



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

In the Matter of)
UNION ELECTRIC COMPANY) Construction Permit Nos. CPPR-139
(Callaway Plant, Units 1 and 2)) CPPR-140

WILLIAM SMART'S BRIEF IN REPLY TO
UNION ELECTRIC'S APPEAL BRIEF

12/8/78

INTRODUCTION

The Atomic Safety and Licensing Board (Licensing Board) decided that the NRC Staff has the authority to conduct an investigation into the firing of William Smart by the Daniel Construction Co. (Daniel) and to enforce its demand by suspension of the Callaway construction permits if there is continued refusal to allow the investigation. The Licensing Board's decision on these issues was correct and should be affirmed by the Atomic Safety and Licensing Appeal Board (Appeal Board).

The Nuclear Regulatory Commission (NRC) has the authority to conduct the investigation as a necessary component of its authority to protect worker sources of information from retaliation. The basis for this authority has been set out in William Smart's appeal brief. Moreover, there is an additional, independent basis for this authority which stems from the NRC's need for the information required to police the Callaway construction properly. Furthermore, the NRC Staff may conduct

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the investigation immediately, and may do so independently of any other proceedings, and without obtaining a warrant. Finally, the prospective construction permit suspension remedy approved by the Licensing Board is just and well suited to the violation.

I. THE NRC HAS THE AUTHORITY AND THE NEED TO INVESTIGATE THE CAUSE OF WILLIAM SMART'S DISCHARGE.

William Smart's appeal brief presents the basis for his position that the NRC has the authority to order a remedy if it finds that a nuclear construction worker has been discriminated against in retaliation for providing safety information to the NRC. This remedial authority flows from the NRC's broad statutory authority to monitor the proper construction of nuclear facilities in order to protect the public health and safety, and from the importance of preserving worker sources of information in connection with the NRC's inspection of the quality of nuclear construction. A necessary predicate to the exercise of the NRC's remedial authority is an investigation of suspected retaliation. Such an investigation in furtherance of the NRC's safety mission is supported by several statutory and regulatory provisions.

The Atomic Energy Act gives the NRC broad authority to conduct the investigations and inspections needed to fulfill its responsibilities. The Commission is authorized to:

make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or

in the administration or enforcement of this chapter, or any regulations or orders issued thereunder.

42 U.S.C. § 2201(c); and to

provide for such inspections of activities under licenses issued pursuant to sections 2073, 2093, 2111, 2133, and 2134 of this title, as may be necessary to effectuate the purposes of this chapter, including section 2134 of this title.

42 U.S.C. § 2201(o).

The Energy Reorganization Act of 1974, which created the NRC, gave it further inspection authority in section 206(d) to enforce the obligation of firms "constructing, owning, operating or supplying the components of" (42 U.S.C. § 5846(a)) a licensed facility to report defects and violations.

The Commission is authorized to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of this section.

42 U.S.C. § 5846(d). The Commission has implemented this statutory authority by regulations authorizing inspections in connection with the various NRC activities where they are needed, e.g., 10 C.F.R. §§ 19.16(b), 21.41, and 50.70.

However, even if the Appeal Board finds, contrary to William Smart's position, that the NRC does not have the authority to remedy retaliatory employment discrimination, or does not reach the remedial authority issue, the investigation initiated by the NRC Staff into the causes and circumstances of Mr. Smart's discharge is, nonetheless, authorized and necessary. The important role of the construction worker source in assisting the NRC to fulfill its safety mission is discussed in section II.A

of Mr. Smart's appeal brief.

A retaliatory discharge by a nuclear construction general contractor could well lead to impairment of the NRC's ability to supervise the safe construction of the nuclear power plant unless the NRC adjusted its activities in response to the employer's action. Also, discharge of a "disloyal" worker who has "made trouble" by pointing out construction defects to the NRC would call the licensee's dedication to quality assurance into question. From either point of view, the NRC needs to be able to investigate circumstances raising a reasonable suspicion of a retaliatory firing in order to, at the very least, allocate its inspection resources with the greatest efficiency. For this reason, if for no other, the investigation undertaken by the NRC and initially blocked by the Daniel Construction Co. is related to the NRC's central safety mission. It is therefore authorized by the inspection provisions discussed above.^{1/} Therefore, the NRC Office of Inspection and Enforcement (I&E)

1/ The fact that the disputed investigation is safety-related makes inapposite the cases cited by Union Electric in support of the proposition that the NRC's authority in nuclear licensing is not unlimited. (Union Electric's Appeal Brief at 11-12.) These cases, New Hampshire v. AEC, 406 F.2d 170 (1st Cir.), cert. denied, 395 U.S. 962 (1969), and Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir. 1969), concerned AEC authority with respect to national policy matters, i.e., wildlife protection and antitrust policy, separate from the AEC's core regulatory function of protecting the public from the dangers associated with nuclear energy.

