

DOCKET NUMBER 50-346  
PROD. & UTIL, FAC.

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of )  
 )  
THE TOLEDO EDISON COMPANY )  
 )  
AND )  
THE CLEVELAND ELECTRIC )  
ILLUMINATING COMPANY )  
 )  
(Davis-Besse Nuclear Power )  
Station) )

Docket No. 50-346

REFERRAL TO ATOMIC SAFETY AND LICENSING APPEAL BOARD  
OF RULING DENYING THREE WEEK DELAY BASED UPON MEDICAL GROUNDS

JURISDICTION

As provided by the Rules of Practice the Atomic Safety and Licensing Board (hereinafter called the Board) appointed to hear this case hereby refers to the Atomic Safety and Licensing Appeal Board its rulings of 11 and 12 February 1971.

In its 11 February ruling the Board denied Intervenor Glenn Lau's motion to delay the hearing for three weeks (T. 2135); and on 12 February denied a motion for reconsideration of its 11 February ruling. (T. 2255)

8008060 972

G

FACTS

Intervenor Glenn Lau became ill during the course of the hearing 26 January 1971 (T. 1147); his illness was diagnosed to be mumps. Upon recovering from the mumps Lau became afflicted with a complication diagnosed as Bell's palsey. On an intermittent basis Lau was present at the hearings during the week of 8 February but did not attend the hearing at all on 12 February, the date the record of the hearing was closed. On 10 February Lau moved as follows:

"I would like to make a motion to the Board that these proceedings be delayed after such time that we can conclude the direct testimony of my witnesses to allow me time to get my health back so I can continue my cross examination.

"We have come so far in and my whole case is just really blossoming now. I would feel very bad to think that I was not able to conclude it. So my motion is that we have a three-week delay to allow me to try and regain my health so I can continue." (T. 1973)

Lau also said if he had not regained health at that time then he would ask for another delay.

On 11 February Lau offered the medical testimony of his personal physician in support of his motion for a three week delay. (T. 2120 et seq.) Oral argument was heard. (T. 1974-1976 and T. 2124-2134)

After carefully considering the matter the Board denied Lau's motion stating that the hearing should go on. (T. 2135-2136) The Board indicated its ruling would be referred to the Appeal Board at the earliest opportunity.

On 12 February, as indicated above, Lau did not appear. (T. 2230) The Applicant moved that ". . . the Board rule that Lau's opportunity for further cross and direct testimony in this case can be terminated." (T. 2231) The Board denied the Applicant's motion. (T. 2231) The Board heard closing summary argument of the Applicant, then conferred with counsel and Mrs. Lau who had arrived during the Applicant's presentation.

After the conference the Board provided Mrs. Lau an opportunity to speak and Mrs. Lau again put the motion before the Board asking for a delay. (T. 2250-2251)

After hearing further argument on the motion for reconsideration the Board denied it. (T. 2254-2255)

#### BACKGROUND

Although Lau indicated he had notice of the hearing on 18 November 1970, and although he intended to intervene, he did not attend the prehearing conference held 23 November. On the first

day of the hearing, 8 December 1971, Lau was accompanied by counsel and a petition to intervene which he filed was considered. The petition had been filed late and lacked the requisite degree of specificity (10 CFR 2.714); Lau was given additional time to amend or rewrite his petition to intervene.

Lau's amended petition to intervene was filed 9 December; Lau and his counsel were urged by the Board to confer with counsel for Applicant and the AEC staff in order to clarify one of the two contentions made in the petition as grounds for intervention. (T. 365) After hearing further argument on Lau's amended petition, the Board granted leave to intervene on 10 December.

Subsequently, Russell Baron, Esquire, counsel for Intervenor Coalition for Safe Nuclear Power, requested an additional ninety (90) days within which to prepare its case. (T. 430) Counsel for Lau then stated:

"I just wanted to stress that on behalf of Mr. Lau the failure for us to have adequate time to prepare is utterly fatal.

\* \* \*

"I am in full agreement with Mr. Baron. He has originally spoken of 90 days, and he has spoken also of 60 days.

