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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before Administrative Law Judge
James A. Laurenson

SERVED APR 29 1983

In the Matter of)	Civil Penalty Proceeding
)	License No. 42-08456-02
CONSOLIDATED X-RAY SERVICE)	EA 82-45
CORPORATION)	ASLBP No. 83-483-01 OT
P. O. Box 20195)	
Dallas, Texas 75220)	April 28, 1983

INITIAL DECISION

Appearances: Andrew Grosso, Esq.
Richard Hoefling, Esq.
Stephen G. Burns, Esq.
for Staff of Nuclear Regulatory Commission

Hugh Smith, Esq.
Schoolfield and Smith
for Consolidated X-Ray Service Corporation

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JURISDICTION AND PROCEDURAL HISTORY

On January 18, 1982, the Office of Inspection and Enforcement of the Nuclear Regulatory Commission (hereinafter "NRC") conducted an inspection of Consolidated X-Ray Service Corporation (hereinafter "Consolidated") at its Woodbridge, New Jersey office. On March 2, 1982, an enforcement conference was held between NPC and Consolidated. On April 12, 1982, NRC issued a Notice of Violation and Proposed Imposition of Civil Penalty in the amount of \$4,000. On May 6 and May 7, 1982 Consolidated responded and opposed the imposition of any civil penalty. Thereafter, on August 6, 1982 the NRC issued an Order Imposing Civil Monetary Penalty in the amount of \$4,000. Consolidated requested a hearing on August 27, 1982. On November 1, 1982, the Nuclear Regulatory Commission ordered that this matter be heard by an administrative law judge. On November 15, 1982, I was designated as the presiding administrative law judge in this matter. On December 3, 1982 a prehearing conference was held by telephone and a Notice of Hearing and Prehearing Order was issued. A hearing was held in Bethesda, Maryland on January 19, 1983. Thereafter, the parties filed briefs with proposed findings of fact and conclusions of law.

ISSUES

The parties stipulated that Consolidated violated 10 CFR § 34.23 and Condition 17 of License 42-08456-02. (Stipulations 19-21 and 24, hereinafter S. 19-21, etc.). Therefore, the only remaining issues are

whether a civil penalty should be imposed for the violation and, if so, the amount which should be assessed.

APPLICABLE LAW

Section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2282, provides for the assessment of civil penalties up to \$100,000 for each violation of the Act "or any rule, regulation, or order issued thereunder, or any term condition, or limitation of any license issued thereunder"

10 CFR § 2.205 specifies the procedures for assessing civil penalties. As pertinent here, that regulation provides that after the hearing the judge shall issue an order "dismissing the proceeding or imposing, mitigating, or remitting the civil penalty."

10 CFR § 2.205(f).

At the time of the violation herein, but before the time any penalty was proposed or assessed, there was in effect an "interim policy" which the Nuclear Regulatory Commission designated and published as "Proposed General Statement of Policy and Procedure for Enforcement Actions." 45 Fed. Reg. 66754 (Oct. 7, 1980). However, on March 9, 1982 the Commission published "General Policy and Procedure to NRC Enforcement Actions." 47 Fed. Reg. 9987 (March 9, 1982). The latter policy was also codified as 10 CFR Part 2, Appendix C. In any event, the parties herein have stipulated "that the enforcement policies, present and interim, are the standards to be used in deciding the issue in this case" (T. 13).

STIPULATIONS

The parties entered into 29 stipulations which were received in evidence at the hearing and which are attached hereto, marked as Appendix, and incorporated herein by reference. Pursuant to the stipulations, Consolidated has been licensed since 1962 by the NRC and its predecessor as an industrial user of radioactive by-products material for inspection purposes. (Transcript pages 15-16, hereinafter T. 15-16). It is the holder of NRC license number 42-08456-02. Gary Thomas Kelly was employed by Consolidated as a radiographer (hereinafter "the radiographer"). (S. 2). The radiographer was properly certified and had received the required training. (S. 22). On January 15, 1982, he was assigned to work on radiography of a gas pipeline under construction in Oil City, PA. (S. 3). Shortly after 7 a.m. the radiographer set up his exposure device, a Gamma Century camera containing 24 curies of iridium-192 (hereinafter called "camera"), and made his first exposure. After making the exposure, the radiographer found that the control cable and key were frozen in place while attached to the camera. Thereafter, he forced the guide tube off the camera and inserted the front safety plug in the camera. (S. 4, 15 and Ex. 11). After developing the film in his truck, the radiographer received permission to leave the job site until noon when his next exposure was scheduled. (S. 5). The radiographer then drove away in his truck under conditions as follows: "the camera was not secured to the vehicle, the rear safety plug was not inserted in the camera, ...the key was left in the camera lock...[and] the tailgate of the truck was left down." (S. 5