Even so, Congress reacted to those judicial decisions by expanding the AEC's authority in those areas. Given the fact that the present NRC action is directed toward fulfillment of its role as the public's nuclear safety guardian and its broad regulatory authority to achieve this goal, no such congressional expansion of powers is necessary to support the NRC Staff's present actions.

acted within its authority to demand Daniel's submission to the investigation into Mr. Smart's firing.^{2/}

II. THE NRC STAFF WAS CORRECT TO PROCEED IMMEDIATELY WITH ITS SAFETY RELATED INVESTIGATION.

A. The NRC Investigation May Proceed Independently of Any Grievance Mechanism or Labor Department Investigation.

The Appeal Board should reject Union Electric's position that, even if the NRC has the investigatory authority claimed by the Staff, the NRC must hold off on its investigation until other possible inquiries, such as a collective bargaining grievance proceeding or Labor Department investigation, are completed. As discussed above, the NRC needs to be able to investigate possible retaliatory firing to maintain its access to information from workers, to gauge a licensee's attitude toward quality assurance and NRC supervision, and to allocate its inspection resources. Nothing in logic or law requires the NRC to defer to other proceedings, private or governmental, at the cost of delay and possible continued impairment of the NRC's performance of its safety mission.

Union Electric's claim of mandatory NRC abstention in favor of arbitration or action by the Labor Department under the new section 210 of the Energy Reorganization Act in a future case is based on the tenuous and unsubstantiated claim that the

^{2/} This investigation has now been carried out, pursuant to an order of the Appeal Board (ALAB-503, Oct. 20, 1978), approving the agreement of the parties. The order and agreement provided for Daniel's cooperation with the NRC's investigation and further provided that the results of the investigation would not be released by I&E pending the outcome of this appeal.

NRC investigation might interfere with these other proceedings if the NRC made an inconsistent finding. Even if that were so, in matters of regulating nuclear activities for the public safety, the NRC's statutory mandate is paramount. It need not rely on other interested bodies, which may have different priorities and goals, and whose proceedings may be directed to different aspects of the situation than those of concern to the NRC. Of course, the NRC Staff has some discretion to coordinate its investigation with other organizations, but it cannot be forced to defer its safety-related investigation at the insistence of the licensee who is the subject of an investigation.^{3/}

3/ Although Union Electric has softened the position it took before the Licensing Board (see William Smart's brief to the Licensing Board at 19 n.9), Union Electric still seeks to advance its cause by attempting to distinguish the NRC's authority over Daniel from that over Union Electric, the licensee. (Union Electric's Appeal Brief at 29 n.22.) The Appeal Board should decisively reject this distinction and hold Union Electric fully responsible for impairment of the NRC's safety function by a contractor that Union Electric has designated to perform the work authorized by its construction permits.

This principle was firmly established in the case of the unreported geological fault at the North Anna site, in which the Atomic Safety and Licensing Board stated:

[T]here is no merit in the Licensee's plea that its officers had no knowledge that the statements discussed herein were material false statements. If the Licensee were permitted to avoid responsibility because its agents or its independent contractors failed to inform it of material information, it could thwart the purpose of this Act.

Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), LPP-75-54, 2 N.R.C. 498, 504-05 (1975), affirmed as to liability, ALAB-324, 3 N.R.C. 347, 357 (1976), affirmed as to liability, CLI-76-22, 4 N.R.C. 480, 486-87 (1976), aff'd sub nom. Virginia Electric and Power Co. v. Nuclear Regulatory Commission, 571 F.2d 1289 (4th Cir. 1978).

