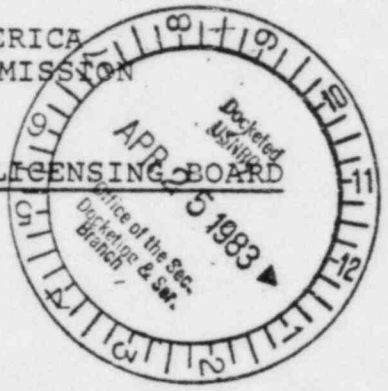
April 21, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket Nos. 50-445 50-446
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating Licenses)

APPLICANTS' BRIEF ON THE EFFECT ON THIS PROCEEDING OF THE RECOMMENDED DECISION OF THE DEPARTMENT OF LABOR's ALJ IN "ATCHISON v. BROWN & ROOT"

I. Introduction

During the conference call of April 7, 1983, the Licensing Board requested that the parties brief the question of collateral estoppel in regard to the Recommended Decision of the Department of Labor's ("DOL") Administrative Law Judge ("ALJ") in Charles A. Atchison v. Brown & Root, Inc., Case No. 82-ERA-9.[1] In accordance with the Board's request, Applicants hereby submit

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1 In its Memorandum and Order of January 4, 1983, the Board stated that the exhibits, testimony and other evidence from the DOL proceeding are "relevant and necessary for a complete and adequate record on QC issues." Memorandum and Order at 4, (January 4, 1983). The Board reserved decision on what effect the DOL Recommended Decision would have on the Comanche Peak proceeding. Id. In response to the Board's Notice of Resumed Evidentiary Hearing dated March 4, 1983, the Applicants supplied the Board with "copies of the material core exhibits admitted into evidence by the DOL." Board Notice at 7. The Applicants also supplied the Board with the transcript of the DOL evidentiary hearings.

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this brief. For the reasons set forth below, the doctrine of collateral estoppel need not and should not be applied in this case. Before discussing collateral estoppel, however, Applicants state their position on the more general question of the effect of the DOL proceeding on this proceeding.

II. Summary of Position

Applicants' position regarding the recommended decision of the Labor Department's ALJ is two-fold. First, Applicants contend that labor disputes arising under Section 210[2] can only be resolved by DOL and are not before this Board. Second, because the labor law questions in the DOL proceeding are not germane to the issues before the Board, there is no common issue to which collateral estoppel might apply. The question is not whether the Board is precluded from relitigating Atchison's complaint. No party seeks to collaterally attack the DOL decision in this forum, and if one did, the Board would lack jurisdiction to entertain such an attack. Rather, the question is what effect, if any, does the DOL poceeding have on this operating license proceeding. The starting point for this analysis begins with the issues in a Section 210 proceeding and how they relate to an NRC proceeding.

Section 210 authorizes the DOL to investigate an employee's complaint of discrimination or discharge for engaging in "protected activities," to conduct a hearing if those allegations are substantiated by DOL's investigation and to grant relief to

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2 Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851.

an employee found to have been discriminated against by the employer. Only two issues are before DOL in a Section 210 proceeding, viz., (1) was the employee engaged in a "protected activity" and (2) was he discriminated against or discharged because of such activity.

In the Atchison case, the DOL ALJ stated the issue as follows:[3]

> [T]he issue to be determined here is whether Brown and Root violated the employee protection provisions of the Act, 42 U.S.C. §5851, by discharging Atchison for complaining about and reporting the construction defects and quality control deficiencies in the nuclear plant workplace, for his averred filing of NCR #296, and his April 12, 1982 filing of NCR #361.

In deciding this issue, the ALJ found that Atchison's filing of NCR #296 and NCR #361 were "protected activities" within the meaning of Section 210 and further found that his termination by Brown & Root resulted from that activity, i.e., his filing of those two NCRs.[4]

Leaving aside the question of the finality of the ALJ's Recommended Decision (see Part III.C.2, infra), we now address the question of the effect on this proceeding of the ALJ's finding that the filing of an NCR is a protected activity. The NRC also has authority under Section 210, but that authority

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3 Charles A. Atchison v. Brown and Root, Inc., Case No. 82-ERA-9, slip op. at 9 (December 3, 1982).

