UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

12/12/78

In the Matter of	)	
Union Electric Company (Callaway Plant, Units 1 and 2)	)	Construction Permit Nos. CPPR-139 CPPR-140

STAFF BRIEF OPPOSING EXCEPTIONS TO INITIAL DECISION

50-483
480

December 12, 1978

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PRINCIPAL STATUTORY PROVISIONS INVOLVED

Sections 161c. and 161o. of the Atomic Energy Act of 1954, 42 U.S.C. 2201(c) and 2201(o):

"Sec. 161. GENERAL PROVISIONS. - In the performance of its functions the Commission is authorized to--

* * *

"c. 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 Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. Witnesses subpenaed under this subsection shall be paid the same fees and mileage as are paid witnesses in the district courts of the United states;

* * *

"o. require by rule, regulation, or order, such reports, and the keeping of such records with respect to, and to provide for such inspections of, activities and studies of types specified in section 31 and of activities under licenses issued pursuant to sections 53, 63, 81, 103, and 104, as may be necessary to effectuate the purposes of this Act, including section 105".

ARGUMENT
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* Licensee's brief shows this portion of its argument as part "V". Since there is no part "IV" in the text, this is obviously a typographical error.

FACTUAL AND PROCEDURAL SETTING

This enforcement proceeding is before the Appeal Board on exceptions [1/] to a decision [2/] by the trial tribunal established by the Commission to hear and initially decide issues specified by the Commission for decision. [3/] The proceeding below did not involve an

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1/ Exceptions have been taken by Union Electric Company (the "Licensee") and by William Smart (the "Intervenor"). To preclude any need for grappling with questions as to whether a stay pending appeal was required in order to prevent the Licensing Board's decision from taking effect, and if a stay is required in enforcement cases under NRC's rules, whether a stay is warranted in this case, the Appeal Board called an informal conference among counsel and the Board. At that conference an agreement was reached by the parties on procedural mechanisms which have the effect of permitting operations under the construction permits to continue pending a decision by this Board. The parties' agreement was submitted to and accepted by the Appeal Board. Memorandum and Order, October 20, 1978 (ALAB-503).

2/ Initial Decision on Order to Show Cause, September 28, 1978 ("Init. Dec.").

3/ Notice of Hearing, May 11, 1978. The Commission's Notice puts the issues in these words:

"The issues before the Atomic Safety and Licensing Board to be considered and be decided shall be:

"(1) whether the Commission in its investigation was denied access to records and personnel relating to the termination of a worker who had alleged construction problems which if uncorrected could lead to unsafe conditions in an activity licensed by the Commission; and

(Continued)

evidentiary hearing. Instead the facts are set forth in a stipulation [4] entered into by counsel for the Licensee and the Staff which was subsequently agreed to by the Intervenor [5] and approved by the Board.[6]

The factual stipulation effectively disposed (affirmatively) of the question whether the attempted investigation was prevented. [7]

3/ Continued from previous page -

> "(2) whether Construction Permits No. CPPR-139 and No. CPPR-140 should be suspended until such time as the Licensee, including its employees, agents and contractors engaged in activities under the license, submits to investigations and inspections as the Commission deems necessary and as authorized by the Atomic Energy Act of 1954, as amended, in the Commission's regulations.
>
> "In addition, the Board is authorized to resolve the Licensee's contention that NRC should defer its investigation to the ongoing grievance proceeding between the worker and contractor here involved."

4/ Stipulation, June 15, 1978.

5/ William Smart's Agreement to Stipulation, June 27, 1978.

6/ Prehearing Conference Memorandum and Order, July 6, 1978.

7/ Stipulation, supra, note 5 at para. 8.

Thus, under the Commission's Notice of Hearing two issues remain. First is the question of the proper reach of the NRC's investigatory authority: Does it extend to investigations of the sort here attempted? Secondly, assuming it is determined that the NRC's authority extends to finding out whether a worker was fired because he gave safety information to the NRC, the question of the appropriate sanction for a licensee's refusal to submit to a lawful investigation is presented.[8] On the first of the remaining issues the Board below held

> "that the proposed investigations and inspections are within the statutory authority of the Commission and its regulations." [9]

And, as to the question of the appropriate sanction, the Board found that

> "refusal to permit the investigation...interferes with the Commission's duty and responsibility to assure the public health and safety." [10]

and, that in the circumstances

> "the drastic remedy of suspension of the construction license is required." [11]

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[8] Intervenor believes that there is a third issue in this proceeding which has been improperly excluded:

> "the issue of the NRC's authority to take action against a licensee for retaliatory firing of a construction worker who gave information to the NRC." William Smart's Exception to the Initial Decision, October 3, 1978.

In part IV of this brief we demonstrate why this issue has been properly excluded from this proceeding.

[9] Init. Dec. at 16.

[10] Id. at 20.

[11] Id.