B. No Warrant Is Required For the NRC's Investigation.

No warrant is required for the investigation of the firing of William Smart undertaken by the NRC because: (1) Union Electric is operating in a "closely regulated" industry for which an exception to the warrant requirement has been recognized, and (2) the present investigation is related to the NRC's safety function, which Union Electric admits takes the subject of the investigation out of the builder's reasonable expectation of privacy.^{4/}

As set forth in section II.B of William Smart's appeal brief, Congress has established a pervasive scheme of regulating nuclear activities as the quid pro quo for allowing any private, commercial development of nuclear power. In the case Union Electric relies on to argue the necessity of a warrant, the Supreme Court recognized that "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." Marshall v. Barlows, Inc., 436 U.S. 307, 313, 98 S.Ct. 1816, 1821 (1978). Nowhere is the "long tradition

^{4/} The warrant issue is clearly an afterthought by Union Electric and is not properly before the Appeal Board. Nowhere in the stipulated facts or even Union Electric's statement of the facts is there any hint that Daniel demanded a warrant from the NRC as was done by Mr. Barlow in Marshall v. Barlows, Inc., infra. If, as must be assumed at this stage of the argument, the NRC is authorized to conduct the investigation, the lack of a warrant is significant only if Daniel had told the NRC that one was needed and desired. That the lack of a warrant was not the basis of Daniel's refusal is clear from the fact that the warrant issue was not raised in Union Electric's answer to the Order to Show Cause, which preceded the Barlows decision.

of close governmental supervision" (id.) as comprehensive over the entire existence of an industry as in the case of commercial nuclear energy. Union Electric appears to miss this point as it discusses the intensity of government regulation of "the electric utility industry." (Union Electric Appeal Brief at 28.) Federal regulation of the nuclear industry in the interest of public health and safety is the basis of the NRC's authority to conduct the present investigation.

Union Electric concedes the NRC's right to a warrantless inspection of "reports and records pertaining to site work and safety considerations" (Union Electric Appeal Brief at 24.) But Union Electric has offered no meaningful distinction between the Smart investigation and others the NRC routinely conducts without any question of a warrant, either as to its relation to the NRC's safety mission or as to Daniel's privacy interest. Thus, the NRC Staff had the right to conduct the investigation and Daniel was wrong to obstruct it.

III. PROSPECTIVE CONSTRUCTION PERMIT SUSPENSION WAS WITHIN THE STAFF'S DISCRETION

The Licensing Board characterized the sanction proposed by the Staff's Order to Show Cause as a "drastic remedy," which the Board, nonetheless, found to be required. (Initial Decision at 20.) This description is unduly dramatic, since the Staff, throughout this proceeding, has consistently given Union Electric the opportunity to litigate the validity of the Staff's demand that Daniel submit to the investigation before there would be any prospect of suspension of the construction permits.

Even more puzzling is Union Electric's argument raising the spectre of a "forfeiture" if it should lose this case.

(Union Electric Appeal Brief at 41.) In that event, Union Electric's position would be analogous to that of a recalcitrant witness who is kept in jail until he purges his contempt. With the legal principle established against it, there is little likelihood that Union Electric would choose the hardships of suspending construction at Callaway. In this restrained and commensurate approach, the NRC Staff has acted within its jurisdiction in its choice of an appropriate sanction.

In any event, there is no question of actual suspension of the construction permits left in this case. By order of the Appeal Board (ALAB-503, Oct. 20, 1978), adopting the agreement of the parties, the disputed investigation has been conducted by the NRC. In that order and agreement, the Appeal Board and the parties agreed that the fact that the investigation has been conducted would not moot any of the issues in this appeal. Thus, the Appeal Board should issue a declaratory judgment holding that the Staff acted within its discretion in ordering the sanction approved by the Licensing Board. Nonetheless, the NRC Staff has the information found in the investigation. The effect of such a ruling by the Appeal Board would be that the NRC Staff may release its findings and use that information as the basis of appropriate further actions which are not part of this proceeding.

CONCLUSION

For the foregoing reasons, the Appeal Board should affirm the Licensing Board's ruling on the NRC's authority to conduct an investigation into the firing of William Smart and on the construction permit suspension remedy. Further, the Board should order any report on the investigation which has been conducted by agreement of the parties to be released and allow it to be the basis of further actions by the NRC.

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing
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