4 Id., at 25-26. Brown & Root has taken the position before the Secretary of Labor that the ALJ's Recommended Decision is inconsistent with the facts and erroneous as a matter of law. Under DOL rules, there is no final agency action unless and until the Recommended Decision is affirmed by the Secretary. 29 C.F.R. §24.6.

complements DOL's authority; and does not compete with it. Pursuant to 10 C.F.R. §50.7, the Commission may take enforcement action if a licensee or its contractors discriminate against an employee for engaging in protected activities. Enforcement sanctions may include denial, revocation or suspension of a license or imposition of a civil penalty. 10 C.F.R. §50.7(c). However, Licensing Boards presiding in operating license proceedings have no authority under Section 50.7 to sanction a licensee found to have violated Section 210. Section 50.7 and its supporting Statement of Consideration (47 Fed. Reg. 30452) clearly envisage that this role is filled by the NRC Staff's Office of Inspection and Enforcement. NRC Regulations contain no provision conferring jurisdiction on OL Licensing Boards to impose fines sua sponte or to take any other enforcement action.[5] Rather, the Staff is vested with the authority to investigate alleged violations and with the prosecutorial discretion to propose enforcement action. If its investigation of a Section 210 complaint discloses matters of health or safety significance, the Staff can issue a Notice of Violation and the applicant or licensee will have the opportunity to request a hearing. If a hearing is requested, then an ASLB will be empaneled. 10 C.F.R. §§2.201-2.206. Then and only then might a Licensing Board become involved.[6]

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5 Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-82-31, slip op. at 2-3 (October 14, 1982).

6 Id., at 3.

Both logic and fundamental due process dictate this approach, because if a Board could take enforcement or licensing action on the basis of a DOL decision, it would be acting on the basis of allegations against which the applicant had no opportunity to defend. An applicant is entitled to a hearing, if requested, under Section 189 of the Atomic Energy Act, 42 U.S.C. §2239, on any matter affecting its fundamental rights. The hearing must be conducted in accordance with Section 4(c) of the Administrative Procedure Act. The APA provides that a party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to cross-examine witnesses as required for full disclosure of the facts. 5 U.S.C. §556. The agency's decision must be based on the record before the agency and must be supported by substantial evidence. 5 U.S.C. §§556, 557. As to enforcement actions, if a hearing is requested, the same requirements apply. 5 U.S.C. §558. Applicants here have had no such opportunity to defend themselves. Even if the ultimate DOL decision were to be accorded conclusive effect in the enforcement proceeding (a legal question not addressed here), Applicants still would be entitled to litigate the propriety of the enforcement sanction imposed.

The Licensing Board lacks authority to look behind the ALJ's Recommended Decision to determine whether Section 210 was violated. This is the exclusive responsibility and area of expertise of the Labor Department. Further, as noted above, the Board also lacks enforcement authority, that being the province of the NRC Staff. From the Board's standpoint as the protector

of the public health and safety, what then is important about Section 210 proceedings in general and the Atchison case in paticular? If the Recommended Decision of the ALJ is adopted by the Secretary of Labor and becomes a final order, four questions arise from a conclusion that Atchison was unlawfully terminated by Brown & Root for engaging in protected activities. First, what is the safety significance of the two NCRs involved in the DOL decision and how were they dispositioned? NCR #296 involved 4 CB&I supplied pipe whip restraints alleged to have deficient welds. All four restraints were subsequently reinspected and repaired in accordance with procedures in the vendor's QA manual. Applicants' Exhibit 122E. NCR #361 involved an allegation that there were no procedures for training inspectors for non-ASME welding activities. This NCR was voided as patently wrong because quality procedures specify that Brown & Root is responsible for such training. Applicants' Exhibit 135. There is no evidence of record even suggesting that either disposition was inappropriate.

The second question is: does Atchison's termination indicate that there was a systematic practice of retaliatory discrimination on other occasions at Comanche Peak? Third, was Atchison's termination designed to have, or did it in fact have, a "chilling effect" on employees reporting health and safety concerns? Either question might imply that the Quality Assurance/ Quality Control ("QA/QC") program was not functioning adequately. However, there is absolutely no evidence of record to support any such inferences. The Atchison discharge was an

isolated incident. There is no evidence that others have been discriminated against. To the contrary, the record reflects that Applicants have maintained an aggressive QA/QC program that encourages its inspectors to find and report non-conforming conditions. (E.g., Applicants' Exhibits 43, 59, 60 and 141 at 38-39.) Indeed, Atchison himself was instructed to report defects found outside the scope of his assigned tasks. CASE Exhibit 650W.

Finally, the records before DOL and this Board, and the DOL ALJ's finding that Atchison was incredible (Recommended Decision at 3-4) could raise safety questions about the quality of any work which Atchison inspected during his several weeks as a QC inspector for non-ASME activities. However, the evidence of record here indicates that Applicants conducted an extensive verification program in which every weld inspected by Atchison was reinspected and appropriately dispositioned (Applicants' Exhibit 141 at 17).

