just that he's a worker who is now working  
14 at a nuclear power plant and considering whether or not  
15 he should go through this ordeal again by bringing information  
16 to the NRC.

17 CHAIRMAN ROSENTHAL: I don't see how, again,  
18 on the assumption that Mr. Farrar asked you to make, which  
19 is that he's been in the vernacular made whole; what  
20 difference is it whether he was made whole one way or the  
21 other.

22 He's been made whole, and I don't see how he,  
23 as opposed to these hypothetical other workmen --

24 MR. BANCROFT: I would say that as an intervenor  
25 party to this proceeding, the administrative proceedings of

d10  
1 the Nuclear Regulatory Commission are not as strictly  
2 adversarial with each party representing only his own  
3 interests. But the Appeal Board --

4 CHAIRMAN ROSENTHAL In order to intervene, did  
5 Mr. Smart have to assert a personal interest in the  
6 outcome of the proceedings? Hasn't the Commission indicated  
7 that in terms of intervention as a matter of right,  
8 judicial principles of standing govern, which include  
9 injury, in fact.

10 Now, doesn't it follow from that that when the  
11 individual is admitted to the proceeding that he is confined  
12 to asserting his own interests?

13 MR. BANCROFT: I don't think that last one  
14 follows.

15 CHAIRMAN ROSENTHAL: Why not?

16 MR. BANCROFT: Once he is in the proceeding, he  
17 can raise the -- he can in fact raise the public interest  
18 and the interest of the Nuclear Regulatory Commission in  
19 pursuit of the public interest to take the actions necessary  
20 to counteract the effects of the statements that there's  
21 nothing that the NRC can do for a fired worker.

22 And that is having an effect.

23 CHAIRMAN ROSENTHAL: I don't think he could take any  
24 action, but the action that the NRC is being asked to take  
25 is to determine that there's authority within the Commission

dll

1 to order any reinstatement of Mr. Smart, and Mr. Smart's  
2 already been reinstated.

3 We can't ask for action pertaining to himself,  
4 which in the context of himself is academic.

5 MR. BANCROFT: You come back to the statement  
6 that was originally made as a hypothetical.

7 CHAIRMAN ROSENTHAL I come back with a hypothetical  
8 because we don't have anything here to es ablish that that  
9 hypothetical is wrong.

10 Now, we've been informed that maybe that was off  
11 the record as well, that the arbitrator had ordered Smart  
12 restored with back pay. You suggested earlier -- at least  
13 as you interpret it -- that order called for his reinstatement  
14 to his former position without loss of seniority, et cetera.  
15 Then what we have here is a failure on the part of Daniel  
16 to comply with the arbitrator's award.

17 Now, that may be so or that may not be so.

18 MR. SALZMAN: If I'm correct, you were the first  
19 one to inform us of Mr. Smart's reinstatement.

20 MR. BANCROFT: I did.

21 CHAIRMAN ROSENTHAL: And it seems to me that at  
22 this point we have no record basis for assuming that  
23 the arbitrator's award which is presumably a matter of  
24 public record of which we can take official notice, that  
25 award was not complied with.

1 MR. SALZMAN: And it was judicially enforceable  
2 too.

3 MR. BANCROFT: By Mr. Smart's union.

4 MR. SALZMAN: Or Mr. Smart?

5 MR. BANCROFT: I'm not sure at this point about  
6 Mr. Smart.

7 CHAIRMAN ROSENTHAL: All that we can take official  
8 notice of now is that there was an arbitrator's award that  
9 called for Mr. Smart's restoration to his former position  
10 without loss of seniority, in other words, to make Mr. Smart  
11 whole.

12 Now, if in fact that's not the case, it seems to  
13 me that to avoid mootness, you have to get that before  
14 us in some proper form, unless we were to agree with you that  
15 even if Mr. Smart has been made whole, nonetheless, the  
16 matter should not be treated as moot.

17 And I can't speak for my two colleagues on that,  
18 but I can tell you you have an uphill road insofar as I'm  
19 concerned.

20 MR. BANCROFT: As I understand it, the Licensing  
21 Board and Appeal Boards can take matters which are affecting  
22 the NRC's function on their own whether or not William  
23 Smart is argued in the matter.

24 If you are aware of a situation where the  
25 example that has been made of William Smart with the



d13 1 promises that were made to him --

2 CHAIRMAN ROSENTHAL: The promises that were  
3 made to him are also not part of the record.

4 MR. FARRAR: I have to apologize to the Chairman  
5 because I interrupted him 10 minutes ago to ask about that.

6 CHAIRMAN ROSENTHAL: That's the dangers. I forgot  
7 the question, which I suppose is some indication that they're  
8 not that important.

9 MR. FARRAR: I thought it was. What are we to do  
10 with these promises that are not part of the stipulated  
11 facts?

12 Mr. Reynolds, none of his people would have been  
13 there, so he has no way of denying them or admitting them.  
14 You've thrown them into some briefs, and I'll ask Mr. Murray  
15 about them. From your point of view, what can we do with  
16 the fact that you've said there were some promises?

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1 MR. BANCROFT: That is not part of the record, and  
2 it is not part of the stipulated facts, so you can't rely on  
3 that fact.

4 MR. FARRAR: Isn't that crucial?

5 MR. BANCROFT: No.

6 MR. FARRAR: Assuming this case is otherwise moot --  
7 now, I'm not saying it is moot. We can mumble something about it  
8 in our opinion, but we usually want to have a good reason to go  
9 ahead and do that.

10 (Laughter.)

11 MR. FARRAR: But if you can't say to me that the  
12 equity that your man had going for you might have induced me to  
13 reach this question, even though it might in a court of law be  
14 considered moot.

15 CHAIRMAN ROSENTHAL: Assuming it was in the Commis-  
16 sion's Notice of Hearing.

17 MR. FARRAR: Even though it might be moot in a court  
18 of law, I might have been induced to reach it because you said  
19 your man sat in a room, the inspectors promised him that if he'd  
20 tell them what was going on out there they would protect his job.

21 Now, whether that happened is pretty crucial to me in  
22 deciding whether this man has a claim on our time and resources  
23 to go ahead and decide the question of the Commission's authority.

24 Mr. Reynolds is absolutely correct -- I think he is  
25 absolutely correct. Is he correct that this is not in the

1 record in a way that we can take cognizance of it?

2 MR. BANCROFT: Yes, he is correct. And the thing  
3 that you can take cognizance of is that from the point of view  
4 of Mr. Smart in the future, and other workers looking at his  
5 case, the same publicity that was given to Mr. Murray's state-  
6 ment that there was nothing that the NRC could do for Mr. Smart,  
7 the promise that was made to Mr. Smart was reported in the news-  
8 papers by the reporter who was present at the meeting.

9 MR. FARRAR: If this were an evidentiary hearing, of  
10 course, Mr. Reynolds would be up now, of course, saying that  
11 that's no better, either.

12 MR. BANCROFT: It is, from the point of view not that  
13 the truth that the promises were made, but to other workers who  
14 were considering on relying on assurances by the NRC of confi-  
15 dentiality.

16 MR. FARRAR: Okay, I will agree with you.

17 Well, let's assume we can take cognizance of  
18 Mr. Murray's remarks. Mr. Reynolds may have something to say  
19 about that. But Mr. Murray says we can't help these people. He  
20 doesn't say -- I don't know if he said whether or not there was  
21 a promise made, but he says we can't get these people reinstated.