and 6). After traveling approximately two miles, the radiographer noticed that the camera was not in the truck. (S. 7). The radiographer's attempts to find the camera on and along the road were unavailing. (S. 8). At 12:46 p.m. the radiographer gave notice of the loss of the camera to the following: Oil City Police, Pennsylvania State Police, and Consolidated's home office. (S. 10). At approximately 2 p.m. Consolidated notified NRC Region I of the disappearance of the camera. (S. 18).

At 5:45 p.m., a person notified the Oil City Police that he had the camera in his van. The radiographer accompanied the police to the van where they found the camera in the following condition: "the device was not open. The key was in the lock, the lock was depressed, and the control cables and front plug were attached." (S. 14). The person who had the camera stated that he did not unlock it or crank out the source. Ibid. There was no visible damage to the camera and a "Caution Radioactive Materials" label was still attached to the camera. (S. 16).

The parties further agree that 10 CFR § 34.23 "requires that locked radiographic exposure devices and storage containers be physically secured to prevent tampering with or removal by unauthorized persons." (S.19). Condition 17 of Consolidated's license requires that no device be moved unless all safety plugs are inserted and the device is locked. (S. 20). Consolidated admitted that, contrary to the requirements of 10 CFR § 34.23 and Condition 17 of its NRC license, one of its radiographers transported a camera containing 24 curies of iridium-192 under conditions as follow: the rear safety plug was not inserted, the

camera was not secured to the vehicle, and, although the camera was locked, the key was left in the lock. (S. 21). The parties agree that Consolidated's ability to pay a civil penalty is not in issue in this proceeding. (S. 25).

ARGUMENTS

NRC contends as follows: Consolidated admits that it violated 10 CFR § 34.23 and Condition 17 of its license; under present NRC enforcement policy this is a Severity Level III violation as described in Example C(1) of Supplement VI (or in the alternative, under NRC interim enforcement policy this was a violation described at Example C-1 of Supplement VII) with a base civil penalty of \$4,000; and that upon a consideration of the factors in the enforcement policy which could increase or decrease the base amount of the civil penalty, there is no valid reason to increase or decrease that amount and a civil penalty of \$4,000 should be assessed to serve a remedial purpose.

Consolidated does not contest the fact that the violation occurred. However, it does contend that the \$4,000 civil penalty is unfair and should be remitted in its entirety or, in the alternative, that the penalty should be mitigated or reduced. In support of its contention, Consolidated relies on the absence of management culpability, its prompt reporting of this incident to NRC, its prompt corrective actions after the violation, and the fact that NRC erroneously failed to consider this to be a transportation violation with a significantly smaller base civil penalty.

OPINION

At the outset, I note that the Commission's Order of November 1, 1982 referring this matter for a hearing, directed "That the presiding officer should be guided by the NRC 'General Statement of Policy and Procedure of Enforcement Actions,' 47 F.R. 9987 (March 9, 1982)"

I note this fact because the violation herein admittedly occurred on January 15, 1982 whereas the above policy was not effective until March 9, 1982. In any event, the parties do not assert any significant difference between the two enforcement policies and I have found none.

This Opinion will track the outline submitted by NRC Staff and followed by Consolidated. The issues to be discussed are as follows: (1) the classification of the violation; (2) determination whether a civil penalty is appropriate; (3) determination of the base civil penalty and consideration of adjustment factors; and (4) consideration of Consolidated's contention that the individual employee should have been cited.

1. Classification of the Violation

There is a conflict between the parties as to the proper classification of the violation. NRC Staff asserts that "the loss of a radiography device was a significant violation that should be classified at Severity Level III under the enforcement policy's supplement for fuel cycle and materials operations." NRC Staff Brief at 9. On the other hand, Consolidated claims that the violation arose out of the loss of the device during transportation and, hence, should be assessed as a "transportation" rather than a "fuel cycle and materials operations"

violation. Licensee Brief at 4 and 10. Consolidated does not dispute the classification of Severity Level III. Licensee's Proposed Conclusion of Law No. 5 at 5. The distinction between the two classifications is important because Table 1A-Base Civil Penalties for Industrial Users of Material begins the calculation of a civil penalty at \$8,000 for a "health physics" violation but only \$5,000 for a "transportation" violation.