The Licensee's exceptions [12] present for review three questions: first, whether the attempted investigation is authorized by law; second, if so, whether a warrant is required and, third, whether suspension pending compliance is a proper sanction for a refusal to permit a lawful investigation. The exception taken by the Intervenor [13] raises a fourth question as to whether the Board below properly excluded an issue from the proceeding.[14] In the argument which follows each of these four issues is treated in turn.

ARGUMENT

I

NRC'S INVESTIGATORY POWERS EXTEND TO WHETHER A WORKER WAS FIRED FOR GIVING SAFETY INFORMATION TO NRC

A. A Pervasive Regulatory Scheme Is Established by Statute

The Atomic Energy Act of 1954 opened the nuclear field to private participation. In doing so, however, the Act made that participation subject to a pervasive regulatory scheme. One court put it this way:

12/ Exceptions of Union Electric Company to the Initial Decision, October 6, 1978.

13/ William Smart's Exception to the Initial Decision, October 3, 1978.

14/ See note 8, supra, and Part IV of the argument, infra.

> "Thus, while the 1954 amendments [to the Atomic Energy Act of 1946] allowed forfeiture of monopolistic government control over the development and utilization of atomic energy, exclusive government ownership rights and control could be surrendered only through compliance with the AEC licensing scheme which the new legislation directed." 15/

The issue in the case from which this quote was taken was Federal pre-emption. But the court's language concerning the pervasiveness of the Federal regulatory scheme is germane here. The court said at pages 1152-3 of its decision:

> "While the Act, as amended, and its legislative history, when viewed together, provide the strongest manifestation of Congressional intent to pre-empt the field of regulation over the construction and operation of nuclear reactors, we also find further evidence of an implied Congressional intention to pre-empt this area by the pervasiveness of the federal regulatory scheme which Congress directed and which the AEC has carried into effect through the promulgation and enforcement of detailed regulations governing the licensing of atomic power plants. In what is perhaps the most comprehensive treatise on atomic law, Stason, Estep & Pierce, Atoms and the Law (1954), the authors commented:
>
> 'the federal licensing scheme to control the development and utilization of atomic energy, as established by Congress and implemented by the AEC, is extraordinarily pervasive, probably more pervasive than any regulatory scheme considered by the Supreme Court in analogous [preemption] cases discussed above. Furthermore, the Commission's licensing system is but a part of an intensive program to promote the public and private development and utilization of atomic energy.'
>
> * * *

15/ Northern States Power Company v. State of Minnesota, 447 F.2d 1143, 1148 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972).

> As also noted by the authors of this treatise, it is significant that the pervasiveness of the federal regulatory scheme was subsequently even broadened by Congress in the enactment of Pub. L. 85-256, § 5, 85th Cong., 1st Sess., now 42 U.S.C. § 2039 which gives statutory standing to the Advisory Committee on Reactor Safeguards." (Emphasis supplied).

The regulatory scheme of the Atomic Energy Act is not only pervasive it is also:

> "hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends." 16/

and it is

> "virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescriptions in its charter as to how it shall proceed in achieving the statutory objective." 17/

B. Broad Investigatory Authority is Conferred on NRC to Achieve Statutory Goals of Protecting the Public Health and Safety

Sections 161c and 161o of the Atomic Energy Act (42 U.S.C. 2201(c) & (o)) authorize the Commission to:

> "make such...investigations, obtain such information...as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act...," (161c)

and to

> "provide for such inspections of...activities under licenses issued pursuant to sections...103 ...as may be necessary to effectuate the purposes of this Act...". (161o)

16/ Public Service Co. of New Hampshire v. U.S. Nuclear Regulatory Comm., 582 F.2d 77, 82 (1st Cir. 1978).

17/ Id. at 82, quoting with approval Seigel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).

It is plainly beyond contest that a major responsibility of the NRC is to assure that activities under NRC licenses do not endanger public health and safety. 18/ Thus, the above-quoted provisions authorize the conduct of inspections and investigations during the reactor construction phase to assure that the plant is not built in such a way that it would be unsafe to operate. See In re Consumers Power Company (Midland Plant, Units 1 & 2), ALAB-283, 2 NRC 11 (1975), which involved defective cadwelding of rebar during construction.

The attempted investigations here have a clear health and safety goal. NRC wants to find out whether any actions by those engaged in activities under the license may have tended to dry up a source of safety information. We need to know the answer to this question for at least two reasons. First, we need to know whether to consider mounting a special inspection effort 19/ if there seems a reasonable probability that there may now exist at the plant defects the existence of which has not been brought to our attention because of fear of retaliation. And, second, we need to know whether to consider imposing

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18/ Among the fundamental "Findings" of the Atomic Energy Act of 1954, is one that reactors and the utilization of nuclear materials must be regulated "to protect the health and safety of the public". 42 U.S.C. 2012(d) and (e).