22 Is that reason enough, in this case, for us to say,  
23 "Wait, there's a serious problem. There is something we had  
24 better write something about." If no promises were made to  
25 Mr. Smart, doesn't bringing us into this facet of the case depend,

1 from an equitable point of view, on whether the promises were  
2 made?

3 Mr. Murray is just sitting there saying generally we  
4 don't protect these people. Maybe that's a point for a rule-  
5 making. But doesn't this case, our decision in this case, turn  
6 on promises that we have no record of?

7 MR. BANCROFT: The importance, from the point of  
8 view of the Nuclear Regulatory Commission, of making this ruling  
9 on its authority is not the individual case of Mr. Smart. I  
10 agree that, from the point of view of your allocation of your  
11 time and resources, the equities of an individual are important.  
12 But the larger issue that you have to address is: Is there a  
13 situation out at the Calloway plant that may be dangerous  
14 because of the perception of workers there that the NRC can't be  
15 relied on? It's a question of the credibility of the NRC.

16 MR. SALZMAN: Doesn't that depend upon evidence? And  
17 there is the problem: There isn't any evidence in this case.

18 I can presume there are dangerous situations anywhere.  
19 People see all sorts of horrible things that other people poo-poo  
20 and say there's nothing to it. But in any sort of administra-  
21 tive board you must rely on the record and, aside from this one  
22 incident that's covered by the stipulated facts, I see no evi-  
23 dence of which we can take cognizance that any such situation  
24 exists.

25 Remember, the word is "evidence." You are an attorney,

1 and you know what evidence is. I don't see any evidence that  
2 such a situation exists. I do not know that it's in my authority  
3 to say that "evidence-shrevidence" will decide anything.

4 MR. BANCROFT: As evidence of the perception of the  
5 workers at the plant, I would be happy to submit the newspaper.

6 MR. SALZMAN: No, no, no. Your time for submitting  
7 is over, Mr. Bancroft. What happened in the trial is finished.  
8 You were the responsible attorney. You handled it as you saw  
9 fit. And at the time you thought that the best way to proceed  
10 was to join in the stipulation. That eliminated the evidence.

11 This is an appellate hearing. We must decide on  
12 the basis of the record we have before the licensing board.  
13 There is no evidence in this record, am I correct, that any such  
14 perceptions exist? There certainly is none contained in the  
15 stipulation of fact.

16 MR. BANCROFT: Evidence as to the promises made.

17 MR. SALZMAN: Evidence as to the promises or evidence  
18 as to the concern by other workers. It would have been easy  
19 enough, I would presume, if you would come forward with appropri-  
20 ate affidavits or request that these things be amended or added  
21 to the stipulation or disagreed with the stipulation at the  
22 trial. But none of these things did you do, Mr. Bancroft. And  
23 we are bound to decide the case on the four corners of the  
24 record.

25 MR. BANCROFT: The cases involving chilling effects

1 in First Amendment cases, the questions of chilling effects and  
2 what not, are always matters of inference.

3 MR. SALZMAN: What authority do you have for that  
4 statement, sir? I mean, I don't know of any such authority.

5 MR. BANCROFT: In First Amendment cases where they're  
6 talking about -- or where the courts are talking about voidness  
7 or vagueness in questions, there are no evidentiary hearings as  
8 to will you be chilled from doing this again in the future?

9 MR. FARRAR: How about the List case years ago?  
10 NAACP versus Button. It's been a long time since I have read  
11 it, but that went off, if I remember right, not chilling List  
12 because then people would be afraid to join. Was that the fear  
13 of joining proven in the trial, or was that the Supreme Court  
14 assuming that that was human nature?

15 MR. BANCROFT: I don't know, in that case. But I  
16 -- it is my recollection from reading many of those cases that  
17 the chilling effect was not a matter of proof.

18 CHAIRMAN ROSENTHAL: Well, it might be a matter of  
19 proof if it's being used to avoid a claim of mootness. It may  
20 be for some purposes that this chilling effect is being presumed  
21 or is justifiably presumed. That doesn't necessarily mean that  
22 it's presumed for all purposes; does it? I mean, there is, as  
23 Mr. Farrar suggested, it seems to me, an appeal to equity here,  
24 when you're asking us to undertake a consideration of a question  
25 in the context of your client, when the record before us suggests



1 that your client has already gotten a relief which you would have  
2 us declare he's entitled to. You're asking us to utilize our  
3 time, which is reasonably precious, to pursue this question.

4 It seems to us that there ought to be some kind of  
5 record foundation for the special considerations that you sug-  
6 gest warrant this.

7 MR. BANCROFT: In answer to Mr. Salzman's concern  
8 about the lack of proof about the perceptions of other workers  
9 as to the reliability of the NRC, what I am asking the Appeal  
10 Board to presume is the fact that William Smart was fired, which  
11 is of record, after he gave information to the NRC, would be  
12 widely known among the workers at the Calloway plant.

13 MR. SALZMAN: Would the reason for his reinstatement  
14 be equally widely known?

15 MR. BANCROFT: The reasons for his reinstatement were  
16 from the grievance proceeding, so that doesn't do anything to  
17 increase --

18 MR. SALZMAN: Step back from this case for one minute.  
19 I find it, with all deference, a little difficult to see all these  
20 union workers trembling for their jobs because the NRC cannot  
21 protect them.

22 Are you aware of how long people have been building  
23 atomic plants? Years. The NRC and its predecessor, the AEC,  
24 have been supervising their construction for a long time. Nothing  
25 you or anyone else has told me even suggests that one instance

1 has arisen in which the NRC has been called upon to step in to  
2 protect workmen.

3 Now, given that track record, how can we be free to  
4 presume that the workmen at Calloway were all really concerned  
5 about protection of the NRC? I would assume the presumption, if  
6 any one is to be drawn, is that nobody really thought the NRC  
7 would do anything. I mean, that is certainly an equal if not  
8 much stronger presumption in this case, and isn't that really  
9 the reason why we have to have some evidence? The NRC hasn't,  
10 for 20 years --

11 MR. BANCROFT: But we don't have any other cases.

12 MR. SALZMAN: I see. This is the first situation in  
13 which any employer has ever fired anybody in the retaliatory --

14 MR. BANCROFT: If you are referring to the absence of  
15 instances that workers know --

16 MR. SALZMAN: Inferences that you would have us draw  
17 are hardly compelled by the record, Mr. Bancroft. If you wish us  
18 to take in what we do know, we do know that the NRC has not in  
19 the past generally intervened in these matters. Therefore, any  
20 perception of the workers is equally logical, if not more so,  
21 that the workers presume that the NRC are not going to inter-  
22 vene in this particular instance.

23 MR. BANCROFT: They might or might not assume that  
24 a priori. But after an instance has arisen where a worker was  
25 fired and after going to the NRC and then the NRC staff announces

1 that it can do nothing for him --

2 MR. SALZMAN: Well, that's what would happen with the case before  
3 hand. It's never done it beforehand, and now it says it isn't  
4 going to do anything. How does that change the status quo?

5 MR. BANCROFT: The case beforehand was that it was  
6 untested. This is the first instance, a case of first impres-  
7 sion.

8 MR. SALZMAN: It just strikes me as anomalous to ask  
9 us to draw that any people, without any evidence, are relying  
10 upon the NRC to guard their jobs when, for 20 years, the NRC  
11 hasn't done so and no incident has ever arisen. If anything, I  
12 suspect the inference it draws is that their suspicion is con-  
13 firmed by these statements rather than that something else is  
14 checked.