For present purposes, the issue can be simplified by stating that this is either a "transportation" violation or not. Neither the "Base Civil Penalties" Table nor the Commission's "General Statement of Policy and Procedure for Enforcement Actions," 10 CFR Part 2 (hereinafter General Enforcement Policy) defines the pertinent terms or discusses the problem of proper classification. Consolidated argues that this is a transportation violation because the original Notice of Violation alleged that Condition 17 of its license required that "the device is secured to the vehicle during transportation" and that stipulation 21 herein states, in pertinent part, that "a radiographer in the employ of Consolidated X-Ray, at a field site in Oil City, Pennsylvania, transported a radiographic device" NRC Staff concedes that transportation was involved in this incident but asserts that the "primary problem was that an industrial user of a radiographic exposure device mishandled and inadequately controlled the device." NRC Brief at 11. NRC Staff goes on to analyze the history of the Transportation Supplement and cites authority for the proposition that the Transportation Supplement was taken from the Department of

Transportation (DOT) Regulations and was to deal with "use of defective shipping containers or to improper loading and preparation of purchases for shipment." 44 Fed. Reg. 77136 (Dec. 31, 1979). Staff states that the transportation aspect of the Notice of Violation was deleted by amendment at the time of the hearing because the cited provision has never been formally added to license Condition 17. Reply Brief at 3.

Upon a consideration of the arguments and authorities of the parties on this matter, I find that the NRC Staff is correct in its assertion that the violation in controversy is not a "transportation" violation. While it is true that the device was apparently lost while being transported, the essence of the violation was that the radiographer lost the device. In other words, he failed to keep proper control of a radioactive source. I find that this was a "fuel cycle and materials operations" violation and that the transportation was only incidental.

2. Is a civil penalty appropriate for this violation?

The General Enforcement Policy states the following: "Generally, civil penalties are imposed for Severity Level I and II violations, are considered and usually imposed for Severity Level III violations, and may be imposed for Severity Level IV violations" (Emphasis supplied). As noted supra, Consolidated concedes that "the violation in this case is properly classified as a Severity Level III violation." Licensee Proposed Conclusion of Law No. 5 at 5.

Consolidated argues that there was no exposure to anyone, the licensee had no previous similar occurrences, the device was recovered

without incident, and this matter resulted from a momentary lapse by a fully trained radiographer and such an occurrence could not have been foreseen by the licensee. Licensee's Brief at 13-15. While it would be speculative to draw any conclusions from the record as to why the radiographer lost the device, the foregoing assertions by Consolidated are essentially true. However, these factors, whether considered singly or in combination, are insufficient to demonstrate that no civil penalty should be assessed for this Severity Level III violation.

In Atlantic Research Corporation, CLI-80-7, 11 NRC 413, 422 (1980), the Commission stated, "We believe a strong enforcement policy dictates that the licensee be held accountable for all violations committed by its employees in the conduct of the licensed activity." Thus, even the alleged "momentary lapse" of the radiographer is chargeable to Consolidated. Stipulation 28 acknowledges this fact.

Likewise, in X-Ray Engineering Co., CLI-60-11, 1 AEC 553 (1960), the Atomic Energy Commission revoked and terminated a byproduct material license. There, the licensee argued "that its offenses should be regarded as less severe because no personal injuries were incurred thereby." Id. at 555. The AEC rejected this argument and stated: "Our statutory obligation to protect the public health and safety is not subject to the condition precedent that actual injuries occur." Ibid. Thus, the fact that no person suffered personal injuries in the instant matter is of no relevance in determining whether or not to impose a civil penalty.

I conclude that Consolidated has not established any valid reason to support its contention that no civil penalty should be imposed for this Severity Level III violation.

3. Determination of the Base Civil Penalty and Consideration of Adjustment Factors

Tables 1A and 1B of the General Enforcement Policy list base civil penalties for all violations. 47 Fed. Reg. 9992 (March 9, 1982). I have determined that the instant matter constitutes an industrial users of material (including radiographers) health physics violation at Severity Level III. Thus, Table 1A lists a base civil penalty of \$8,000 for a Severity Level I violation and Table 1B provides that this amount shall be reduced to 50% of the amount listed in Table 1A for a Severity Level III violation. Hence, I find that the base civil penalty for the instant violation is \$4,000.