The QA/QC issues before the Board flow from Contention 5.[7] Resolution of the health and safety matters placed in issue by

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[7] Contention 5. The Applicant's failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 CFR Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC), and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the contruction of the facility. As a result, the Commission cannot make the findings required by 10 CFR §50.57(a) necessary for issuance of an operating license for Comanche Peak.

that Contention should be the focus of the Licensing Board. The Board must be satisfied that construction of the facility is adequate in order to make the findings in 10 C.F.R. §50.57(a) implicated by this Contention (see 10 C.F.R. §2.760a). Questions of labor law such as whether the filing of an NCR is a "protected activity" or not, and whether an employee was unlawfully terminated, are immaterial to the Board's decision unless they lead to safety problems. The merits of personnel actions are within the exclusive province of the Labor Department, and are matters over which NRC has no authority.

In sum, the Board's responsibility is to resolve the QA/QC issues raised in Contention 5. As to the question of whether Atchison was improperly discharged in violation of Section 210 of the Energy Reorganization Act, the final resolution of the DOL case will be dispositive. On the distinct and separate questions under the Atomic Energy Act of (1) whether the NCRs that led to Atchison's termination had safety significance, (2) whether the discharge was part of a systematic pattern that might call the QA/QC program into question, and (3) whether the discharge was calculated to have or did in fact have a "chilling effect" on employee reporting, the Licensing Board has made its own record and must issue its own decision to the extent necessary to resolve Contention 5. The adequacy of the NRC Staff investigation of Atchison's termination, about which the Board has expresses skepticism in the past, is not really a pertinent factual issue in this case. The Board is free to decline to rely on this aspect of the Staff investigation as evidence on these

questions. See Applicants' Motion for Reconsideration, filed simultaneously herewith. There is ample probative, material evidence in the record adduced by the Applicants to rebut any negative inferences as to the QA/QC program which the intervenor would have the Board draw from the Atchison discharge.

III. Collateral Estoppel

In view of the foregoing, Applicants submit that there is nothing in the DOL case that can or should be relitigated here, and thus that collateral estoppel need not be invoked by the Board. Nevertheless, in view of the Board's directive that the parties discuss the applicability of collateral estoppel, Applicants provide the following analysis. It concludes that collateral estoppel does not apply here because there is no identity of parties and issues, and because the DOL decision is not final.

A. In General

Collateral estoppel as well as the associated doctrine of res judicata are judicially formulated doctrines founded upon "consideration of economy of judicial time and [the] public policy favoring the establishment of certainty in legal rela-

tions."[8] Under appropriate circumstances, the doctrine of collateral estoppel is applicable to administrative proceedings (as well as judicial proceedings),[9] and the Appeal Board has recognized its applicability in NRC proceedings.[10]

In Parklane Hosiery, Inc. v. Shore, 439 U.S. 322, 327 n.5 (1979), the Supreme Court described the doctrines of res judicata and collateral estoppel as follows:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. 1B, J. Moore, Federal Practice ¶0.405[1], at 622-624 (2d ed. 1974; e.g., Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1876).

Given those definitions, only the doctrine of collateral estoppel is proper for analysis here. For a prior decision to be binding in a subsequent proceeding on the basis of collateral estoppel,

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8 Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

9 See United States v. Utah Construction and Mining Company, 384 U.S. 394, 421-422 (1966).

10 Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974).

the following elements must be shown:[11] (1) the parties sought to be bound or estopped in the second action must have been parties or controlling non-parties or in close privity to the parties in the first action; (2) four factors relating to issues must be satisfied -- (a) the issue sought to be precluded must be the same as that involved in the prior proceeding, (b) the issue must have been actually litigated, (c) it must have been determined by a valid and final judgment, and (d) the determination must have been essential to the prior judgment;[12] and (3) the adjudicatory body in the prior proceeding must have had competent jurisdiction.[13] As discussed at length below, neither the identity of parties test nor any of the issues tests for application of collateral estoppel are satisfied here.

It may be added that even if all tests were satisfied, there are circumstances which warrant exception to application of collateral estoppel. The Appeal Board has recognized that "significant supervening developments having a possible material bearing upon any of the issues previously adjudicated . . . or . . . the presence of some unusual factor having special public interest implications" may mitigate application of collateral estoppel. Farley, supra, ALAB-182, 7 AEC at 216. A major factor

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11 See Montana v. United States, 440 U.S. 147, 153 (1979); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977); see also 1B Moore's Federal Practice ¶0.443 (1977).

12 Gulf Oil Corp. v. FPC, 563 F.2d 588, 602 (3d Cir. 1977); Haize v. Hanover Ins. Co., 536 F.2d 576, 579 (2d Cir. 1976); see Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979).

13 1B Moore's Federal Practice, ¶0.443 (1977).

militating against application of the doctrine here is the vast difference in areas of expertise and focus between DOL and NRC, as will be discussed later. Such mitigating factors have also been recognized by the Supreme Court. Montana v. United States, supra, 440 U.S. at 155.