15 My point is not whether these things are right or  
16 wrong. It's equally logical to draw the inference the other way.  
17 That being so, I think we're precluded from drawing the inference  
18 you want in the absence of some evidence.

19 MR. BANCROFT: The question here is not that you have  
20 to conclude as a matter of fact and proof that there is a chill-  
21 ing effect at Calloway; it's a question of whether your sense is  
22 that that is plausible and that it's probable enough that you  
23 should take the time to address this issue.

24 MR. SALZMAN: I suggest that reasonable men might  
25 differ on whether that's a plausible inference, is what I am

1 suggesting.

2 CHAIRMAN ROSENTHAL: Your time is expired.

3 MR. FARRAR: Let me ask, Mr. Bancroft, we've talked  
4 here about the standing of Mr. Smart and whether we have to wait  
5 for the grievance procedure; under the terms of the contract  
6 Mr. Smart works under, is he entitled to ask the NRC staff to  
7 reinstate him in his job? Now, I grant that they're not bound  
8 by the grievance procedure. I assume they have the authority  
9 someplace else to take steps they believe are necessary. But  
10 suppose Mr. Smart goes to them and says, "Hey, I just got fired  
11 because I think it's retaliatory. Help me get my job back."  
12 Can he do that under the grievance proceeding?

13 MR. BANCROFT: I am not sure what your question is.

14 MR. FARRAR: It's binding on the company, it's bind-  
15 ing on the union, and it's binding on him.

16 MR. BANCROFT: Is your question whether he can do  
17 both? In other words, if he invokes his grievance?

18 MR. FARRAR: No. Whether or not he invokes his  
19 grievance, can the company or the union claim "foul" if he runs  
20 to the staff?

21 MR. BANCROFT: I think that the safety significance  
22 of the Atomic Energy Act overrides, even if there were a pro-  
23 vision of the collective-bargaining contract.

24 CHAIRMAN ROSENTHAL: Why isn't he bound if there is  
25 a contract extant between the union and the company and he, under

1 conventional principles of law, is bound by that contract? In  
2 other words, he has a contractual obligation to pursue one route  
3 and one route alone, and that's the grievance procedure under  
4 the collective-bargaining agreement. How can he come to the  
5 NRC and say, "I am entitled to breach my contract"?

6 MR. BANCROFT: You see, I don't think that the  
7 grievance mechanism is mandatory that a worker with a grievance --

8 CHAIRMAN ROSENTHAL: It isn't a question of mandatory.  
9 Does it allow him, as a matter of contract, does it allow him  
10 to say, "I am going to ignore the grievance procedure that's  
11 established under the collective-bargaining agreement, and, in  
12 lieu thereof, come to the Nuclear Regulatory Commission and ask  
13 them."

14 MR. BANCROFT: I think it does allow that. I think  
15 the only thing he gives up is the right to strike.

16 CHAIRMAN ROSENTHAL: And you say that is a matter of  
17 labor law or contract, reading the contract?

18 MR. FARRAR: Now, I think we saw the contract at one  
19 point. Maybe we didn't. We've seen a number in the past.  
20 You're saying it just doesn't say that the remedy is binding  
21 once invoked. You're saying that's all it says, this particular  
22 contract, the remedy is binding once invoked, or the procedure  
23 is binding once invoked; it gives the employee the option to  
24 pursue another route?

25 MR. BANCROFT: Yes.

1 MR. FARRAR: Mr. Reynolds, can you get us the con-  
2 tract?

3 MR. REYNOLDS: I am sure I can.

4 Do you have the contract, a copy of it here, in  
5 Washington?

6 MR. MURRAY: I have got a new copy, the relevant por-  
7 tions, in one of the briefs.

8 MR. REYNOLDS: That was just the grievance procedure.

9 MR. MURRAY: Oh, sorry.

10 MR. REYNOLDS: I think I can get it.

11 CHAIRMAN ROSENTHAL: Your time is expired,  
12 Mr. Bancroft.

13 I think we will now follow our customary procedure  
14 to take a 10-minute break, in order, among other things, to give  
15 the reporter, who works perhaps harder than anyone else, the  
16 opportunity to take a welcome respite.

17 We will resume at quarter after.

18 (Brief recess.)  
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1 ORAL ARGUMENT ON BEHALF OF THE NRC STAFF

2 BY MR. MURRAY:

3 CHAIRMAN ROSENTHAL: Please be seated.

4 All right, Mr. Murray, we will now hear from you.

5 MR. MURRAY: Thank you.

6 Mr. Chairman, and may it please the Board:

7 The utility here may think that what's involved is a  
8 labor dispute or an attempt by the NRC to exercise watchdog  
9 authority over labor matters. But I respectfully submit that  
10 at the heart of this case is the reach of the investigatory  
11 authority of the Nuclear Regulatory Commission, the authority  
12 to protect public health and safety by investigating whether  
13 an individual was fired because he came to us with safety  
14 information.

15 Now, I submit that there are at least half a dozen  
16 good reasons why we have the authority to make the investigation  
17 here in question.

18 Number one, we're dealing with a concededly broad  
19 statute, a statute that says, if I may paraphrase it, you may  
20 make any investigation you wish in the interest of the public  
21 health and safety. It doesn't say, unless there's a labor  
22 dispute also concomitantly involved. It says you may make any  
23 investigation you wish, so long as the public health and safety  
24 interest is involved.

25 I've sat here this morning. I've listened to you

1 gentlemen question the previous counsel. You know that a health  
2 and safety purpose is behind this investigation. It's set forth  
3 in the stipulation. It's set forth in the order to show cause.  
4 Beyond that, the statute that we deal with has a clear health  
5 and safety purpose. That's why we're here.

6 We're not interested in the labor dispute qua labor  
7 dispute; we're interested in the impact on the public health and  
8 safety of a licensee of ours going around and firing people for  
9 giving us safety information.

10 MR. FARRAR: I'm sorry, I was trying to follow up  
11 your last question. You say it's set forth in the stipulation  
12 that there's a safety purpose. Is that set forth that the  
13 company agrees to that?

14 MR. MURRAY: I confess to being a little bit disingen-  
15 uous on that point.

16 MR. FARRAR: The company agrees that you said it had  
17 a safety purpose.

18 MR. MURRAY: That's correct. And until today,  
19 incidentally, this was the first time I heard a clear statement  
20 from the licensee that it didn't have a safety purpose. All I  
21 heard was a labor dispute was involved and nothing else, until  
22 today, beyond the health and safety purpose of the statute.

23 These types of statutes are required by the courts  
24 to be given a liberal construction. The Public Service  
25 Company of New Hampshire case requires this particular

1 statute be given a liberal construction.

2 Two other reasons repose in the notions of common  
3 sense and sound policy. It simply doesn't make common sense  
4 to suppose that the Congress of the United States, in delegating  
5 authority to protect the public health and safety from the  
6 potential hazards of nuclear power, in delegating that autho-  
7 rity, said you can do it except where a labor dispute is  
8 involved.

9 CHAIRMAN ROSENTHAL: But Mr. Reynolds disputes that  
10 there is in fact a safety link. I don't think he disagrees  
11 with you that if in fact there were a clearly discernible  
12 safety link, that the Commission would have the authority to  
13 investigate it under its broad statutory authority in the area  
14 of the preservation of the public health and safety, the  
15 protection of the public health and safety.