19/ Licensee generously invites NRC to make such an inspection at any time (Licensee's brief at 18). However, NRC cannot be placed in a position of squandering its resources, if such augmented inspection efforts are not required. See note 39, infra, and discussion in text accompanying nn. 39-40.

some sort of sanction [20] on the license.[21] If, for example, it were to turn out as a result of the inspection that Mr. Smart was indeed fired because he gave safety information to the NRC, this might be considered the sort of situation "which would warrant the Commission to refuse to grant a license on the original application" under section 186 of the Atomic Energy Act. If it were so considered, suspension or revocation action would have to be evaluated. In all events, the investigations are plainly related to the NRC's health and safety responsibilities[22] as set forth in the original Order

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20/ The term "sanction" is used here in a broad sense to include such actions as laying on additional license conditions. See 10 CFR 2.204.

21/ A third reason for the investigation--whether we need a rule to protect employees from being fired for giving safety information to the NRC--has been largely mooted by a recently approved amendment to the Energy Reorganization Act of 1974. Public Law 95-601, approved November 6, 1978, adds a new section 210, the text of which is set out in the attachment to Brief of William Smart, dated November 2, 1978. See also section E, infra.

22/ The Public Service Co. of New Hampshire case, note 16, supra, makes clear that a generous reception is to be accorded this agency's interpretation of its own jurisdictional reach:

> "The agency's interpretation of what is properly within its jurisdictional scope is entitled to great deference, Power Reactor Co. v. Electricians, 367 U.S. 396, 408, 81 S.Ct. 1529, 6 L.Ed. 2d 924 (1961); Nader v. NRC, 168 U.S. App. D.C. 255, 265-66, 513 F.2d 1045, 1055-56(1975), and will not be overturned if reasonably related to the language and purposes of the statute. Hardin v. Kentucky Utilities Co., 390 U.S. 1, 8, 88 S.Ct. 651, 19 L.Ed.2d 787 (1968); NLRB v. Hearst Publications, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 (1944); Bangor and Aroostock Ry. Co. v. ICC, 574 F.2d 1096, 1104 n.8 (1st Cir. 1978)." 582 F.2d at 82.

to Show Cause [23] and repeated in paragraph 7 of the Stipulation.[24] NRC needs to make the investigations to find out what the facts are.

The Licensee's notion that the relationship between the attempted investigations and the NRC's health and safety responsibilities is somehow obliterated by the concommitant existence of a labor dispute is unsupportable. It is contrary to common sense to suppose that a labor dispute could override the NRC's health and safety responsibilities under the Atomic Energy Act.

It is a corollary principle that statutes conferring responsibilities on federal agencies to protect public health and safety should be broadly construed in order to effectuate their protective purposes. Thus, in the fields of mine safety[25] and food and drug regulation[26] for example, federal courts have rejected narrow statutory constructions that would defeat the safety and remedial purposes of the legislation. In other contexts the Commission and the Appeal Board have not hesitated to liberally construe the Atomic Energy Act of 1954, as amended, in order to effectively implement the Act's purposes and provisions.[27]

23/ Order to Show Cause Why Construction Permits Should Not Be Suspended, April 3, 1978.

24/ See note 4, supra.

25/ E.g., Rushton Mining Co. v. Morton, 520 F.2d 716, 720 (3d Cir. 1975); Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974); St. Marys Sewer Pipe Co. v. Director of the United States Bureau of Mines, 262 F.2d 378 (3d Cir. 1959).

26/ E.g., United States v. An Article of Drug...Bacto-Unidisk, 394 U.S. 784, 798 (1969); United States v. Diapulse Corp., 457 F.2d 25, 28 (2d Cir. 1972); Natick Paperboard Corp. v. Weinberger, 389 F. Supp. 794 (D. Mass. 1975).

27/ In re Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1, 7 (1977); In re Virginia Electric & Power Co. (North Anna Power Station, Units 1&2), CLI-76-22, 4 NRC 480, 490 (1976), aff'd, 571 F.2d 1289 (4th Cir. 1978); In re Detroit Edison Co. (Greenwood Energy Center, Units 2&3), ALAB-247, 8 AEC 936, 940-41 (1974).

The Licensee has advanced an ingenious, though flawed, argument based upon the very breadth of the inspection authority delegated to NRC. Pointing to cases which establish that there are, of course, limits to NRC's jurisdiction in antitrust[28/] and environmental[29/] area, the Licensee argues that

> "the broad responsibility of the NRC to regulate the commercial development of nuclear energy so as to ensure adequate protection to the public health and safety was not reguarded by the courts as a Commission license to assume watchdog control over every conceivable industry matter." 30/

And from this it follows, according to the Licensee's argument, that the attempt to find out why Mr. Smart was fired is illegal.