The General Enforcement Policy provides that the base civil penalty may be adjusted after considering five specific factors. 47 Fed. Reg. 9991 (March 9, 1982). Three of the enumerated factors can only be considered in increasing the amount of the base civil penalty. No one contends that the base civil penalty should be increased in the instant matter so I will not discuss those three factors. However, Consolidated claims that it is entitled to a reduction in the base civil penalty because of the other two factors: (1) prompt identification and reporting and (2) corrective action to prevent recurrence. The General Enforcement Policy provides that each of those factors may result in a

reduction of up to 50% of the base civil penalty. 47 Fed. Reg. 9991 (March 9, 1982).

A. Prompt Identification and Reporting

The General Enforcement Policy provides as follows:

Reduction of up to 50% of the base civil penalty may be given when a licensee identifies the violation and promptly reports the violation to the NRC. In weighing this factor, consideration will be given to, among other things, the length of time the violation existed prior to discovery, the opportunity available to discover the violation, and the promptness and completeness of any required report. This factor will not be applied to violations which constitute or are identified as a result of overexposures, unplanned releases of radioactivity or other specific, self-disclosing incidents. In addition, no consideration will be given to this factor if the licensee does not take immediate action to correct the problem upon discovery.
Ibid.

The precise time at which the radiographer lost the camera is not known. However, the parties stipulated that the camera was found in the road by a third person between 9 and 10 a.m. (S. 13). The stipulated facts further show the following: (1) at 12:46 p.m. the radiographer notified Consolidated that the device was missing (S. 10); and (2) at about 2 p.m. Consolidated notified NRC Region I of the lost exposure device. (S.18).

Consolidated claims that it is entitled to a 50% reduction of the base civil penalty because it promptly reported this incident within approximately one hour and fifteen minutes after its notification. NRC Staff claims that Consolidated is not entitled to any reduction for prompt reporting because of the following: (1) the timeliness of the

notification should be measured from the time the radiographer discovered it to be missing since his knowledge as an employee is attributable to Consolidated; (2) even the lapse of 1½ hours, from the time Consolidated management was informed of the loss and reported it to NRC, does not qualify as prompt reporting; and (3) this was a "self-disclosing incident" which precludes any reduction for prompt reporting.

NRC Staff argues that the radiographer was an employee of Consolidated and, since the radiographer was aware of the disappearance for several hours before it was reported, the timeliness of the report should be measured from the time when the radiographer discovered that the device was missing. The only authority cited to support Staff's position is 10 CFR § 34.2(b), a regulation defining a "radiographer" to include a person "who is responsible to the licensee for assuring compliance with the requirements of the Commission's regulations and the conditions of the license" While it is true that a licensee is accountable or liable for all violations committed by its employees in the course of licensed activity, it does not follow that a licensee should be denied a reduction in a base civil penalty simply because its employee failed to report a violation. I believe that the better rule would be to measure the timeliness of reporting a matter to the NRC from the time the licensee's management knew or should have known of the violation. This rule would encourage licensees to promptly report violations. The Staff's proposal would discourage a licensee such as Consolidated in the instant case since several hours had elapsed from

the time the radiographer became aware of the disappearance until he notified his office. Applying this rule to the instant matter, it is apparent that the radiographer was working alone and no one at Consolidated knew or should have known of the disappearance of the device until the radiographer reported it.

Before evaluating the passage of 1½ hours from the time of notice to Consolidated and the time of notice to NRC Staff, it must be determined whether this is a "specific, self-disclosing incident" for which a reduction in the base civil penalty is not available. The term, "specific, self-disclosing incidents" is not defined in the General Enforcement Policy. I invited the parties to address this question in their briefs. Staff submits no authority on this matter but states as follows:

"The loss of a radiography camera in the public domain was such a self-disclosing incident. The violation was not difficult to detect as is a subtle defect in complex equipment, nor was it easily concealed. No special inspection by the Licensee was needed to notice the loss. Finally, the lost camera eventually turned up in the hands of members of the general public. The 'self-disclosing' nature of the violation precludes the granting of mitigation for prompt identification and reporting." NRC Staff Brief at 27.