16 MR. MURRAY: Yes, Mr. Chairman.

17 CHAIRMAN ROSENTHAL: He says that link doesn't exist.

18 MR. MURRAY: I heard that expressed for the first  
19 time this morning explicitly.

20 CHAIRMAN ROSENTHAL: Whether you heard it for the  
21 first time this morning or you had heard it on many prior  
22 occasions, what's your response to it?

23 MR. MURRAY: My response to it is nonsense, that it's  
24 clear that we have a health and safety purpose here. If a  
25 licensee of the Nuclear Regulatory Commission, a licensee

1 authorized to construct a nuclear power plant, can go around  
2 firing whistle-blowers, workers who come to the NRC with  
3 information concerning what they perceive to be, at least,  
4 potential safety defects -- if they can go around firing people  
5 for that and we knew about it before the license was issued,  
6 I respectfully submit we would not have issued the license.

7 CHAIRMAN ROSENTHAL: Do you see a difference between  
8 what appears, on the face, at least, to be an isolated instance  
9 and what appears to be a pattern? In other words, if it came  
10 to the NRC inspector's attention that there had been a number  
11 of people that had been fired by this contractor and, lo and  
12 behold, it also appeared that each of those persons at one time  
13 or another had been in conversation with the inspectors over  
14 alleged construction deficiencies, that might establish a  
15 pattern that would give the inspectors some reason to wish to  
16 get underneath the causes of dismissal, the assigned causes of  
17 dismissal.

18 But as far as the stipulation indicates here, this  
19 is the one and only occasion.

20 MR. MURRAY: It's not in the stipulation, but I  
21 would concede it's the only one that's gone to litigation that  
22 I am aware of.

23 CHAIRMAN ROSENTHAL: The stipulation certainly does  
24 not refer to any other instances.

25 MR. MURRAY: Right.

1 CHAIRMAN ROSENTHAL: So perhaps by negative inference,  
2 one could proceed on the basis that this is the first instance,  
3 at least, that's come to the attention of Inspection and  
4 Enforcement, in which an employee had been dismissed from  
5 Daniels' employment after having spoken with the inspectors.  
6 Now, do you think this makes any difference whether we're  
7 dealing in the context of a possible pattern?

8 MR. MURRAY: I can see a difference, Mr. Chairman,  
9 in some respects, but not really directly relevant to this  
10 case. I can see a difference in terms of how exacerbated the  
11 situation might be if it were a pattern, if we would view it  
12 with more alarm than a single instance, I suppose.

13 CHAIRMAN ROSENTHAL: I'm not interested in whether  
14 you would view it with more alarm. I'm interested in whether  
15 it makes a difference from the standpoint of your authority  
16 to investigate.

17 MR. MURRAY: None whatsoever. We either have the  
18 authority or we don't have the authority. And if we're exer-  
19 cising it for the first time or for the one-thousandth time,  
20 we have the authority.

21 MR. SALZMAN: Doesn't the suggestion that the  
22 authority hasn't been exercised over all these years suggest  
23 that probably you do have it and you just decided to try it  
24 now?

25 MR. MURRAY: That may be an inference you wish to

1 draw, Mr. Salzman, but I would draw the inference that times  
2 are changing. People are fighting back these days. People are  
3 not behaving the way they did some years ago.

4 MR. SALZMAN: I'd be inclined to say that you had  
5 an authority which died by lack of exercise.

6 My serious question is: If the Commission exercises  
7 the authority and has seen fit to exercise it in the connection  
8 of operating licenses under Section 19 of the regulations, the  
9 Taft-Hartley, and has not seen fit to exercise it at all with  
10 respect to construction permits, how do you get the authority  
11 to investigate it? In other words, you have specific proce-  
12 dures. The Commission has issued rules and said, this is the  
13 way our authority will be exercised, and it will be exercised  
14 in these circumstances.

15 Isn't it arguable that the Commission has not  
16 elected to use similar authority in the operating history?

17 MR. MURRAY: I suppose you could construct a weak  
18 argument along those lines. The short answer, of course, is  
19 that Part 19 deals with remedies, not with our authority to  
20 make an investigation. Part 19 deals with what we can do with  
21 respect to the employee-employer relationship. What we're  
22 talking about in this case is the authority of the government  
23 to make an investigation into whether or not circumstances  
24 exist which cast doubt on the public health and safety.

25 MR. SALZMAN: Part 19 is labeled "Inspections which



1 contain express authority to investigate." And the normal  
2 rule in law is that a specific provision takes precedence over  
3 a general provision.

4 MR. MURRAY: Expressio unius est exclusio alterius.  
5 I'm familiar with it.

6 MR. SALZMAN: You start with that. And here the  
7 Commission has said, in these circumstances you can do this,  
8 and you have another set of circumstances in which the  
9 Commission has chosen not to exercise its authority, or at  
10 least so it appears.

11 MR. MURRAY: The Commission has chosen not to  
12 exercise its authority in a rulemaking context, that's true.  
13 If you look at the history of Part 19, Mr. Salzman, you'll find  
14 that it's associated with enactment of the Occupational  
15 Safety and Health Act. Under that Act, authority was given to  
16 various agencies to take over in part authority that OSHA would  
17 otherwise have in areas where those other agencies had juris-  
18 diction.

19 That was done by the AEC, and they took over the  
20 jurisdiction to regulate the health and safety, the OSHA-type  
21 health and safety, over uses of radiation instruments, uses of  
22 actual radiation. We would have authority at construction  
23 sites to invoke Part 19 for a radiographer who was welding pipe,  
24 or something of that sort. It just excluded, by not including,  
25 the more general question of authority to take action in the

1 interest of public health and safety at a construction site  
2 where the radiation potential or radiation danger is 30 years  
3 down the pike, where if something is built into that plant, a  
4 latent defect that we don't know about because the worker doesn't  
5 come forward to tell us, because he's chilled from coming  
6 forward because he sees that Mr. Smart or perceives that  
7 Mr. Smart is fired for giving us safety information, it gets  
8 built into that plant and 30 years later the thing goes up in  
9 smoke.

10 Now, those were the kind of defects that we're  
11 talking about getting at.

12 MR. SALZMAN: May we take into consideration whether  
13 workers perceive a chilling effect here? The question -- be  
14 careful how you answer that, because if you answer it yes,  
15 aren't we then also obliged to do what Mr. Bancroft said?

16 MR. MURRAY: I'm not going to answer it yes, have no  
17 fear.

18 MR. SALZMAN: You just suggested it to me, because  
19 I thought your argument was relying in part about how the  
20 poor workmen are going to be chilled in their views and  
21 therefore will not bring these matters to your attention.

22 MR. MURRAY: We're worried about a reasonable man's  
23 perception of a firing for coming to us with safety information,  
24 not how an individual workman happens to perceive it. If we  
25 were to follow that path, if they perceived it and he was

1 fired for a valid reason and they perceived it differently, we  
2 would be arguing we could do something about that, which of  
3 course we can't.

4 I might say, while I'm in that area, I've been  
5 quoted around here quite a bit this morning as to what I said  
6 or didn't say, and so forth and so on. I didn't have the oppor-  
7 tunity, I suppose, to put forward the idea, which is factual  
8 as far as I'm concerned, that I made some remarks in the course  
9 of oral argument at the trial stage in this proceeding. I  
10 would submit that Mr. Bancroft has taken those remarks wholly  
11 out of context.

12 What I meant to say was simply that we may not be  
13 able to help Mr. Smart personally for this particular proceed-  
14 ing. But we sure can take action against the Licensee if we  
15 find out that Mr. Smart was fired because he gave safety  
16 information to NRC.