Underlying all discussion of collateral estoppel, moreover, is the principle of fundamental fairness in the due process sense. Notwithstanding a showing of the elements set forth above, public policy requires that collateral estoppel be considered in conjunction with the policy that a litigant shall not be deprived of a fair adversary proceeding in which to present or defend its case. See Makariw v. Rinard, 336 F.2d 333, 334-35 (3d Cir. 1964); 1B Moore's Federal Practice ¶0.406[2] at 904-906. Having set forth the general legal principles, we now turn to consideration of collateral estoppel in this case.

B. Parties

Among the elements of collateral estoppel which must be present before the doctrine applies is that there must be identity of parties. It is essential that a party in the present litigation against whom a prior judgment is asserted was a party or in privity with a party in the earlier litigation.[14] This requirement is founded upon due process considerations. A person cannot be bound by a judgment unless he has had reasonable notice of the claim against him and an opportunity to be heard in

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14 Montana v. United States, 440 U.S. 147, 153-154 (1979). Mosher Steel Company v. NLRB, 568 F.2d 436, 440 (5th Cir. 1978). South Texas, supra, 10 NRC at 572; see 1B Moore's Federal Practice ¶0.411.

defense of that claim. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundations, 402 U.S. 313, 329 (1971); see 1B Moore's Federal Practice ¶0.411[1]. This is to assure that a party has been afforded a "full and fair" opportunity to litigate the issue at some point and eliminates the constitutional argument that a party will be denied due process. See Allen v. McCurry, 449 U.S. 90, 95 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979).

The Applicants in the NRC proceeding are Texas Utilities Generating Company, Dallas Power & Light Company, Texas Electric Service Company, Texas Power & Light Company, Texas Municipal Power Agency, Brazos Electric Power Cooperative and Tex-La Electric Cooperative of Texas. Not one of these organizations was a party to the Labor Department proceeding. The only parties to that proceeding were Mr. Atchison and Brown & Root, Inc. Thus, the question is whether any of these Applicants was a controlling non-party or in privity with Brown & Root. In deciding whether a prior decision should bind a non-party, the court or adjudicatory body must determine whether the nature and extent of the non-party's interest in the prior litigation is sufficient to deem him a "participating or controlling" non-party.

The Supreme Court, in United States v. California Bridge & Construction Company, 245 U.S. 337, 341 (1917), stated that privity involves a person so identified in interest with another that he represents the same legal right. Generally, a non-party must have control of, or at least joint control, or the right to

control, the prosecution or defense of the suit to be deemed in privity with a party.[15] The non-party must, for instance, be able to control the decision to appeal.[16] It is not sufficient that a non-party merely assists or cooperates in the prosecution or defense by providing funds for payment of litigation expenses,[17] by providing an attorney,[18] or by procuring witnesses or evidence.[19]

If a relationship found to exist between the party and non-party is too attenuated, collateral estoppel will be barred by due process considerations. Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 329 (1971). For instance, in Bigelow v. Old Dominion Copper Mining & Smelting Company, 225 U.S. 111, 126-127 (1912), the Supreme Court stated that privity was not established because the question litigated was one that might affect the non-party's liability in a subsequent action. The Seventh Circuit, in Whitley v. Seibel, 676 F.2d 245, 248 n.1 (7th Cir. 1982), summarized the parties requirement as follows:

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15 See Southwest Airlines v. Texas International Airlines, Inc. 546 F.2d 84, 95 (5th Cir. 1977) cert. denied sub nom. Texas International Airlines, Inc. v. Texas Aeronautics Commission, 434 U.S. 832 (1978); American Safety Flight Systems, Inc. v. Garrett Corp., 528 F.2d 288, 289 (9th Cir. 1975). See also Del Mar Avionics v. Quinton Instruments, 645 F.2d 832, 834-35 (9th Cir. 1981).

16 Litchfield v. Goodnow, 123 U.S. 549, 551 (1887).

17 TRW, Inc. v. Ellipse Corp., 495 F.2d 314, 318 (7th Cir. 1974).

18 McIlheny Co. v. Gaidry 253 F.2d 613 (5th Cir. 1918).

19 Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F.Supp. 892 (S.D.N.Y. 1968).

> Collateral estoppel can be invoked by and against new litigants. It can be used as a shield by a new defendant against a plaintiff who was a party to the former litigation. Or it can be used as a sword by a new plaintiff who was a party to the former litigation. It can never be used as a sword against a party who has not previously had his day in court. [citations omitted]

The question of parties arose in the St. Lucie antitrust proceeding at the NRC. There the applicant argued that collateral estoppel effect should not be given to a prior decision of the Fifth Circuit regarding territorial allocation of the wholesale power market on the grounds that the intervenor in the NRC proceeding should not have the benefits of that decision without having risked an adverse result, in that it could have, but did not, intervene in the judicial proceeding. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), 14 NRC 1167, 1173-1174.[20] The Board ruled that it must look to "all relevant considerations", not merely whether a party could easily have joined in a prior action, in determining whether to invoke the collateral estoppel doctrine. The Board gave collateral estoppel effect to the Fifth Circuit decision on the basis of the Applicant's full participation and vigorous defense as a party to that suit and because the appellate court's determination (setting aside a jury verdict in appeal) was that the evidence of conspiracy was "overwhelming," such as to admit if only one

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20 There are many aspects to the St. Lucie decision. In addition to arguments relating to the effects of the district court decision, the Board heard collateral estoppel arguments on two FERC opinions and a Fifth Circuit decision. We discuss the arguments and the Board's ruling on these other decisions later in the brief.

reasonable conclusion. St. Lucie, supra, LBP-81-58, 14 NRC at 1174-1175.