The answer to this argument is twofold. First, the existence of limits on NRC's jurisdiction in the areas of antitrust and the environment have always involved essentially separate concerns and separate statutory underpinnings from those in the health and safety area. Second, the question has never been whether there may be some limits even on the NRC's health and safety responsibilities. Rather, the question is whether the concommitant existence of a labor dispute somehow operates to bar an investigation which has an undisputed health and safety nexus. As we show in the following

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28/ Cities of Statesville v. Atomic Energy Commission, 441 F.2d 962 (D.C. Cir. 1969).

29/ New Hampshire v. Atomic Energy Commission, 406 F.2d 170 (1st Cir. 1969).

30/ Licensee's brief at 12 (emphasis in original).

section, the mere existence of a labor dispute does not operate as such a bar.

C. The Existence of a Labor Dispute Cannot Bar an Investigation with a Health and Safety Purpose

The Licensee's argument doesnot come to grips with whether the NRC's attempted investigation has any health and safety purpose,[31] and, if it does, whether it would be authorized. Rather, the tack taken is to characterize the investigation as an attempt to assert "watchdog authority over labor matters"[32] and then to explain why NRC does not have such "watchdog authority". By necessary inference, of course, the Licensee argues that existence of a labor dispute overrides any authority NRC may have to investigate health and safety matters. To state such an argument almost serves to answer it. The notion that 161o should be read as if it said:

> "provide for such inspections...as may be necessary to effectuate the purpose of this Act...except where such inspection could interfere in any way with a pending labor dispute..."

is not correct. The Atomic Energy Act contains no such qualification. Quite the contrary, health and safety concerns are not subordinated to any others. As the Commission has recognized over the years, with the approval of the Supreme Court, "public safety is the first, last, and

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31/ One would search in vain for any contention by the Licensee that there is no health and safety purpose to the attempted investigation. See also Stipulation at para. 7 and note 58, infra.

32/ Licensee's brief at 13.

a permanent consideration in any decision on the issuance of a construction permit or a license to operate a nuclear facility".[33/] Existence of a labor dispute, therefore, cannot somehow operate to cut off the right to investigate for health and safety purposes. And the concededly "broad investigative powers"[34/] conferred upon the NRC by section 161 of the Atomic Energy Act plainly authorize the attempted investigation.

D. Safety Considerations at the Site Require Investigation of Whether a Worker was Fired for Giving Safety Information to the NRC

The Licensee argues that

> "[a] review of the causes underlying an employee's discharge is not compelled by any safety considerations at the Callaway site." [35/]

In support of this argument the Licensee points out that NRC can perform any overview of the actual construction work it wishes to and that "[n]o impediments have even arguably been placed in the way". [36/]

33/ Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 401, 415-16 (1961); In re Virginia Electric & Power Co., supra note 27, 4 NRC at 490. The public health and safety stands with the common defense and security as one of the two primary jurisdictional bases for the exercise of regulatory authority under the Atomic Energy Act. NRC also has regulatory jurisdiction in the antitrust and environmental areas.

34/ Licensee's brief at 13.

35/ Id. at 18.

36/ Id.

And, the Licensee adds, if NRC is concerned about a "chill",

> "[t]he existence of non-existence of such a 'chill' can easily be ascertained..." 37/

How? By "talk[ing] with other construction workers to ascertain what impact, if any, Mr. Smart's firing may have had on their inclination to pass along their alleged safety concerns to the NRC." 38/

What the Licensee is saying here, of course, is this: if NRC wants to find out whether there is a safety defect in the plant which has remained unreported because of the circumstances surrounding Mr. Smart's firing, it can just go and inspect to its heart's content. And, if NRC wants to find out if there was in fact a "chill", it can just go ask the workers.

Whether or not these suggestions of the Licensee are feasible 39/

37/ Id. at 19.

38/ Id.

39/ NRC's current reactor inspection program is described in NUREG 0397 (March 1978). Included in that description is the following paragraph at page 6:

> "During construction, a sampling of licensee activities is inspected to make sure that the requirements of the construction permit are followed and that the plant is built according to design and applicable codes and standards. Construction inspections look for qualified personnel, quality material, conformance to approved design and for a well-formulated and satisfactorily implemented quality-assurance program, since these factors are most important to the successful construction of a nuclear plant. The licensee's implementation of these elements is assessed by examination, on a spot check basis, of construction activities." (Emphasis supplied.)