17 MR. FARRAR: Let me ask you. Let's assume you went  
18 ahead with this investigation. Forget the grievance procedure  
19 for the moment. You went ahead with the investigation,  
20 concluded Mr. Smart was fired for whistle-blowing and were  
21 ready to take action. You could suspend the permits if you  
22 had sufficient reason, say, you guys are such bad actors we  
23 don't want you near us any more, that's the end; revoke the  
24 permits.

25 That would be the worst that you could do. Please,

1 I'm not in any way suggesting that those are the facts in this  
2 case. But you would have the authority, if you could justify  
3 it, to take that action, revoke the permits, go away, leave  
4 the site, you cannot build this nuclear power plant. If you  
5 can do that -- and I think no one would dispute your authority  
6 to do that -- why can't you say: Well, we're worried about  
7 your management attitude, we're going to send some more  
8 inspectors out there and keep a close eye on you people, and  
9 sort of like Richard Burton and what's his name, we're going  
10 to have a public humiliation, I forget of who. You people  
11 are going to go out there and say to the workers: We've  
12 changed, we shouldn't have done what we did to Mr. Smart, and  
13 it's the first step in proving it to them to make sure there  
14 is no chilling effect around here in the future, we are going  
15 to reinstate Mr. Smart.

16 Now, why couldn't you direct them -- it's a somewhat  
17 humorous example, but why couldn't you take that kind of step  
18 to say, look, the only way to shape this job situation up is  
19 for you to take Mr. Smart back and tell all the employees that  
20 you're doing it, too.

21 MR. MURRAY: I'm not sure that we couldn't. I'm not  
22 positive that we couldn't. I hadn't researched this point  
23 because it's not involved in this case. But I suggested the  
24 reasons why we might not be able to go to the remarks of  
25 Mr. Salzman earlier, when he was talking about Part 19, an

1 explicit statement of authority to help workers in a Part 19  
2 context.

3 MR. FARRAR: That's a nice short answer to what for  
4 me is a very serious question, assuming these promises were  
5 made.

6 MR. MURRAY: What promises?

7 MR. FARRAR: Okay, let me ask you about that. Is  
8 there anything in the record to your knowledge about whether  
9 in fact your inspectors made any promises to Mr. Smart?

10 MR. MURRAY: It depends on how you describe the  
11 record. If you describe the record as including argumentation --

12 MR. SALZMAN: No.

13 CHAIRMAN ROSENTHAL: Argumentation of counsel?

14 MR. MURRAY: Argumentation of counsel.

15 CHAIRMAN ROSENTHAL: It clearly doesn't.

16 MR. MURRAY: There is nothing whatsoever on that  
17 point. I had one more reason --

18 MR. FARRAR: On the other hand, when these claims  
19 had been floating around, you've never denied it anywhere.

20 MR. MURRAY: If you'd like a little background, I  
21 happen to have called the director of the Region III.

22 MR. FARRAR: No, Mr. Reynolds will be up if you  
23 start that.

24 MR. MURRAY: It might put the inspectors in a better  
25 light, although I submit it's not part of this proceeding.

1 There was another reason --

2 MR. FARRAR: We'd better keep out of it, but wait a  
3 minute. Why do you think, if that's what you said, that you  
4 can't help Mr. Smart in this proceeding? I think you answered  
5 me yes, there are situations in which you could require, as a  
6 condition of keeping the permit, that the company reinstate the  
7 fellow. Why would you, in effect, throw in the towel rather  
8 than push for that? Now, you might push for that and lose.  
9 Mr. Reynolds may succeed in convincing us or some court that  
10 you don't have that authority.

11 Why, without even attempting to exercise it, would  
12 you say, well, we can't help Mr. Smart in this case?

13 MR. MURRAY: There are several reasons. Number one,  
14 a grievance proceeding is going on. He had a lot of grievance  
15 machinery there available to him, and he was exercising it.

16 Number two, this is a first case of first impression,  
17 so far as I know. It's certainly the first time it's been  
18 litigated. And considerations of fairness in the rulemaking  
19 process, Part 19's existence, all conspire --

20 MR. FARRAR: Wait a minute. I don't follow that.  
21 If it's the first case, then I would say you can have an  
22 arguable basis for your position. Try it out. If you lose  
23 and find out you have no authority, why, you haven't lost  
24 anything. If you win and find out you do have the authority,  
25 then you have it, we don't need a rulemaking, we don't need



1 anything else.

2 MR. MURRAY: You're dragging me off, of course -- and  
3 I understand that -- into a policy question that I'm not  
4 prepared to answer. It's not part of, really, my function.

5 I will say this: that our main focus was on public  
6 health and safety and how public health and safety is impacted  
7 by this situation, by the apparent circumstances or the alleged  
8 circumstances of Mr. Smart being fired because he came to us  
e-6 9 with safety information.

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1 Our interest was: what are we going to do to  
2 protect the public health and safety from latent defects  
3 being built into that plant? And we weren't that much  
4 concerned with poor Mr. Smart, as I put it at one time, for  
5 those reasons.

6 MR. FARRAR: It may not have been the principla  
7 focus, but it's a way of getting to what you just said,  
8 is your principal point. And if you say, that's not a  
9 step we'll take, if our worker, you know, I might wonder about  
10 it.

11 MR. MURRAY: I'm not sure whether it is a step  
12 we'd take or not. It's a step we haven't taken here before.  
13 We felt we had ample authority for the five reasons we've  
14 already given you. There's a sixth reason. To make the  
15 investigation, and didn't need the throw-in of trying to  
16 raise essentially a questionable issue, as Mr. Salzman  
17 pointed out.

18 MR. FARRAR: So, are you saying, then, since you  
19 were thwarted at the outset of the investigation, that the  
20 Commission staff has made no decision on whether they would  
21 push for Mr. Smart's reinstatement and will not make such  
22 a decision until they come face to face with that at the  
23 end of the investigation?

24 MR. MURRAY: I most assuredly am, Mr. Farrar.  
25 Most assuredly I'm saying that. It's totally premature until

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1 we make the investigation.

2 MR. FARRAR: So, it is not true -- it is  
3 not necessarily true that the staff believes it cannot help  
4 Mr. Smart in this case.

5 MR. MURRAY: No, that's quite correct. It's not  
6 necessarily true. However, with the overtaking of events  
7 by the new employee protection legislation which we've  
8 heard about this morning, with the reinstatement with full  
9 back pay according to Mr. Smart's own papers, I don't know  
10 about what's happened since then.

11 MR. FARRAR: Wait a minute. It was from your  
12 brief that we got the citation of Senator Hart saying  
13 the new law doesn't derogate from your prior authority.

14 MR. MURRAY: It says a good deal more than that.

15 MR. FARRAR: No, no. We've had that.

16 MR. MURRAY: Importantly, it says we have  
17 currently this authority.

18 MR. FARRAR: Okay. I can't see then how that  
19 overtakes things that the new legislation --

20 MR. MURRAY: It doesn't wholly overtake it.

21 MR. FARRAR: And I can't see that this reinstatement  
22 wholly overtakes it because -- let's take my hypothetical  
23 that I gave Mr. Bancroft. Even if he's fully reinstated into  
24 his old job, there still could be a germ of an idea in his  
25 mind, hey, I'm not going to go through that again.