Consolidated likewise submits no authority on the question but states that:

Additionally, NRC argues that this is a violation of a self-disclosing nature. We contend, however, that it is not. At least, NRC has not submitted any evidence to the effect the violation was self-disclosing. The matter is open to speculation from all sides, but the fact remains that the Licensee reported it in no more than

one hour and fifteen minutes after its own notification. Licensee's Brief at 6.

Presumably, a "specific, self-disclosing incident" is one which is obvious and no special credit should be given to a licensee for reporting it to the NRC. I do not find that to be the case here. Again, it is important, as a matter of policy, to encourage licensees to promptly report the disappearance of a radiographic source. An application of the "specific, self-disclosing incident" exception here would defeat that goal. The failure of the Commission and Staff to clearly define a "specific, self-disclosing incident" also precludes its application in this case. Hence, I reject NRC Staff's assertion that this was a "specific, self-disclosing incident."

The final question to be answered in this area is whether Consolidated should be entitled to a reduction in the base civil penalty due to prompt identification and reporting where it reported the disappearance of this device within approximately 1½ hours after notification. Consolidated offered no evidence at the hearing to explain this delay. Here there was a source containing 24 curies of iridium-192 which was unaccounted for and had been lost on a public road. This presented a potential for causing serious harm to a member of the public. While I would not necessarily require immediate or simultaneous notification of the NRC, under the facts of this case the lapse of 1½ hours from the time the matter was reported to Consolidated and the time of Consolidated's report to NRC, without explanation by

Consolidated, precludes any reduction of the base civil penalty for this factor. This is not intended to infer that Consolidated was derelict in reporting this matter. I only find that Consolidated did not establish "prompt identification and reporting" of the instant violation for purposes of qualifying for a reduced civil penalty.

B. Corrective Action to Prevent Recurrence

The General Enforcement Policy provides as follows:

Recognizing that corrective action is always required to meet regulatory requirements, the promptness and extent to which the licensee takes corrective action, including actions to prevent recurrence, may be considered in modifying the civil penalty to be assessed. Unusually prompt and extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value shown in Table 1. On the other hand, the civil penalty may be increased as much as 25% of the base value if initiation of corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor consideration will be given to, among other things, the timeliness of the corrective action, degrees of licensee initiative, and comprehensiveness of the corrective action--such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern. 47 Fed. Reg. 9991 (March 9, 1982).

As relevant here, the stipulated facts show that Consolidated took the following corrective action to prevent recurrence: (1) the radiographer who committed the violation was fired; (2) all employees were required to attend a refresher course dealing with the proper survey of radiographic devices; and (3) the President of Consolidated

visited the office in question and instructed the radiographers concerning the importance of following safety procedures. Although not previously mentioned in letters to NRC, Consolidated contended at the hearing that it also had a policy of conducting unannounced field audits.

It is not a simple task to assess the significance of Consolidated's decision to terminate the employment of the radiographer. Consolidated asserts that the discharge of the radiographer "in terms of labor relations is capital punishment" Licensee's Brief at 16. While acknowledging that termination of an employee is a drastic action, NRC Staff states that such a termination "may produce an atmosphere of concealment between employee and licensee." NRC Staff Brief, p. 24, n. 92. In any event, the punishment here was less than capital since the radiographer received a reprieve when he was reemployed by Consolidated in May, 1982. (T. 180). The termination or discharge of an employee who commits a violation may or may not be proper in a particular case. However, I believe it would be improper to consider the discharge or termination of an employee as a factor in reducing a civil penalty. As NRC Staff notes, such a firing sends mixed signals to other employees. Moreover, a reduced civil penalty for such a discharge would encourage other licensees to think first of a discharge of the offending employee. It would not be unreasonable for employees to conclude that if they reported violations to the licensee, their employment would also be terminated. Thus, this practice may defeat the Commission's goal of prompt reporting of violations. Under the facts of

this case, I find that the discharge or termination of the radiographer is not "corrective action to prevent recurrence" for which a reduction in the base civil penalty would be appropriate.