Moreover, budget figures in NUREG 0039-3 (Jan.1978) which contains the budget estimates for FY 1979, show (at p. 39) that 45,000 inspector hours (on site) will be devoted to the 92 reactors currently under construction. This is an average of about 0.23 man years per year per reactor. From these figures, it is apparent that enormously augmented inspection efforts would be required if NRC were to even attempt a "100% inspection".

and would prove effective,[40] they reflect confusion as to the purpose of the investigation attempted at Callaway. The NRC investigation was aimed at finding out whether it might be necessary to mount an augmented inspection effort at Callaway. It would not be a prudent use of limited inspection resources if it were to turn out that Mr. Smart had not been fired for giving safety information to NRC. So, we need to know the facts before we decide what actions may be required. The NRC investigation was also aimed at obtaining information which could serve as the basis for some sort of enforcement action against the Licensee designed to prevent repetition of conduct the information might reveal.[41] This end cannot be attained by an inspection of the plant, however exhaustive it may be, nor can it be accomplished by questioning workers as to whether they feel "chilled". The only way to ascertain whether actions in the interest of public health and safety are necessary, is to get the information. NRC is currently being prevented by the Licensee from obtaining the information and, therefore, its health and safety responsibilities are being frustrated by the Licensee. So long as the Licensee allows this intolerable situation to persist, the appropriate remedy, as demonstrated in Part III of this argument, is license suspension pending compliance.

40/ Just how revealing an "Are you chilled?" question might be seems open to serious question. In any event, however revealing the responses to such a question might prove to be, NRC is primarily interested in whether the Licensee's actions could have created a "chill" in the mind of the proverbial reasonable man. Whether or not such a "chill" was, in fact, created might never be pinned down with certainty. But, if the Licensee's actions could have created such a "chill", NRC's health and safety responsibilities are impacted.

41/ As noted in section E, infra, a third reason for the investigation--that of obtaining information in aid of possible rulemaking--has been largely mooted by recently enacted employee protection legislation.

E. The History of New "Employee Protection" Legislation Confirms NRC's Authority to Make the Investigation Here

As the Licensee sees it, newly enacted employee protection legislation [42] renders it "abundantly clear" [43] that NRC may not investigate whether an employee was fired for giving the NRC safety information. The abundant clarity of the law on this point apparently reposes in the idea that since the Secretary of Labor can protect an employee by redressing a discriminatory discharge, NRC could not have been delegated authority to find out whether a discharge occurred because an employee gave safety information to NRC. Apart from being a patent non sequitur, this notion ignores the fact that NRC's need to know the basis for this discharge action is entirely different from, and wholly independent of, that of the Labor Department. The Labor Department's need to know relates strictly to the affording of any necessary protection to the employee. NRC on the other hand needs to know in order to evaluate (i) the adequacy of the requirements currently imposed on the Licensee, (ii) the Licensee's continued fitness to hold an NRC

42/ The recently approved NRC Authorization Act, Pub. L. 95-601 (1978), contains a provision (section 10) adding a new section 210 entitled "Employee Protection" to the Energy Reorganization Act of 1974. The new law prohibits NRC licensees, license applicants and their contractors and subcontractors from discharging or otherwise discriminating against any employee for, among other things, giving the NRC safety information. The law provides for the filing of complaints with the Secretary of Labor. Upon receipt of such a complaint the Secretary is required to conduct an investigation. Broad authority is conferred on the Secretary to redress violations of the law.

43/ Licensee's brief at 16.

license and (iii) the need for an augmented inspection effort.[44/] Put in slightly different terms, NRC's need to know relates to the NRC/Licensee relationship and to the health and safety of the public, while the Department of Labor's need to know relates strictly to the employer/employee relationship. Moreover, it is abundantly clear, to borrow a phrase, from floor remarks of Senator Hart, manager in the Senate of the bill which became the new law, that the new law in no way serves to cut off the NRC's authority to conduct investigations of the sort involved here:

> "Finally, while new section 210 of the Energy Reorganization Act of 1978 provides the Department of Labor with new authority to investigate an alleged act of discrimination in this context and to afford a remedy should the allegation prove true, it is not intended to in any way abridge the Commission's current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendency of a proceeding before the Department of Labor pursuant to new section 210 need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954." 124 Cong. Rec. S15318 (daily ed. Sept. 18, 1978). (Emphasis added.)

Far from having the effect of cutting off NRC's authority in this area, the legislative history of the new law just quoted confirms that authority.

44/ See discussion at note 21, supra. Prior to enactment of the new employee protection law, NRC also had a need to know in order to assist it in deciding whether to promulgate a rule forbidding discharges based upon having given NRC safety information. This reason for needing the information has, of course, been largely mooted by the new legislation.

Furthermore, this history also highlights the important distinction between the fundamental role of the Department of Labor (i.e., to protect employees against retaliatory actions) and that of the NRC (i.e., to assure public health and safety by regulating activities of licensees having health and safety implications). These two entirely different and separate responsibilities serve to underscore the need to preserve the flexibility of the NRC to pursue its own investigations, should the occasion for doing so present itself.[45/] The above-quoted comment of Senator Hart also confirms the existence under the law of this flexibility.

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45 / While at this juncture it is difficult to speculate as to what the "normal" case may be under the new legislation, the Staff would suppose that, in the absence of some circumstance requiring an immediate NRC investigation, the Staff would await the outcome of the investigation by the Department of Labor. Nevertheless, circumstances could arise in which the NRC's public health and safety responsibilities could require knowledge of the reasons for a worker's discharge in advance of the time such knowledge would become available as a result of the Department of Labor's investigation. For example, continued operations under a license could well turn on whether or not a particular licensee has violated the new law, and the public health and safety could demand a resolution of that question before the Department of Labor could complete its investigation.

