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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
REGULATORY & SERVICE  
BRANCH

Before Administrative Judges

Marshall E. Miller, Chairman  
Dr. Kenneth A. McCollom  
Dr. Richard F. Cole

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In the Matter of	}	Docket Nos. 50-445
TEXAS UTILITIES GENERATING COMPANY, <u>et al.</u>	}	50-446
(Comanche Peak Steam Electric Station, Units 1 and 2)	}	(Application for Operating License)
		January 4, 1983

MEMORANDUM AND ORDER

The Intervenor CASE filed a motion on December 14, 1982 to supplement its admitted exhibits by adding five more exhibits (CASE Exhibits 735, 736, 738, 739 and 740). Proffered Exhibit 738 is a copy of a Recommended Decision dated December 3, 1982, filed by an Administrative Law Judge of the U.S. Department of Labor (DOL) in a matter involving the alleged illegal discharge of Charles A. Atchison, complainant, by Brown and Root, Inc., respondent (Case No. 82-ERA-9).

Exhibits 735, 736 and 739 are I&E Reports concerning special inspections conducted by NRC Region IV inspectors in response to concerns testified to by Charles A. Atchison in this proceeding.

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Exhibit 740 is a copy of a letter from the Applicants to NRC Region IV regarding radiographs of welds on piping assemblies, furnished by ITT Grinnell, having been altered or "enhanced" with a soft lead pencil or an ink pen.

The Applicants filed an answer in opposition to CASE's motion on December 23, 1982. The Staff filed an answer to the motion on January 3, 1983, objecting to the admissibility of CASE Exhibit 740, but not to Exhibits 735, 736, 738 and 739. For reasons discussed infra, CASE's proposed Exhibit 738 (Recommended Decision of DOL Administrative Law Judge) will be admitted into evidence and made part of the record in this proceeding. Rulings on the admissibility of the remaining exhibits will be deferred until the evidentiary hearing is resumed.<sup>1</sup>

Exhibit 738 is a detailed, closely reasoned opinion and proposed order, finding that Mr. Atchison's wrongful discharge as a quality control (QC) inspector by Brown and Root resulted from his complaints about and reporting of construction defects and quality control deficiencies. Some of its factual background and findings relate to and cite transcripts of testimony and exhibits admitted in the instant proceeding during our July 26-30, 1982 evidentiary hearings.<sup>2/</sup>

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<sup>1/</sup> The Board has declined CASE's request for it to consider CASE's brief filed with the Appeal Board, in deciding the instant motion.

<sup>2/</sup> DOL Recommended Decision, December 3, 1982, pp. 3-5, 9-10, 12, 14, 19-20.

Substantial evidence was described and analyzed concerning Mr. Atchison's reporting of alleged welding defects in pipe whip restraints, filing of nonconformance reports (NCR 296, 361), ostensible reasons for discharge, NRC investigative reports (Staff Ex. 199), Mr. Atchison's job performance, and the "pow-wow" note of April 12, 1982.

Some of the exculpatory testimony offered by the respondent's witnesses was found to be "incredible, false and pretextual".<sup>3/</sup>

It further stated:

"The weight of this evidence supports a finding that as of his April 12, 1982 job removal by Brandt and job termination by Purdy, respondent had no legitimate business reason for his removal and termination, and that he was removed by Brandt and terminated by Purdy solely because he filed NCR #296 and NCR #361, protected conduct within the Act's meaning; but for this conduct complainant, as of April 12, 1982, would not have been removed from his non-ASME job in Brandt's group, and terminated by Purdy. It is further found these protected activities were the sole bases for Brandt and Purdy's conclusion complainant was unable to perform his assigned tasks, and did not follow supervisory instructions and the motivating basis for Brandt and Purdy's evaluation and administrative response, Brandt to remove and Purdy to fire."<sup>4/</sup>

The evidence discussed in the DOL Recommended Decision is clearly relevant to, and in some cases an extension of, the evidence taken in this proceeding regarding the Staff's investigation of Mr. Atchison's allegations of wrongful discharge for performing his duties as a QC inspector.<sup>5/</sup> Without deciding at this time

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<sup>3/</sup> Id., at 21.

<sup>4/</sup> Id., at 25-26.

<sup>5/</sup> Staff Ex. 197, "Testimony of NRC Staff Members Robert G. Taylor and Donald D. Driskill Regarding NRC Staff Investigation & Inspection Findings on Allegations by Charles Atchison"; 199, NRC Investigative Report, 6/30/82; Tr. 2461, 2472, 2474-75, 2609, 2612-15.

what effect per se such DOL decision would have on this proceeding, certainly the underlying exhibits, testimony and other evidence are relevant and necessary for a complete and adequate record on QC issues. We have previously ruled that allegations of wrongful discharge of a QC inspector for reporting construction defects is a serious matter, and that "labor practices such as the firing of employees who report construction deficiencies can have serious safety implications."<sup>6/</sup>

It would be anomalous to have a DOL decision holding that Mr. Atchison was wrongfully fired for reporting quality control deficiencies, while confining NRC evidence to the Staff's conclusions and its investigator's testimony that his investigation "of the allegation that Mr. Atchison was terminated for writing NCR's did not substantiate or refute this allegation."<sup>7/</sup> Without attempting to make a final judgment at this time, we have indicated preliminarily that it is rather incredible for an experienced investigator to spend many hours taking signed witness statements from eleven witnesses only to wind up finding that this evidence was in perfect equipoise.<sup>8/</sup> The Intervenor has challenged the NRC Staff's competence in handling and investigating QC allegations by "whistle-blowers," and has questioned the Staff's alleged bias in

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<sup>6/</sup> Order entered September 30, 1982, at 7, fn. 8.