The General Enforcement Policy provides "that corrective action is always required" Ibid. Unusually prompt and extensive corrective action may result in up to a 50% reduction in the base civil penalty while the penalty may be increased as much as 25% "if initiation of the corrective action is not prompt or if the corrective action is only minimally acceptable." Ibid. The appearance of Consolidated's President in the office to reinforce a commitment to safety, coupled with a refresher course on the proper survey of radiographic devices, constituted appropriate abatement or corrective action. However, this action does not constitute "unusually prompt and extensive corrective action" which would be sufficient to reduce the base civil penalty. If Consolidated had been able to establish that it had also instituted a new unannounced field audit program, that fact coupled with the above corrective action would have qualified Consolidated for a reduced civil penalty. Consolidated presented insufficient evidence to establish the fact of such a program. J. Lee Ballard, Senior Vice President of Consolidated, testified that there was an unwritten policy of unannounced audits. Consolidated had no written material concerning the frequency of such audits or any notification to radiographers that such audits would take place from time to time. Mr. Ballard presented no data concerning the frequency of audits of radiographers. (T. 169-174). While I find the testimony of Mr. Ballard to be vague, I also find it to

be insufficient because it fails to show any change in the procedures after the incident in question. Thus, I conclude that Consolidated has not established that it is entitled to a reduction in the base civil penalty because of its "corrective action to prevent recurrence."

4. Liability of Individual Radiographer

Consolidated argues as follows: "If the real purpose of the civil penalty is to capture the attention of the industry as to the importance of the regulations then we submit that the radiographers themselves should be brought into the purview of civil penalty." Licensee's Brief at 15. It goes on to cite the Commission's General Enforcement Policy permitting enforcement actions against individuals and Section 234 of the Act which permits imposition of civil penalties upon "any person." NRC Staff did not respond to this assertion.

While there may be merit to Consolidated's suggestion that a civil penalty should be imposed on the employee who committed the violation, this is of no moment in the instant matter. Whether such a penalty is assessed against the employee does not affect the amount of a civil penalty assessed against the employer. Rather, the question of whether to assess civil penalties is an enforcement decision which is properly left to the NRC Staff's Office of Inspection and Enforcement. Such a decision has no bearing on this proceeding.

5. Conclusion regarding General Enforcement Policy

After considering all of the arguments and authorities submitted by the parties, I conclude that NRC Staff correctly classified this violation, determined the amount of the base civil penalty, and declined

to reduce the base civil penalty under the criteria listed in the General Enforcement Policy. Nevertheless, I do not believe that \$4,000 is the proper amount for a civil penalty in this matter.

a. General Statement of Policy is not a regulation

The Commission intended that the assessment of a civil penalty should be an exercise of sound discretion under the particular facts of the occurrence rather than an application of a rigid formula. This is manifest in the Statement of Consideration which was published concurrently with the General Enforcement Policy. The Statement of Consideration provides as follows:

"Comment: Is the Enforcement Policy a General Statement of Policy or a regulation?"

Response: An underlying basis of this policy that is reflected throughout it is that the determination of the appropriate sanction requires the exercise of discretion such that each enforcement action is tailored to the particular factual situation. In view of the discretion provided, the enforcement policy is being adopted as a statement of general policy rather than as a regulation, notwithstanding that the statement has been promulgated with notice and comment procedures. A general statement of policy will permit the Commission maximum flexibility in revising the policy statement and it is expected that the statement, especially the supplements, will be revised as necessary to reflect changes in policy and direction of the Commission.

In drafting the statement it was expected that the specific enforcement criteria should provide adequate guidance and be applied in the majority of circumstances requiring enforcement actions. The policy, as indicated above, does provide discretion to take appropriate action if, after considering the policy

statement, the Director determines that application of the criteria is inappropriate. For example, there may be cases where more than a 25% increase in civil penalty is appropriate based on prior enforcement history." 47 Fed. Reg. 9989 (March 9, 1982).

I also note that the Commission's Order of November 1, 1982, referring this matter for hearing stated that I "should be guided" by the General Enforcement Policy.

b. Role of Administrative Law Judge and Mitigating Factors

There is nothing in the General Enforcement Policy which evinces an intent to alter the jurisdiction or authority of the presiding administrative law judge in a civil penalty matter. A brief examination of the role of the administrative law judge is in order.

In Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536, (1979), the Appeal Board stated as follows:

"The Director is not the ultimate fact finder in civil penalty matters. Commission regulations afford one from whom a civil penalty is sought the right to a hearing on the charges against it. 10 CFR 2.205(d) and (e). At that hearing, the Director must prove his allegations by a preponderance of the reliable, probative, and substantial evidence. It is the presiding officer at that hearing, not the Director, who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties warranted. 10 CFR 2.205(f)."