II

WARRANT IS NOT REQUIRED FOR NRC INVESTIGATION OF ACTIVITIES AFFECTING HEALTH AND SAFETY UNDER NRC LICENSE

As demonstrated in part IA., supra, the atomic energy industry is the very paradigm of a "pervasively regulated" industry. It is, therefore, beyond serious question that lawful NRC inspections of licensees' activities fall squarely within the warrantless search exception for the "closely regulated industry" carefully carved out by the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). That case barred warrantless searches under the Occupational Safety and Health Act of 1970.[46] But the Court's opinion contains the following statement pertinent here:

46/ 29 U.S.C. 657(a). The regulatory schemes of OSHA and the Atomic Energy Act are poles apart. OSHA does not involve a licensing scheme; and it applies to all employers of a certain size engaged in interstate commerce. The Atomic Energy Act operates only on those who apply for and receive express permission to build atomic facilities and utilize atomic materials. Moreover, any deference by OSHA to on-going grievance proceedings--and such deference is a matter of discretion to be exercised on a case-by-case basis, not a requirement (see 29 CFR 1977.18(c))--is entirely appropriate in view of the fact that the OSHA statute deals directly with the employer-employee relationship. In contrast, the Atomic Energy Act is concerned with the public health and safety, the relationship between the licensee and the public.

> "The Secretary urges that an exception from the search warrant requirement has been recognized for 'pervasively regulated business[es],' United States v. Biswell, 406 U.S. 311, 316 (1972), and for 'closely regulated' industries 'long subject to close supervision and inspection.' Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77 (1970). These cases are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v. United States, 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade) and firearms (Biswell) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." 47/

To avoid the clear import of this holding, the Licensee doesn't really argue that the atomic energy industry is not closely regulated. Rather it mischaracterizes the investigation attempted here as an effort to examine into

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47/ Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978). NRC licensees, by becoming licensees, are required to submit to all applicable NRC regulations, including 10 CFR 50.70 which reads as follows:

> "Each licensee and each holder of a construction permit shall permit inspection, by duly authorized representatives of the Commission, of his records, premises, activities, and of licensed materials in possession or use, related to the license or construction permit as may be necessary to effectuate the purposes of the act, including section 105 of the act."

This required submission constitutes advance consent to lawful inspections and for this reason no warrant is required for such inspections.

Recognizing the "pervasively regulated businesses" exception delineated in Barlow's, Inc., a federal district court recently upheld warrantless searches under the Surface Mining and Reclamation Act of 1977 as necessary "to ensure that the public health and safety and the environment are protected". In re Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1319 (D.D.C. 1978).

"labor relations matters".[48] The Licensee then proceeds to make two points premised on this basic mischaracterization. The first is that a wholly unauthorized investigation cannot be undertaken without a warrant, at the very least.[49] As to this point, let there be no question that the Staff believes unauthorized investigations should not be undertaken. But such an investigation is not involved here. The investigation here, as has been shown in Part I above, has a health and safety purpose and is authorized.

The Licensee's other point is that even if it were assumed that the attempted investigation was "on the outer fringes of Commission authority"[50] it nevertheless "necessarily follows"[51] that a warrant is required here. Why? Well, because a warrant was required in Barlow's, Inc., and that case dealt with an attempted investigation which was central to OSHA's mandate. To this point there are several answers. First, the fundamental litmus for an exception to the warrant requirement is ignored; no mention is made of the fact that we are

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48/ Licensee's brief at 29. Other formulations employed are: "labor problems", at 23, "labor matters" at 24 and 26, and "labor practices", at 27 and 30.

49/ Licensee's brief at 24-26.

50/ Id. at 25.

51/ Id. at 26.

dealing with a pervasively regulated industry. No mention is made either of the fact that the Licensee is bound under NRC's regulations[52] to submit to authorized inspections without a warrant. And, finally, it is not explained how the notions of "outer fringes" and centrality have any substance when dealing with an issue of legal authorization. For in the last analysis, an action is either authorized or it is not. And if it is an authorized NRC inspection, as has already been demonstrated in Part I, above, no warrant is required.

A final argument advanced by the Licensee is that the two cases cited by the Court in Barlow's, Inc. dealing with the firearms[53] and liquor[54] industries can be readily distinguished from an "investigation of labor practices by the NRC".[55] But as has already been shown, the investigation here is undeniably for health and safety purposes, is authorized, was consented to, and is addressing a pervasively regulated industry. For these reasons the warrantless search exception of Barlow's, Inc. applies here.

52/ 10 CFR 50.70, reprinted at note 47, supra.