St. Lucie is distinguishable from the case at bar for several reasons. There, the applicant was the defendant in the federal antitrust litigation in the federal courts later sought to be used against it in the NRC proceeding by a non-party to the federal case. That applicant against whom collateral estoppel was asserted had fully defended the prior suit in federal court. St. Lucie, supra, LBP-81-58, 14 NRC at 1174. Here, Applicants, against whom the DOL decision would be asserted were not parties nor controlling non-parties to the Labor Department proceeding and have not had an opportunity to defend. Second, the issues in St. Lucie were the same as those in the prior proceeding. As discussed fully at pages 18-27, infra, the issues in the present NRC case are not the same as in the prior (DOL) case.

In resolving the question of parties in this instance, it is important that the Board is aware of the relationship between Applicants and Brown & Root. Brown & Root is the general contractor in the construction of the Comanche Peak Steam Electric Station. During relevant times, Brown & Root employed over 4,000 employees at the site, with approximately 400 employees assigned to the QA/QC department. The QA/QC department is divided into two separate entities -- the ASME[21] QA program and the non-ASME QA program. The ASME program governs construction activities undertaken pursuant to the ASME Code and is the responsibility of Brown & Root. The non-ASME program governs

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21 American Society of Mechanical Engineers ("ASME").

non-ASME construction activities and is the responsibility of TUGCO. Brown & Root employees are assigned to work in both programs. While those Brown & Root employees assigned to the non-ASME program are supervised by TUGCO, they remain the employees of Brown & Root and any personnel action relating to such employees is taken by Brown & Root (Applicants' Exhibit 141 at 14).

Charles Atchison was employed at the site by Brown & Root as a QA/QC field inspector. He was detailed to TUGCO for a period, during which he remained a Brown & Root employee, and was returned to Brown & Root just prior to his discharge. The decision to terminate was made by Brown & Root's On-Site QA Manager. Tr. 2508, 2510-2513.

Pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 and the applicable regulations of the Labor Department,[22] Atchison filed a complaint against his employer, Brown & Root, alleging that he had been terminated illegally for engaging in a "protected activity". On the basis of DOL's investigation of Atchison's complaint, a proceeding was instituted against Brown & Root to determine whether it had discriminated against its employee engaged in protected activity. The proceeding before the DOL ALJ was defended by counsel for Brown & Root, all pleadings were filed by Brown & Root, and the legal theories employed were those of Brown & Root. The relief ordered by the ALJ, i.e., reinstatement of Atchison to his former

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22 29 C.F.R. Part 24.

position and payment of back pay, if sustained, will operate solely against Brown & Root.

Applicants did not participate in the Labor Department proceeding and did not have control of, or the right to control, the defense of Atchison's allegations. Applicants could not be directly affected by the DOL proceeding since the Labor Department can only grant relief to an employee found to have been illegally discriminated against, and only against the employer. Applicants were not and cannot be deemed participating or controlling non-parties to the DOL proceeding. Applicants have not had their day in court and, therefore, to bind Applicants by the DOL Recommended Decision would be a denial of due process.

C. Issues

While absence of identity of parties alone is sufficient to prevent application of collateral estoppel in a subsequent proceeding, we nonetheless discuss the standards relating to issues. As noted above, four tests as to issues must be satisfied for litigation of an issue to be precluded: (1) the issue sought to be precluded must be the same as that in the prior action, (2) the issue must have been actually litigated, (3) it must have been determined by a valid and final judgment, and (4) determination of the issue must have been essential to the prior judgment. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1459-1460 (1982). See also Houston Lighting and Power Company (South Texas project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566

(1979), aff'd, ALAB-575, 11 NRC 14 (1980). All four criteria must be satisfied if the issue is to be precluded. See 1B Moore's Federal Practice ¶0.433[1].

1. Differing Legal Standards and Agency Expertise.

In applying these principles, the Board should consider the different legal standards involved in the two proceedings. In Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC 265, 363 (1979) the Appeal Board stated:

> Where the legal standards of two statutes are significantly different, the decision on an issue under one statute does not give rise to collateral estoppel in a litigation of a similar issue under a different statute. [citations omitted].