1 MR. MURRAY: I put this forward for your  
2 consideration, Mr. Farrar. If the new employee protection  
3 legislation which gives plenary remedial authority to the  
4 Secretary of Labor to deal with just this sort of case, it  
5 doesn't require much imagination to suppose that Senator  
6 Hart might have had this case in mind when he made the  
7 remarks he made.

8 Certainly, it was going on at the same time,  
9 but with this legislation coming on, it pretty much fills the  
10 field. It tells us that Congress thinks that this is about  
11 as far as we ought to go.

12 MR. FARRAR: I don't know. I used to have a  
13 little something to do with labor relations, and sometimes,  
14 you know, the union and the employee don't see things eye to  
15 eye. The employee can't always count on the union to  
16 represent only his interests as opposed to some slightly  
17 different interest the union might have.

18 And as far as the Secretary of Labor is concerned,  
19 couldn't a rational workman figure -- Commission inspectors  
20 say -- those are the guys with the muscle. They're right in  
21 on this job. They have the power of life and death over  
22 these companies. You know, it's a big plus to me, says the  
23 employee, to be able to look to that remedy rather than to  
24 my grievance procedure and rather than to the Secretary of  
25 Labor.

1 I still don't see how these things have overtaken --

2 MR. MURRAY: I would suppose that anything is possible,  
3 Mr. Farrar, but we must remember that we now have something  
4 we never had before. We have a federal statute that makes it  
5 against the law for licensees of the Nuclear Regulatory  
6 Commission to go around firing people for coming to us with  
7 safety information, a federal statute giving full powers  
8 of redress, as least as I read the statute, to the Secretary  
9 of Labor in the event such a thing should happen.

10 MR. FARRAR: So, then, is this a way of saying that  
11 we should steer clear of this question for the time being?

12 MR. MURRAY: Well, it is; I would just briefly  
13 summarize to say that it's premature to reach it, and it's  
14 unnecessary to reach it, and it is of course, as has been  
15 brought out in the questioning here before, wholly outside the  
16 scope of this proceeding.

17 I might just add this proceeding is an enforcement  
18 proceeding. This proceeding is noticed by the Commissioners  
19 themselves, not by a Licensing Board, not by the Appeal Board.  
20 This proceeding has within it explicit, narrow issues for  
21 decision by you gentlemen.

22 MR. FARRAR: Let's see how narrow those issues are.  
23 Let's go to issue number two, whether the permit should be  
24 suspended. Now, that's a narrowly stated issue, but what's  
25 wrong with the chain that I forged with Mr. Bancroft?

1 MR. MURRAY: You can make that argument.

2 MR. FARRAR: You can't suspend the permits unless  
3 the investigation was authorized, and one reason that the  
4 investigation might have been authorized was that the  
5 Commission has the power to reinstate this fellow. That  
6 gives them the authority to investigate, and that gives  
7 them the authority to suspend the permits if the investigation  
8 is thwarted.

9 What's wrong with that argument?

10 MR. MURRAY: I suggest that in light of the  
11 cloud cast over that argument by Mr. Salzman's remarks,  
12 the six good reasons why we have the authority; we don't  
13 need to drag in some questionable reason for it.

14 MR. FARRAR: Refresh my recollection. I recall  
15 some clouds emanating, but not specifically.

16 MR. MURRAY: The cloud I was referring to was  
17 the expressio unius est exclusio alterius. And I think  
18 insofar as it went to the narrow point it went to is a perfect  
19 valid point or at least is arguable. It certainly casts a  
20 good deal of doubt over whether we without a regulation  
21 could go in there and reinstate Mr. Smart.

22 MR. FARRAR: Now, wait a minute. Our procedures,  
23 as distinguished from some other agencies, say that you can  
24 do things by regulation or by order. I'm not aware of anything  
25 that limits your authority to only things in the health and



1 safety area and only things that are already established  
2 that a regulation --

3 MR. MURRAY: I agree.

4 MR. FARRAR: So, why can't you do it by order here,  
5 and why couldn't we get to it?

6 MR. MURRAY: Because the fundamental authority  
7 to act by order may not be there. The fundamental  
8 authority to take the action -- we can act by order if we  
9 can act in a legal way.

10 CHAIRMAN ROSENTHAL: That's the question. The  
11 thing I thought Mr. Farrar's point was this, which was in  
12 the context of the question as to whether this board or  
13 the Licensing Board could decide the matter one way or the  
14 other of the Commission's authority to order an employee  
15 be reinstated upon a finding that that employee had been  
16 dismissed as a retaliatory measure.

17 Now, Mr. Farrar's suggestion, I thought, was  
18 the second Commission question, the Commission said was  
19 within the framework of the proceeding, was whether the  
20 permits should be suspended until such time as the contractor  
21 submitted to the investigation.

22 All right. So the question is: does the  
23 Commission have the authority to conduct the investigation?  
24 Because if it doesn't have that authority, plainly it could  
25 not suspend the construction permits until the contractor

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1 submitted to the investigation.

2 MR. MURRAY: My silence is aggrievant at all times.

3 CHAIRMAN ROSENTHAL: Mr. Farrar's suggestion was  
4 that in determining whether the Commission had the authority  
5 to conduct the investigation, it might be relevant whether  
6 the Commission has the authority to order reinstatement of an  
7 employee dismissed for whistle blowing because if it has that  
8 latter authority, the authority to order reinstatement,  
9 then, so the argument would go, it has the authority to  
10 suspend the permits as a sanction to require compliance with  
11 the investigation request.

12 That was what, if I understood Mr. Farrar -- so  
13 this has nothing to do with whether -- what the answer is to the  
14 question in ordering the statement.

15 MR. FARRAR: It has only to do --

16 MR. MURRAY: I believe the record will show that I  
17 conceded that that would be a make way argument for the  
18 proposition that we have the authority. That would be an  
19 argument for that proposition. I don't think we need that  
20 argument. We have six other arguments that are better, in  
21 my opinion.

22 CHAIRMAN ROSENTHAL: So your argument, then, just  
23 so that I understand it, is that it was unnecessary in this  
24 case to reach the question of the power to order reinstatement  
25 in the context of the question of the power to investigate

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1 because whether or not the Commission has the power to  
2 order reinstatement, it does have the power to take all kinds  
3 of action against the licensee, and that that power standing  
4 alone is enough to justify the position of the staff that  
5 there is authority to investigate.

6 MR. MURRAY: You said it far better than I did,  
7 Mr. Chairman.

8 CHAIRMAN ROSENTHAL: That, I take it -- but why  
9 couldn't the Licensing Board say to you, you may think that  
10 that's right, but we would like to see or examine all of the  
11 possible strings to an authority pull.

12 MR. MURRAY: If you wish to deliver yourselves of  
13 an advisory opinion, or to give some advice to Mr. Smart,  
14 you can do that, but it's not only premature because we  
15 haven't even made the investigation that we're trying to  
16 make here.

17 What this case is about is making an  
18 investigation to find out whether Mr. Smart was fired because  
19 he gave us safety information. Once we get that authority,  
20 then we'll come back and argue with you, if we have the  
21 authority.

22 MR. SALZMAN: It's obvious that the statute cannot  
23 protect at face value. It's true that the Commission has  
24 brought investigatory authority, and it's couched in general  
25 terms. Do you think we could conduct or the staff could

1 conduct an investigation to determine whether or not --  
2 let's suggest the president of Union Electric Company's having  
3 satisfactory marital relationship with his wife.