53/ United States v. Biswell, 406 U.S. 311 (1972).

54/ Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

55/ Licensee's brief at 27.

III

LICENSE SUSPENSION PENDING COMPLIANCE WITH LAWFUL REQUIREMENTS IS REASONABLE AND PROPER SANCTION

Unlike a license revocation, or a civil penalty or even a license suspension for some past noncompliance, the remedy proposed here has no penal aspect to it whatsoever. The remedy proposed here for the Licensee's unlawful refusal to submit to an authorized investigation is merely suspension so long as that refusal persists and no longer. The "drastic remedy of suspension of the construction license" referred to at page 20 of the Initial Decision is significantly tempered by the qualification: "until such time as the Licensee...submits to such investigations...". 56/

As soon as the current barriers to the investigation are removed there is no need for suspension action. Among the mildest of remedies for deliberate refusal to allow a lawful inspection is

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56/ Initial Decision at 22. See also Order to Show Cause, April 3, 1978 where the qualification to suspension action was put in substantially identical terms.

suspension of activities so long as the refusal continues.[57] That is all that is proposed.

The Licensee's arguments (to the effect (i) that "no health and safety concerns" are involved;[58] (ii) that health and safety "has

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57/ Section 186 of the Atomic Energy Act authorized revocation of a license for refusal to comply with applicable requirements. 42 U.S.C. 2236. Had the Staff known when the licensee was applying for the Construction Permits it would refuse inspections of this sort, the Staff certainly would not have recommended granting the Permits in the first place.

The sanction of suspension pending compliance is, of course, premised upon the legal conclusion that the investigation sought here is authorized by law and that continued refusal to permit the investigation (after that legal point has been settled) constitutes a willful refusal to comply with a lawful requirement. This same premise serves to explain why some sort of action other than suspension pending compliance is not appropriate here. Realistically only two alternative actions are available. One is use of the subpoena power under section 161c. of the Act, and the other is use of the civil penalty authority of section 234 of the Act. Neither seems an appropriate response to a willful refusal to comply with a lawful requirement. It is inappropriate to invoke the subpoena power against a licensee simply because the very existence of a licensee/government relationship should obviate any such action. Cf. 10 CFR 50.54(f) Civil penalties could, conceivably, prove ineffective. Despite the power to fine the licensee for continuing refusal to permit the investigation, the Licensee conceivably could regard payment of the fine worth the price. Beyond these points, both alternative approaches could be viewed as somewhat promotional, not so much from the standpoint of being a weak response to a willful refusal to comply with the law, but rather that they could be viewed as implying that NRC somehow cares that the plant gets built.

58/ Licensee's brief at 38. It is of incidental interest that the Licensee states here that:

> "...this labor-management dispute raises no health and safety concern with respect to the Callaway construction work that was the subject of William Smart's complaints." (emphasis added).

The carefully formulated qualification (underlined) to the "no health and safety concern" statement speaks eloquently by silence to the proposition that health and safety concerns are, in fact, involved to this case. They just happen to repose in the effect of retaliatory firings rather than in "the subject of William Smart's complaints."

been the touchstone of a suspension order" in all reported cases on point; [59] (iii) that suspension is "permissible only insofar as certain proscribed conduct can be shown to have occurred"; [60] and (iv) that the suspension "runs directly counter to the requirement of section 9(b) of the Administrative Procedure Act"[61]) all miss the point. The suspension action sought in this case would not be in retaliation for some past action or because the Licensee's "reasonable objections are ultimately not sustained".[62] Such action would only be for continued refusal to submit to an investigation adjudicated to be lawful. It would be for willfully [63] refusing to comply with 10 CFR 50.70.[64] Moreover, the suspension action now sought would only take place pending the Licensee's compliance. At the risk of stressing the point unnecessarily, the Staff cannot let pass without brief comment the attempt by the Licensee generally to portray the sanction of suspension pending compliance as some sort of "harsh"[65] and "precipitous"[66] action which would produce "astonishing"[67] and "anomal[ous]"[68] results. The fact of the matter is, of course, that the parade of horribles associated with a suspension of the construction permits is readily avoidable - at the Licensee's option - merely by the Licensee deciding to obey the law.

59/ Id. at 39.

60/ Id.

61/ Id. at 41.

62/ Id.

63/ The fact that any suspension action would only occur in the event of Licensee's willful refusal to comply answers the Licensee's argument based upon the "second chance" doctrine of section 9(b) of the APA (5 U.S.C. 558(c)). No "second chance" is required in cases of "willfulness".

64/ See note 47, supra, for text of the regulation.

65/ Licensee's brief at 40.

66/ Id. at 45.

67/ Id. at 44.

68/ Id.