The Licensing Board in the South Texas/Comanche Peak antitrust proceeding elaborated on this point, stating that:

> Issues are not identical if the second action involves the application of a different legal standard, even though the factual setting of both proceedings may be the same. Thus the same historical facts may be involved in two actions, but the legal significance of the facts may differ because different legal standards are applicable to them. [South Texas, supra, LBP-79-27, 10 NRC at 569 (footnotes omitted)].

In South Texas, the Licensing Board concluded that the legal standards and issues in antitrust proceedings under Section 105c of the Atomic Energy Act were "significantly different" from those in Section 1 of the Sherman Act, and, therefore, that the decision of a district court based on the Sherman Act could not give rise to collateral estoppel. South Texas, supra, LBP-79-27, 10 NRC at 571.

By contrast, the Licensing Board in the St. Lucie antitrust proceeding found that the particular legal standards applied by the NRC and the Federal Energy Regulatory Commission ("FERC") were not significantly different, and that collateral estoppel effect could thus be given in the NRC proceeding to a FERC finding. St. Lucie, supra, LBP-81-58, 14 NRC at 1175-1176. The Board noted, however, that only those FERC findings that were relevant to the matters at issue in the NRC proceeding would be accorded binding effect. St. Lucie, supra, LBP-81-58, 14 NRC at 1176.

Here, the DOL proceeding involved a labor dispute between an employee against his employer under Section 210 of the Energy Reorganization Act. The only basis for an action under Section 210 is an allegation of retaliatory discrimination against an employee, and the standards by which DOL must evaluate the allegation are whether a protected activity was involved and whether the personnel action by the employer resulted from the employee's protected activity. Thus, the Labor Department's attention is focused on protection of the employee.

The legal standards and issues involved in this operating license proceeding are completely different from those in the Labor Department proceeding. While DOL is concerned with employee protection, NRC is concerned with protection of public health and safety. The standards against which an application for an operating license is judged, and the ultimate findings which the Board must make under the Atomic Energy Act and the Commission's Regulations, are whether there is reasonable

assurance that the activities authorized by the license can be conducted without endangering the health and safety of the public, that such activities will be conducted in compliance with the Commission's rules, and that issuance of the license will not be inimical to public health and safety. 10 C.F.R. §50.57. The more narrow issue, as to allegations involving the QA/QC program, is whether the plant is constructed in conformity with the construction permit and the application. 10 C.F.R. §50.57(a)(1).

The roles of DOL and NRC, and the responsibility granted to each by Section 210, define the nature of the issues to be decided by each. While complementary, those issues are distinct, and derive from the unique expertise of the Department of Labor to decide labor disputes on the one hand, and, on the other hand, the expertise of the NRC to decide health and safety questions relating to the construction and operation of nuclear power facilities.

Section 210 gives the Secretary of Labor authority: (1) to investigate an employee's complaint of discrimination or discharge for engaging in "protected activities", (2) to conduct hearings on the employee's allegations based on the Department's investigation and (3) to order relief to employees found to have been the subject of unlawful discrimination. The NRC also has broad investigatory power over health and safety matters arising under Section 161 of the Atomic Energy Act which is in no way diminished because the same facts may also involve labor disputes or alleged employment discrimination. However, NRC's authority does not serve the same purpose and is not invoked in the same

manner as DOL's authority. There appears to be only one NRC decision interpreting the Commission's authority under Section 210, viz. Union Electric Company (Callaway Plant, Units 1 & 2), ALAB-527, 9 NRC 126 (1979). Callaway involved two principal questions--first, whether the Commission could suspend a construction permit until the constructor cooperated with an NRC investigation of alleged employee discrimination, and second, whether the NRC could order a worker reinstated. The Appeal Board stated that the investigatory powers of the Commission and the Labor Department are:

> . . . complementary, not duplicative . . . [B]oth encourage the reporting of unsafe or improper practices to Commission officials. But Section 210 focuses chiefly on protecting employees against retaliation, rather than on safeguarding the public's rights. [Id. at 138 (emphasis added)].

A principal difference between the authority of DOL and NRC is the relief each agency can grant.

> [T]he Secretary [of Labor] apparently lacks two remedial powers -- which the Commission possesses -- necessary to insure full protection of the public interest. The first is the right to take important action against the employer, and the other is authority to do so immediately. Thus, even after finding that an employee has been fired for reporting unsafe construction practices, the Secretary may order reinstatement and back pay -- not correction of the dangerous practices themselves. [Id. at 138-139].