<sup>7/</sup> Staff Ex. 197, at 10-11.

<sup>8/</sup> Tr. 3045.

favor of the Applicants. Clearly further evidence on these issues will be required when the evidentiary hearing resumes.<sup>9/</sup>

The Recommended Decision is also a follow-up to evidence already in our record. CASE Exhibit 650B, Attachment 2, is the written determination of May 14, 1982 by the Area Director of the DOL that Mr. Atchison was wrongfully discharged. The Area Director had essentially the same information as the NRC investigator, and signed unexpurgated witness statements were shared by them, although denied the Board.<sup>10/</sup> This DOL Area Director's determination has been the subject of testimony and of statements by counsel.<sup>11/</sup> The Recommended Decision results from an appeal of that determination, and is based upon a full evidentiary hearing before an Administrative Law Judge. Such decision contains important additional evidence directly connected with testimony already in our record. In fact, we are surprised that only the Intervenor called this matter to the Board's attention on December 14, 1982 and filed a copy on that date. We have previously admonished both the Applicants and the Staff that they have an affirmative duty to inform the Board promptly of new facts or developments.<sup>12/</sup> This Recommended Decision is a potentially

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9/ Tr. 2669-70.

10/ Id.

11/ Here as elsewhere we do not consider statements of counsel, whether oral or in briefs or other filings, as constituting evidence.

12/ Order dated October 20, 1981.

significant matter which Applicants and Staff should have immediately forwarded to this Board.<sup>13/</sup>

The Staff has an additional reason to break its silence in this matter. In its investigator's prefiled testimony and his report, it expressly stated:

"Mr. Atchison filed a complaint with the U.S. Department of Labor alleging discrimination and a hearing is currently pending. Depending on the results of this proceeding, further action by Region IV on this matter may be considered."<sup>14/</sup>

The pending DOL hearing there referred to has now been completed with a finding of unlawful discharge, and prompt action by the Staff could reasonably be expected. The Applicants' argument that the Recommended Decision is "not effective until acted upon by the Secretary of Labor"<sup>15/</sup> is not very persuasive, in the absence of any well-founded reason to believe that DOL adjudicatory practice renders a reversal likely.<sup>16/</sup>

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<sup>13/</sup> Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406, fn. 26 (1976).

<sup>14/</sup> Staff Ex. 197, at 11; Ex. 199, at 2, 9.

<sup>15/</sup> Applicants' Answer to CASE's Motion, December 23, 1982, at 7-8.

<sup>16/</sup> The Applicants further argue that an exclusive remedy for discriminatory discharges is provided by DOL under the statute (42 U.S.C. § 5851(a); 29 CFR § 24.2(b)), and therefore the DOL decision is "founded on an evidentiary record not before the Board that was developed to support findings on legal issues not presented in this proceeding or within the jurisdiction of the Board" (Applicants' Answer to CASE's Motion, pp. 7-8). This strained legal reasoning is rejected. Obviously the Board does not intend to trespass upon the DOL's remedy powers, including the proposed award of \$7875 as attorney's fees. However, the underlying evidence concerning this firing of a QC inspector for reporting construction deficiencies could be common to the issues in both proceedings, and equally relevant to "substantiating" such allegations.

Finally, we note that Orders for the production of certain signed witness statements and information by this Staff are presently pending before the Appeal Board.<sup>17/</sup> We will not of course discuss here any matters presently under appellate review. However, there may be evidentiary matters to be considered by the Board following the Appeal Board's decision, in addition to further evidence discussed above and also described in our prior orders.<sup>18/</sup>

The remaining Exhibits proffered by CASE (Ex. 735, 736, 739, 740) will not be ruled on at this time. It is anticipated that one more (and hopefully final) hearing will be held after the Staff has completed its analyses and filed its documents as discussed in previous Board Orders.<sup>19/</sup> Prior to that hearing, the parties shall complete discovery and file prefiled direct testimony on all remaining issues, including the underlying facts and evidence regarding the Atchison matter contained in CASE Exhibit 738, the

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<sup>17/</sup> Licensing Board Order to Show Cause (August 4, 1982); Order Denying Reconsideration (September 30, 1982). Appeal Board: NRC Staff's Exceptions to the Atomic Safety and Licensing Board's Order Denying Reconsideration (October 8, 1982); NRC Staff's Brief In Support of Its Exceptions, etc. (November 17, 1982); NRC Staff's Motion For Directed Certification (November 17, 1982).

<sup>18/</sup> Orders dated December 21, December 7, and September 22, 1982.

<sup>19/</sup> Id. See also Tr. 5408, 5412-14, 5426.

Walsh/Doyle allegations, SSER No. 3, and unresolved Board Notification matters having a significant relationship to the issues in controversy.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Marshall E. Miller, Chairman  
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland  
this 4th day of January, 1983