IV

WHETHER NRC HAS AUTHORITY TO REMEDY A SITUATION OF EMPLOYMENT DISCRIMINATION IS NOT PROPERLY AN ISSUE IN THIS CASE

Notwithstanding enactment of new employee protection legislation[69/] and notwithstanding favorable resolution of his particular grievance proceeding,[70/] Intervenor continues to insist on an answer by this Board in this proceeding to the question "whether NRC has the authority to order remedial action when it finds retaliatory firing of a construction worker who has provided the NRC with safety-related information..."[71/] Since it is now contrary to a Federal statute for an employer such as the Licensee or its contractor Daniel Construction Company to so retaliate against an employee, and since Intervenor has been reinstated with back pay, on the face of matters one might well ask what the Intervenor's reasons are for insisting on an answer to his question. The only reason advanced is this:

> "He [Intervenor] and other workers who are watching the treatment of his case by the NRC need to know what protection he will have if he continues to cooperate with the NRC." 72/

69/ See Part I.E., supra. Concededly, the [illegible]islation does not aid Mr. Smart with respect to his prio[illegible]ions. But, of course, Mr. Smart no longer needs aid in th[illegible]egard in light of his reinstatement with back pay. Note 70, infra.

70/ See William Smart's Notice of his Reinstatement, filed with this Board under date of November 17, 1978.

71/ Id. at 1.

72/ Id.

Anticipating, no doubt, the natural query of why the new legislation doesn't tell the Intervenor and other workers who are watching just what their protection is, Intervenor suggests that a deficiency lies in the fact that the new legislation "has not yet been implemented and tested "[73/] Well, of course, that is right. The new law has not yet been tested or implemented. But the new law requires no test to understand what it promises in the way of protection. It requires no implementation to be effective or to be understood. Therefore, neither Intervenor nor any workers similarly situated need any pronouncements by the NRC as to "whether the NRC can protect" them.[74/]

Quite apart from what the Intervenor might feel he "needs" in the way of an authoritative pronouncement as to the general remedial powers of this Commission, that subject is not properly a part of this proceeding. The contours of this proceeding were established by the Commission in the Notice of Hearing.[75/] As is typical of enforcement cases--and in marked contrast to the normal licensing case--the issues prescribed by the Commission for resolution are of relatively narrow scope. The first issue was the narrow factual one of whether access was denied the inspectors. The other issue was what to do about it, if access was found to have been denied. Neither of these two issues

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73/ Id. at 2.

74/ Id.

75/ The relevant language of the Notice of Hearing is copied in the margin at note 3, supra.

set by the Commission for resolution reach the question of what happens after it has been determined that access was denied and that suspension pending compliance with inspection requirements is the appropriate sanction. Intervenor would have this Board expound on the issue of what can be done about a case of employment retaliation when it is not yet even known whether such a situation exists. Finding out whether such a situation exists is what this case is all about.

Once it is finally established that the attempted NRC investigation is authorized and that suspension pending compliance is the appropriate sanction, the Licensee theoretically has two options. It can allow the inspection or it can suspend activities under the license. Since this latter opion is at least theoretically available, it serves to illustrate the prematurity of the question which Intervenor presses for resolution; any remedy considered at this time would be based upon mere speculation rather than the facts and circumstances of the actual dismissal.[76/]

The Intervenor's exception should be denied because, as shown above, the relief sought is unnecessary, is outside the Commission-established scope of this proceeding, and is premature.

76/ A recent statement by the Appeal Board in another context could appropriately be applied to this case:

"Although NRC adjudicatory boards have the authority to grant declaratory relief to remove uncertainty or to avoid delay (Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1 (1977)), there is no occasion to invoke that authority to resolve purely hypothetical questions which appear unlikely to arise in a concrete setting." In re Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2) ALAB-506, November 9, 1978 at 31-32, fn. 55.

V

CONCLUSION

The nub of this case is how far the Commission's inspection authority goes. The Staff does not say it is boundless. Inspections certainly must be related to the Commission's functions. In this case the inspection is related to the protection of the public health and safety because it seeks to find out whether a worker was fired because he gave safety information to the NRC. If that source of safety information is impaired, public health and safety is impaired; if this Licensee has engaged in the retaliatory firing of a worker, serious questions as to the Licensee's fitness to hold its license are raised. The Staff needs to know what the facts are. And the mere existence of a labor dispute cannot serve to cut off the Commission's legitimate investigatory authority.

A conclusion that the attempted investigation is beyond the Commission's power would be contrary to the broad language of the statute. It would be contrary to the broad reading the courts have required for the statutory words. It would be contrary to common sense and sound policy. And, finally, it would be contrary to the public health and safety. The public health and safety cannot be relegated to a back seat just because a labor dispute occurs at a construction site.

For the foregoing reasons the exceptions should be denied and the decision of the Board below affirmed.

Respectfully submitted,

James P. Murray
Counsel for the NRC Staff

Dated at Bethesda, Maryland
this 12th day of December, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of STAFF BRIEF OPPOSING EXCEPTIONS TO INITIAL DECISION in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of December, 1978.

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