The Appeal Board's interpretation of Section 210 in Callaway is reinforced by the Commission's recent rulemaking which implements Section 210 and a Memorandum of Understanding between NRC and DOL which expresses recognition of each agency's area of responsibility. Effective October 12, 1982 the NRC amended its Regulations (10 C.F.R. §50.7) to implement Section 210 of the

Energy Reorganization Act and to incorporate into the Commission's Regulations its authority under Section 161 of the Atomic Energy Act to investigate matters having health and safety significance in connection with allegations of unlawful discrimination against an employee and to take appropriate action, and to complement the Labor Department's regulations. 47 Fed. Reg. 30452 (July 14, 1982); See 29 C.F.R. Part 24. The NRC rule provides that an adverse finding against an employer by DOL under Section 210 may serve as the basis for the Commission to take enforcement or adverse licensing action against an applicant or licensee. 47 Fed. Reg. 30552 (July 7, 1982). However, such enforcement authority has been delegated by the Commission to its Staff, not the Licensing Boards. Metropolitan Edison Company (Three Mile Island, Unit 1), supra, CLI-82-31, slip op. at 2-3.

On December 3, 1982, NRC and DOL published in the Federal Register a Memorandum of Understanding concerning employee protection which emphasizes that NRC and DOL have separate and distinct responsibilities under Section 210. 47 Fed. Reg. 54585 (December 3, 1982). The purpose of the Memorandum is to facilitate coordination and cooperation regarding handling of Section 210 complaints. The Memorandum recognizes that the NRC and DOL have "complementary responsibilities" in the area of employee protection and that "each agency will carry out its statutory responsibilities independently" but at the same time cooperating to the fullest extent and exchanging information in areas of mutual interest. Id. (emphasis added).

The statutory and regulatory scheme under Section 210 grants DOL distinct responsibility and authority. DOL's sole responsibility is to resolve labor disputes. The Department can grant relief only to employees and then only against employers. It cannot directly affect the rights of NRC applicants or licensees (unless, of course, the applicant or licensee is the employer). While NRC's Regulations authorize the Commission to take enforcement action against an applicant or licensee on the basis of a DOL finding of retaliatory discrimination by a contractor, such action is at the discretion of the Commission. See 10 C.F.R. §50.7(c).

The issue before the NRC is not whether an Applicant's contractor has been held to have violated Section 210, but whether any such violation affects health and safety. Because the legal standards involved and issues before the two agencies significantly differ, the prior decision should not bind the Board in this proceeding under principles of collateral estoppel.

2. Finality

Another of the essential elements of the doctrine of collateral estoppel is finality of judgment in the prior proceeding. See G&C Merriam Company v. Saalfield, 241 U.S. 22, 28 (1916); 1B Moore's Federal Practice ¶0.409[1]. St. Lucie, supra, 14 NRC at 1189-1190, the Licensing Board refused to give collateral estoppel effect to an order of the U.S. District Court granting summary judgment favorable to the Applicants on certain antitrust matters. The intervenor in that proceeding argued that the District Court's Order was not a final judgment and,

therefore, it could not give rise to collateral estoppel. Id. The applicant, on the other hand, argued that the Order should bind the intervenor. Id. The Board rejected the argument that the District Court Order was binding on the intervenor.[23] Id. at 1190.

In this case, the Recommended Decision of the DOL ALJ is not final and cannot presently be enforced even against the employer Brown & Root. It has the status of a "recommendation" to the Secretary of Labor who may or may not uphold that recommendation.[24] Under the applicable DOL rules, 29 C.F.R. §24.6, the Recommended Decision will not constitute final agency action unless affirmed by order of the Secretary. That order is,

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23 The Board determined that the intervenor in the NRC proceeding was not in privity with the party to which the District Court's Order applied. Id. at 1189.

24 Cf. Rawlins v. United States, 686 F.2d 903, 906 (Ct. Cl. 1982). In Rawlins, the plaintiff contended that findings of fact made by a trial commissioner and adopted by the review panel in a Congressional reference proceeding should be given binding effect in a subsequent suit. The Court of Claims stated that:

> A congressional reference proceeding is not the equivalent of a law suit, because the determinations of the panel do not result in a final judgment. Conclusions of law made by a congressional reference review panel are mere recommendations to Congress as to whether a plaintiff has presented equitable grounds for recovery. While Congress has, for the most part, agreed with review panel recommendations, it reserves the right to disagree. Therefore, the findings and conclusions of the review panel have no collateral estoppel effect.
>
> This is not to say that the evidence introduced at the congressional reference proceeding is of no value whatsoever. A congressional reference proceeding is indeed adversarial and there are many similarities between the procedures of congressional reference cases and those of cases within the general jurisdiction of this court.

in turn, subject to judicial review in the U.S. Court of Appeals. Id. §24.7. The ALJ's Recommended Decision is pending before the Secretary of Labor at present. DOL regulations as to recommended decisions do not include an equivalent to the NRC rule which treats licensing decisions as immediately effective and allows licensees to proceed with certain licensed activities pending final agency review.[25] See 10 C.F.R. §2.764.