"Ninety days is reasonable, as is 60 days. Beyond that I am not prepared to say that 30 or 45 or 50 days is unreasonable." (T. 437)

The Board thereupon requested the Intervenors to consider the nature of their respective cases, the witnesses they would need, so the Board would be in a better position to make a practical judgment as to the element of work involved and the amount of time which would be required to accomplish that work. (T. 439)

After conferring with counsel the Board on 10 December 1970 granted Intervenors additional time to prepare and present their respective cases, calling for adjournment until 5 January 1971. (T. 441) Counsel for the Applicant, Gerald Charnoff, Esquire, made the following comment:

"MR. CHARNOFF: May I just comment, and I think it is important to put this on the record, that an element of the discussion at the bench with regard to the adjournment to January 5 was to allow the Intervenors to prepare their case and that the understanding was that the Intervenors, if they are to have any direct case, are to have it ready and available that week and not simply to reconvene the 5th and announce what their direct case might be sometime in the future.

Am I correct in that understanding?

CHAIRMAN SKALLERUP: Mr. Baron? [Coalition counsel]

MR. BARON: You are absolutely correct. I have indicated already that if we are to have a case, it will be in my hands and fully prepared and we will be prepared to proceed on the 5th of January. (T. 441) I will advise you prior to that date one way or the other.

MR. CHARNOFF: Thank you.

Does the same apply, as I understand it does, to Mr. Knight? [Lau counsel]

MR. KNIGHT: Yes, that is correct." (T. 442)

Mr. Knight then requested that he be excused for the balance of the day, reserving the right to cross-examine and reserving the right to make an opening statement at a later date. (T. 443) Both Baron and Knight were excused. (T. 450)

When the hearing reconvened 5 January 1971 different counsel for Lau appeared, having been retained by Lau on 30 December 1970. Counsel for Lau moved for an order delaying the hearings until 8 March 1971 on the ground that Lau had not had "adequate time in which to prepare his case nor have his counsel had adequate time in which to prepare an argument to support his intervention in this matter." (T. 544-547) No satisfactory explanation for the change of counsel by Lau was made. In fact, the second legal counsel for Lau withdrew from the proceeding on 18 January (T. 1071), and on 25 January Lau informed the Board he was representing himself. (T. 953) On 29 January Lau's first counsel reappeared on Lau's behalf. (T. 1493 and 1496)

The Board heard argument on the Lau motion for this additional 60 day delay. (T. 547 et seq.) In view of the limited contention

of Lau the Board requested counsel to provide it with the identity of witnesses, dates the witnesses could appear, scope of their testimony, and how the testimony would bear on Lau's case. (T. 558) The Board requested the Applicant on the other hand to provide data regarding public disclosure of construction plans. (T. 559) Since counsel for Lau indicated they needed 15 minutes to list their witnesses the Board took a 15 minute recess. After 50 minutes had passed the Board resumed the hearing. (T. 560)

The Applicant provided data requested by the Board. (T. 560) Counsel for Lau indicated the information regarding witnesses would not be available until after lunch. (T. 563)

Following lunch counsel for Lau disclosed the names of seven individuals who reportedly desired to testify on Lau's behalf. (T. 566) None ever did. And in the case of two of those named, the record indicates they never had agreed to be witnesses for Lau. (T. 626 and 627) In retrospect Lau's "list" of witnesses was frivolous.

In acting upon Lau's motion for a 60 day delay, the Board also took into consideration Intervenor LIFE's request for additional time to prepare its case. The Board set a schedule for the filing of



papers for discovery and interrogatories, and responses thereto. (T. 624 and 630) The Board on 7 January ordered LIFE and Lau on or before 20 January to provide the parties with the names of witnesses, qualifications of the witnesses, and copies of the complete testimony of the witnesses or an accurate summary thereof.

(T. 765) Although Lau provided some names and identities, Lau did not otherwise comply with this order. Further, most of the witnesses actually called on behalf of Lau were not identified until they testified. (T. 2041 et seq.)