4 MR. MURRAY: Mr. Salzman, let me answer you this  
5 way: we never denied that there are limits on our antitrust  
6 and environmental authority. We haven't claimed that there  
7 are no limits on our authority to protect the public health  
8 and safety. We haven't made that claim.

9 But we are contending that whatever the limits  
10 are on our public health and safety investigatory authority --  
11 and I'm not prepared to tell you what they are -- they are not  
12 reached by this case.

13 This case clearly represents an instance where  
14 we are attempting to make a lawful investigation into why  
15 an individual employee at a nuclear reactor construction site  
16 who comes to us with stories about defects in that plant,  
17 if he was fired for doing that.

18 We can make that investigation.

19 CHAIRMAN ROSENTHAL: What would be the practical  
20 significance of the suggestion of Mr. Reynolds that at a  
21 bare minimum the staff should be required under the new  
22 scheme of things to abide the advent of the Department of  
23 Labor's inquiry into the matter in its determination?

24 MR. MURRAY: I would think that in the normal case  
25 that we would abide the advent of the Labor Department issuing

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1 its determination, but there could circumstances -- and  
2 I believe Mr. Farrar brought that point out earlier today --  
3 there could be circumstances under which the public health and  
4 safety would demand an answer to the question of why was this  
5 individual fired before the Labor Department could get  
6 finished with its investigation.

7 MR. FARRAR: And you'd never know unless you did  
8 your investigation whether those circumstances existed.

9 MR. MURRAY: That's correct.

10 MR. SALZMAN: I take it also in the case of the  
11 Labor Department investigation, like the arbitrator's  
12 decision here, it might not reach the question you're interested  
13 in.

14 MR. MURRAY: Well, I would have to side more with  
15 Mr. Reynolds on that one. The new statute is explicitly  
16 addressed to these types of things, whereas the arbitration  
17 thing is entirely different. That was a strictly employee-  
18 employer bag. This new statute is explicitly enacted to  
19 get at just the kind of situation that Mr. Smart contends he  
20 finds himself in.

21 MR. FARRAR: Let me push Mr. Salzman's hypothetical  
22 a little farther from the point of view of Mr. Reynold's  
23 client.

24 He says here, you know, these investigators came in  
25 and they didn't want to give the material. They didn't see

rid11 1 the safety connection. What are they to do to protect  
2 themselves against what they might view as the unjust  
3 investigation in the hypothetical Mr. Salzman mentioned.  
4 And I assumed your investigators would come in and  
5 make again a plausible case. We have reports that the  
6 president of the company is coming in like a crazy man  
7 every day, giving all kinds of, really bolixing up the job  
8 because he's having marital problems, and we want to, you  
9 know, go into his home, and we want to investigate this.

10 Mr. Reynolds' clients apparently would be, you  
11 know, offended by that, wouldn't let you go ahead with the  
12 investigation.

13 But I can sit here and say a rational investigator,  
14 knowing certain facts, might think that it was important  
15 whether or not this particular company official remained on the  
16 job.

17 How does Mr. Reynolds defend himself against  
18 what he might view in that case as an unjustified  
19 investigation. And if he can't defend himself there, how  
20 does he defend himself here?

21 What steps is he to take or must he comply with  
22 anything your investigator comes up with?

23 MR. MURRAY: He must do what he feels he must  
24 and have what he does reviewed through a legal process.

25 MR. FARRAR: But see, we can't review it. I hate



d12 1 to resurrect the forums of action.

2 MR. MURRAY: Maybe I'm out of synch here.

3 MR. FARRAR: He's really put in a demur. He said,  
4 I'm not going to give you the investigation, so we have  
5 no facts. We don't know why Mr. Smart was fired. How can  
6 we review this situation to see if the investigator was  
7 authorized when the investigation is stopped at the outset?  
8 We couldn't say whether the fellow was having marital  
9 difficulties.

10 We can't say whether Mr. Smart was fired. How  
11 do we evaluate whether your inspector was justified in making  
12 this demand?

13 MR. MURRAY: I suppose the only basis for  
14 evaluation is your own perception of a rational link between  
15 the health and safety purposes of the Atomic Energy Act  
16 and this particular investigation.

17 MR. FARRAR: So that's what it comes down to.  
18 Could a rational investigator think --

19 MR. MURRAY: A rational investigator upon  
20 review, yes. That would be ultimately the courts, I suppose.

21 MR. SALZMAN: I suppose that if Mr. Reynolds'  
22 client didn't care, couldn't be reached, and we attempted to  
23 close down the plant, he'd have immediate recourse to the  
24 courts, and I take it they would be able to draft an  
25 appropriate motion.

d13 1 MR. MURRAY: If necessary, I would agree. I'm not  
2 convinced that this is required.

3 MR. FARRAR: But how does the court review it?  
4 The ultimate authority, the Supreme Court or whoever, how  
5 are they going to -- what is the test they are going to  
6 apply to what an investigator has to come up with?

7 MR. MURRAY: I don't think it's useful, with all  
8 due respect, to think in terms of what an investigator has  
9 to apply.

10 MR. FARRAR: Before you say it's not useful, we  
11 have Mr. Reynolds in the griddle up here, asking, wasn't  
12 it perfectly rational for an investigator to say, hey,  
13 there's some circumstances here in Mr. Smart's firing that  
14 want looking into.

15 MR. MURRAY: But it seems to me you've got to  
16 view the investigator as the entire agency. In that sense,  
17 yes.

18 MR. SALZMAN: Mr. Murray, isn't the answer to your  
19 question that when people -- one always must draw fine  
20 lines as to what is and what is not rational in a given set  
21 of circumstances. But when people embark on activities  
22 which are hazardous, that line is drawn much closer to the  
23 bone than it would be if they were running beauty parlors.

24 MR. MURRAY: As I tried to suggest in referring  
25 to the Public Service Company matter, and other cases.

MR. SALZMAN: There is no escape from the dilemma.

The person who decides must always make these distinctions,  
and in the long run, there's nothing to fall back on except  
your own common sense and your own care and thought because  
there comes a point where there isn't an answer that's  
written down.

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1 MR. MURRAY: In the sense that you're saying it,  
2 that's right. Of course, we feel we have statutory law.

3 MR. SALZMAN: There's nothing involved with  
4 Mr. Reynolds' client's wife.

5 MR. MURRAY: I am sorry?

6 MR. SALZMAN: Mr. Reynolds' client's wife is not  
7 involved in this investigation. That's beside the point.

8 MR. MURRAY: I think you can draw hypothetical cases  
9 that stress that line. That's right. But I think that is  
10 considerably stretched beyond the line in this case.

11 CHAIRMAN ROSENTHAL: But you are not suggesting, are  
12 you, that it would be impossible for the Commission's inspectors  
13 to decide they want to get into the personal lives of company  
14 officials on the grounds that there might be a link between their  
15 personal lives and the safety of the plant?

16 MR. MURRAY: I am not suggesting it's impossible.

17 CHAIRMAN ROSENTHAL: You're just saying we don't need  
18 to reach that interesting speculation here?

19 MR. MURRAY: Right.

20 CHAIRMAN ROSENTHAL: You have got about two minutes.

21 MR. MURRAY: I would like to just say one thing --

22 MR. FARRAR: Mr. Murray, was one of your reasons why  
23 we shouldn't reach Mr. Smart's request, that it was moot? You  
24 gave me a list of things.

25 MR. MURRAY: Yes. It was moot, premature, and outside

1 the scope of the Commission's established proceedings.