Since the Secretary has the right to disagree, the ALJ's Recommended Decision is not presently effective and is not enforceable until the Secretary acts upon it. This does not mean that the Board must delay this proceeding pending the Secretary's decision. To the contrary, the Appeal Board in Callaway, supra, 9 NRC at 138, citing remarks by Senator Hart during floor debate on Section 210, stated that pendency of a DOL proceeding need not delay any action by the Commission. In its present status, however, there is no final order and it would be contrary to established principles of collateral estoppel to accord binding effect to the Recommended Decision.

3. Issue Actually Litigated and Necessary to Decision

As to the remaining two factors, i.e., that the issue sought to be precluded was actually litigated in the prior proceeding and that that issue was essential to the prior decision, neither is satisfied inasmuch as the issues before DOL and NRC are significantly different. The root issues actually litigated as

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25 As to the Secretary's final order, however, the Labor Department's regulations provide that the filing of a petition for review does not operate automatically to stay that final order, unless, of course, a reviewing court so orders. 10 C.F.R. §24.7(a).

essential to the DOL decision were (1) determination of whether "protected activities" were involved and (2) whether the employee was terminated as a result of such activities. Any additional findings were unnecessary to the decision and, therefore, may be regarded as dicta to which collateral estoppel does not attach. South Texas, supra, LBP-79-27, 10 NRC at 573.

D. Public Policy Considerations

Both the Commission and the Appeal Board have recognized that there are exceptions to application of collateral estoppel even when, unlike here, all of the elements are present.[26] In Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 & 3) ALAB-378, 5 NRC 557, 561 (1977), the Appeal Board stated that:

> when the legislative intent is to vest primary power to make particular determinations concerning a subject matter in a particular agency, a court's decision concerning that subject matter may be without binding effect upon that agency, 2 Davis [Administrative Law Treatise] §1812 at pp. 627-628. cf. United States v. Radio Corporation of America, 358 U.S. 334, 347-352 (1959).

Similarly in FTC v. Texaco, 555 F.2d 862, 881 (D.C. Cir. 1977), cert. denied, 421 U.S. 974 (1978), the Court of Appeals admonished that "[a] court should approach gingerly a claim that one agency has conclusively determined an issue later analyzed

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26 E.g., Houston Lighting & Power Company (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303 (1977); Davis-Besse, supra, ALAB-378, 5 NRC at 561; Farley, supra, ALAB-182, 7 AEC at 213-216.

from another perspective by an agency with different subject matter jurisdiction."

As we have argued with regard to issues, Section 210 vests authority in the Secretary of Labor to investigate and resolve labor disputes between an employee and his employer resulting from protected activities. NRC has complementary authority to investigate events which gave rise to the labor dispute and to take action against an applicant or licensee under Section 50.7 of the Commission's Regulations. The joint Memorandum of Understanding provides that NRC and DOL will carry out their respective statutory responsibilities independently, but will exchange information of mutual interest. 47 Fed. Reg. 54585 (December 3, 1982). DOL lacks authority and expertise to decide matters related to public health and safety arising under the Atomic Energy Act of 1954 and the NRC's Regulations, authority and expertise that the NRC Licensing Board alone possesses. See Applicants' Proposed Findings of Fact, at Finding 204A, pp. 111-13 (February 25, 1983). Similarly, NRC lacks authority and expertise to decide labor disputes. Accordingly, public policy dictates that any collateral estoppel effect, if it arose at all, must be limited to those limited issues over which DOL has jurisdiction and expertise under Section 210. Public policy considerations and principles of fundamental fairness such as these are necessary to mitigate the harsh effects of collateral estoppel and assure that a party to a subsequent proceeding in which the doctrine is raised is afforded the opportunity to be heard. Here, although collateral estoppel is not applicable to

the DOL decision for the various reasons discussed, these additional considerations strengthen the argument that the DOL decision should not bind the Board in this proceeding.

III. Conclusion

The Recommended Decision of the Labor Department ALJ, while it may be worth noting in the course of the Board's consideration of QA/QC issues in this proceeding, should not be accorded binding effect under principles of collateral estoppel. The essential elements of collateral estoppel are not satisfied and, further, policy considerations militate against invoking the doctrine. The DOL Recommended Decision is not a final judgment; it is not presently enforceable even against the employer. Applicants were not a party to, and cannot be considered participating or controlling non-parties to, the Labor Department proceeding. The issues involved in the two proceedings are significantly different. The Labor Department was concerned only with the allegation of illegal discrimination. NRC on the other hand is not concerned with labor disputes, per se, but rather whether a plant has been constructed in a manner that is not inimical to the public health and safety. For all of the foregoing reasons, the Recommended Decision of the Labor

Department Administrative Law Judge should not be given binding effect under principles of collateral estoppel.

Respectfully submitted,

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