The Board granted Lau and LIFE additional time until 25 January to cross examine and set forth their cases. (T. 624) The Board said:

"The Board has really I believe extended this extraordinary extension of time to Mr. Lau ...because the Board recognizes that Mr. Lau is the only intervenor that lives within the shadow of the plant. And that being the case we have extended or stretched our discretion to provide him with this additional opportunity to make his case. And it is the Board's intention when it convenes on the 25th to see the case through." (T. 629)

As noted above, when the hearing convened 25 January Lau informed the Board he was representing himself. (T. 953) Lau began cross-examination on 26 January, (T. 1092-1147) but excused himself upon feeling ill. Lau later in the day informed the Board he had seen his doctor who diagnosed that Lau had the symptoms



of mumps; Lau requested the Board to continue with his witness, Dr. Ernest Sternglass and other witnesses. (T. 1165) Dr. Sternglass testified on behalf of Lau on 28 January. (T. 1399 et seq.)

Dr. Arthur Tamplin offered as a Lau witness testified as the Board's witness on 29 January because his testimony was directed toward the 10 CFR Part 20 contention, rather than the Lau contention. (T. 1497)

Witness Carl W. Houston testified on 29 January on behalf of Lau. (T. 1567) Because this testimony appeared to be beside the issue the Board granted Houston the opportunity to provide the Board a written summary of testimony regarding the engineering design of the engineered safeguards. (T. 1579) No such summary of testimony ever was submitted by Houston or Lau. Houston's testimony later was stricken from the record with no objection from Lau. (T. 2214)

The Board on 7 February was informed by Mrs. Lau that her husband had experienced certain complications in recovering from his illness and would not be present for the 8 February session. (T. 1600) On 8 February, shortly after the hearing commenced the Board communicated directly with Lau and offered to meet him at his home, if he preferred, with the recorder, all counsel, and appropriate

witnesses so he would be able to conduct cross-examination. Lau never availed himself of this opportunity. Lau said he had a doctor's appointment that morning and requested the opportunity to confer with the Board and counsel during the noon recess.

During the noon recess Lau met with the Board and counsel and advised he would not attend the afternoon session; that his doctor's appointment was rescheduled for that afternoon and he was attempting to obtain witnesses to testify with regard to snowfall in the area of the plant. (T. 1661)

At Lau's request an evening session was held on 10 February so Lau could present witnesses in support of his contention. (T. 2041 et seq.) Nine such witnesses were heard. Lau himself conducted the examination.

On 11 February the Board denied Lau's motion (supra, p. 2) for a three week delay in the hearing. The Applicant on the same day presented witness John A. Papcun to rebut the testimony of Lau's witnesses heard the evening before. Lau personally conducted cross-examination of witness Papcun. (T. 2152-2164)

Lau declined to cross-examine Applicant witnesses Roe and Goldman who also testified in rebuttal to the testimony of Lau's witnesses (T. 2192), but Lau did cross-examine AEC Staff witness Tedesco. (T. 2200-2206)

The Board set 9:30 a.m. of the following day to hear from Lau with respect to any further direct or cross-examination he might wish to offer. Lau was excused for the day. (T. 2218) He did not appear personally nor did counsel appear on his behalf in the course of the following day's session during which the record of the hearing was closed. Mrs. Lau appeared and moved the Board reconsider its denial of the three week delay; this the Board declined to do.

#### CONCLUSIONS

Lau had ample time to prepare and present his case prior to becoming ill.

The record shows that on several occasions Lau was granted additional time to present his case. For approximately one-half the duration of the hearing (8 December 1970 - 25 January 1971) Lau, although in good health, did not make good use of the time available. Lau's conduct with respect to identifying his witnesses, and engaging and disengaging, then engaging and disengaging counsel again, show Lau's frivolous pursuit of his case.

Lau in fact did present numerous witnesses in support of his contention.

Paradoxically, after the onset of his illness on 26 January 1971, Lau became active and presented his witnesses, the bulk of whom live in the immediate locality of the plant and the place of the hearing, and as such, were readily available earlier in the hearing.