2 MR. SALZMAN: May I ask one question, Mr. Murray:  
3 Would you have any objection to our saying, for the benefit of  
4 Mr. Bancroft, to take you up on what you said -- and we repeat  
5 it, that the Commission has not decided, that Mr. Murray has  
6 not said that the Commission has decided?

7 MR. MURRAY: I would appreciate it if you said that.

8 MR. SALZMAN: What the authority would be, in the  
9 event we were to find such a good reason for a show-cause effort.

10 MR. MURRAY: I would appreciate it if you said that, Mr. Salz-  
11 man. It would help me out in light of what has gone on here this morning.

12 I just want to say one last word. A decision by you  
13 gentlemen that the Nuclear Regulatory Commission does not have  
14 the authority to make the investigation that we believe we're  
15 entitled to make, it seems to me, would be contrary to the  
16 plain words of the statute. It would be contrary to common  
17 sense and considerations of sound policy and would be contrary  
18 to public health and safety.

19 CHAIRMAN ROSENTHAL: Thank you, Mr. Murray.

20 Mr. Reynolds, I will give you a few minutes of  
21 rebuttal, if you would like it. It should be confined to the  
22 arguments that counsel that followed you had made.

23 REBUTTAL BY MR. REYNOLDS:

24 MR. REYNOLDS: Is that limiting?

25 CHAIRMAN ROSENTHAL: I don't know if that's limiting

1 or not.

2 (Laughter.)

3 MR. REYNOLDS: I will just take a few minutes.

4 I think that maybe, to put it in focus, what I would  
5 like to pick up on is Mr. Salzman's statement that in the area  
6 of public safety, when one draws lines you may have to draw it  
7 a little closer to the bone.

8 We don't contest that. I think that is correct, and  
9 I think that what we're looking at here is whether this kind of  
10 inspection, given a claim of retaliatory firing in a single  
11 instance, is one that warrants the NRC to investigate the claim  
12 of discrimination. And I think that this case can be discussed  
13 and has been discussed in a number of hypothetical terms, and  
14 I believe that hypothetical gloss, if you will, on the case, is  
15 important for purposes of where I have been trying to say the  
16 authority question comes out.

17 I will have to tell you very candidly that I would  
18 have a different case and I think I would feel much less com-  
19 fortable standing up here if we were coming to you with a situa-  
20 tion where the utility or its contractor had engaged in a series  
21 of discriminatory firings or discriminatory disciplinary actions  
22 of workers who had, over the past 2-1/2 years of construction on  
23 this site, taken complaints to the NRC.

24 We don't have that. We have an isolated instance.  
25 And I view that as a material situation.



1 MR. SALZMAN: Who was it that said that the longest  
2 journey begins with a single step?

3 MR. REYNOLDS: I think that's right. But I also  
4 think there is a great deal of mischief afoot, and announcing  
5 or pronouncing the authority of this Commission under the  
6 general rubric that we're talking about here, to go in and  
7 become embroiled in these kinds of controversies, I think that  
8 if one is to focus on that and address the authority question,  
9 it should be in a very circumspect manner.

10 I personally do believe that if one can point to some  
11 reason to believe --

12 MR. SALZMAN: Mr. Reynolds, let me ask you this:  
13 In what universe is it that circumspection in the interest of  
14 public safety is a goal that we should look for?

15 MR. REYNOLDS: I think that it is relevant. I think  
16 -- let me put it this way: I think that circumspection is  
17 important for the reason that, one, I think you are trying to  
18 link an event here to the safety function; and one should not,  
19 as you've expressed yourself, be too cavalier with that particu-  
20 lar exercise, because there is a host of other investigations  
21 that might trip on in afterwards.

22 I think the other factor which is very relevant is  
23 that, as we've heard before today, this agency has precious  
24 little extra time; it is very involved in a number of important  
25 safety matters. You are talking about, I believe -- and maybe

1 this is the parade-of-horribles type of argument, but I think  
2 it's a realistic assumption -- you are talking about another  
3 element of activity for this agency to be involved with. And  
4 whether you're talking about the staff level or whether you're  
5 talking about --

6 CHAIRMAN ROSENTHAL: That doesn't go to authority.  
7 That goes to the order of priorities that are established among  
8 the various powers that the agency has.

9 MR. REYNOLDS: I was trying to address why it makes  
10 sense to be circumspect when you're dealing in an area of this  
11 sort, with the label "public health and safety." That's all I  
12 am suggesting..

13 I think that if we had a situation here where some-  
14 body could point -- a rational man could point -- to a chilling  
15 effect, if you will, that that would perhaps bring one closer  
16 to the authority question, link it to safety. I don't think we  
17 have any indication -- in this case we certainly have no indi-  
18 cation. And certainly with the new legislation I don't think we  
19 even can indulge in the presumption that we're talking about a  
20 chill, because one worker gets fired and claims that it was  
21 retaliatory.

22 I don't think that we're talking about a compromise,  
23 if you will, or an infringement on the monitoring capability of  
24 staff and its inspectors under the scheme of things, when you  
25 raise a situation of a firing of a single worker over a period

1 of 2-1/2 years and his claim is because he went to the agency.

2 And I think you're right: We have to take judicial  
3 notice of the grievance. And I will have to readily admit it  
4 did not reach the question and it did leave open other questions.

5 But it does seem to me, if we're talking about an  
6 authority question, I really believe that the link has to be to  
7 the safety aspect of it, has to be one that a rational person  
8 can determine on the basis of the situation at hand.

9 Mr. Murray has told us today we have to get to the  
10 facts to find out if it's retaliatory because we need that for  
11 safety purposes, and I still am not, in my own mind -- hopefully,  
12 as a rational person -- clear what the safety purposes are that  
13 suddenly come to the forefront, if I find out it was a retalia-  
14 tory firing.

15 It seems to me if there are regulations that they  
16 want to put in place if there's further inspection, this agency  
17 can assume that it's got a retaliatory firing and it can take  
18 those measures. And it would be the same measures it would take  
19 if it went out and investigated. And I don't see that the factual  
20 investigation has the link to the safety situation.

21 CHAIRMAN ROSENTHAL: I think you've made that point  
22 before.

23 MR. REYNOLDS: Unless we talk about it in much dif-  
24 ferent hypothetical terms.

25 CHAIRMAN ROSENTHAL: Thank you, Mr. Reynolds.

1 Do you want about two or three minutes, Mr. Bancroft?

2 MR. BANCROFT: No, thank you, Mr. Chairman.

3 CHAIRMAN ROSENTHAL: Thank you.

4 On behalf of the entire Board, I wish to thank all  
5 counsel for very stimulating argument this morning.

6 I also wish, once again, to express our appreciation  
7 to the Howard Law School. This, I can say, is one of the most,  
8 if not the most, attractive moot-court facilities that I have  
9 encountered, and I would go beyond that to say that it is con-  
10 siderably more attractive than most of the courtrooms that I  
11 have been in, and I have covered a fairly substantial number of  
12 at least the federal courtrooms, both trial and appellate.

13 But we very much appreciated the hospitality of  
14 Howard, and, once again, we thank you very much, and on that  
15 note, the matter before us will stand submitted.

16 We will try our hand at deciding it in a reasonably  
17 comprehensible, and possibly even intelligent, fashion. It  
18 might well be that some of the students that have heard this  
19 entire argument can do a better job of it than could we.

20 On that note, the matter stands submitted.

21 (Whereupon, at 12:05 p.m., the hearing was adjourned.)

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