Lau's cross-examination was substantially completed.

Lau completed his cross-examination of the principal witness of the Applicant, and principal witness of the Staff, both of whom had been called to rebut the testimony of Lau's witnesses. Lau declined to cross-examine two other witnesses also presented by the Applicant for the same purpose of rebuttal. Lau earlier in the proceeding had conducted additional cross-examination.

Had a three week delay in the hearing been granted, there was no assurance Lau would be ready to proceed.

When making his motion for delay Lau indicated he would request further delay in the event he had not regained his health at the conclusion of the three week period. In the view of the Board, it would not be proper to postpone important public business of this

nature on the basis of speculation as to the condition of Lau's health three weeks hence.

Lau refused to disclose the nature of the additional cross-examination to the Board.

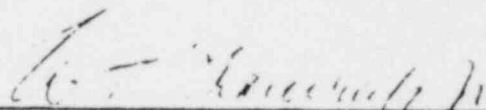
Having been advised of the complications experienced by Lau on recovering from the mumps, the Board offered to meet at his home if he preferred, so Lau would have the opportunity of stating to the official recorder of the proceedings any further questions on cross-examination he wished to pursue. Lau never availed himself of this opportunity. The Board thereby was left in the dark with respect to the nature, relevance, and substantiality of any further Lau direct testimony or cross-examination. The Board contends Lau had a duty to disclose such matters, particularly under the present circumstances, and in failing to perform that duty, Lau eliminated the only substantial basis he might have had for obtaining a further delay in the hearings.

In view of all of the foregoing, and considering the public interest, the interest of the Applicant, the AEC Staff, and the duty of the Board to conduct an orderly, as well as a fair and

impartial hearing, it was the judgment of the Board that the hearing should continue, notwithstanding the condition of Lau's health. Therefore, the Board denied the motion for a three week delay and the motion for reconsideration of that ruling.

The Board based upon its further review of the record, is of the opinion that it ruled properly. However, because of the unusual nature of the situation, the Board is referring its ruling to the Appeal Board.

ATOMIC SAFETY AND LICENSING BOARD



---

Walter T. Skallerup, Jr.  
Chairman

Dated 23 February 1971  
Washington, D.C.

UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of )

TOLEDO EDISON COMPANY, ET AL. )  
(Davis-Besse Nuclear Power Station )  
Unit 1) )

2-23-71

Docket No. 50-346

SUPPLEMENTAL CERTIFICATE OF SERVICE

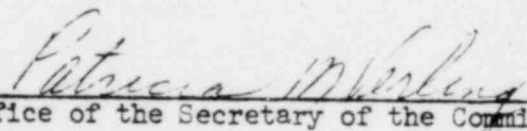
I hereby certify that copies of (1) Brief Re: IMPLEMENTATION OF NATIONAL ENVIRONMENTAL POLICY ACT, and (2) PROPOSED CONCLUSION OF LAW RELATIVE TO THE APPLICABILITY OF THE NATIONAL ENVIRONMENTAL POLICY ACT, undated, in the captioned matter have been served on the following by deposit in the United States mail, first class or air mail, this 23rd day of February 1971:

Walter T. Skallerup, Jr., Esq.  
Chairman, Atomic Safety and  
Licensing Board  
Cox, Langford & Brown  
1521 New Hampshire Avenue, N. W.  
Washington, D. C. 20036

Dr. Walter H. Jordan  
Oak Ridge National Laboratory  
P. O. Box X  
Oak Ridge, Tennessee 37830

Dr. Charles E. Winters  
8800 Fernwood Road  
Bethesda, Maryland 20034

Dr. John C. Geyer, Chairman  
Department of Geography and  
Environmental Engineering  
The Johns Hopkins University  
Baltimore, Maryland 21218

  
Patricia Whiting  
Office of the Secretary of the Commission

cc: Mr. Skallerup  
Mr. Engelhardt  
Mr. Wells  
H. Steele  
H. Smith