There, the licensee complained that the Commission had not promulgated a formal "schedule of fines." The Appeal Board rejected that contention and found that adequate enforcement criteria had been published in the Federal Register. The Appeal Board went on to observe as follows:

"We add only that assessing a penalty inherently calls for the exercise of informed judgment on a case-by-case basis. An absolute uniformity of sanctions (which the licensee appears to think necessary) is neither possible nor required."
Id. at 541.

Subsequently, a civil penalty matter involving Atlantic Research Corp. considered the appropriate standard for assessments. The administrative law judge upheld civil penalties against the licensee in the amount of \$8,600. ALJ-77-2, 6 NRC 702 (1977); ALJ-78-2, 7 NRC 701 (1978). Thereafter, the Appeal Board reversed those decisions and remitted the entire civil penalty because it found that the licensee was free from management culpability. ALAB-542, 9 NRC 611 (1979). The facts of the case were that a radiographer employed by a licensee committed deliberate misconduct which resulted in excessive radiation doses to the radiographer and another employee. Id. at 612. The Appeal Board reviewed the legislative history of Section 234 of the Atomic Energy Act of 1954, as amended, and concluded that the absence of a specific finding of management negligence or failure to take corrective action resulted in the assessment of punitive civil penalties beyond the scope that section. The Commission then reviewed the Appeal Board decision, vacated it, and remanded it for further proceedings. CLI-80-7, 11 NRC 413 (1980). The Commission stated:

"We believe that so long as a person violates the portions of the Atomic Energy Act referenced in Section 234 and the NRC can rationally relate imposition of a civil penalty against that person to potential improvement of conduct, either by the licensee or any other person, in furthering the purposes of the Atomic Energy

Act, then the penalty is within the scope of our Section 234 authority, whether or not the fine might also be called 'punitive.'" Id. at 420

The Commission held that a licensee was "accountable for all violations committed by its employees in the conduct of the licensed activity."

Id. at 422. The matter was remanded to the Appeal Board "for further consideration solely on the issue of mitigation." Id. at 425.

In a decision with one judge dissenting, the Appeal Board then found that mitigation was in order and reduced the civil penalty from \$8,600 to \$2,000. ALAB-594, 11 NRC 841 (1980). The Appeal Board stated, "As we read our present mandate, however, there is nevertheless room for taking into account the management culpability factor in determining whether, and if so, to what extent, the assessed civil penalty should be mitigated." Id. at 845. The Appeal Board then discussed the schedule of civil penalties set out in a manual published by the Office of Inspection and Enforcement as follows:

"And, even though it [the manual] does not have the force of a regulation, should the quantum of the penalty end up in dispute the same considerations militate in favor of the adjudicators according the schedule some attention and weight. But to bear the schedule in mind is not to give it necessarily conclusive effect. As the ultimate decisional authority, with the expressly conferred power to mitigate or remit a penalty assessed by the Director on the basis of the schedule, the adjudicators manifestly must be thought to have the latitude to effect a reduction to a level below the schedule range. Whether that discretion should be exercised (either by the Administrative Law Judge or a reviewing tribunal) will, of course, hinge upon the

facts of the specific case."
Id. at 849.

c. The Instant Matter

I find that the instant matter presents a similar situation to the one which confronted the judges and the Commissioners in Atlantic Research Corporation, supra. Thus, while the NRC Staff has correctly applied the tables and the General Enforcement Policy to the facts of this case, there is no evidence before me to indicate that the lack of management culpability or negligence of Consolidated has been considered or evaluated in the assessment process. In fact, the only mention of negligence in the General Enforcement Policy is in connection with a determination of the severity level. However, that only provides that "[t]he severity level of a violation may be increased if the circumstances surrounding the matter involve careless disregard of requirements, deception, or other indications of willfulness." 47 Fed. Reg. 9990 (March 9, 1982). Perhaps the level of severity should be deemed to include ordinary negligence not amounting to "willfulness." If the severity level presumes ordinary negligence, isn't Consolidated entitled to mitigation where there is no evidence of management culpability? I think so. I find that the General Enforcement Policy does not reflect a consideration of the absence of management culpability in assessing a civil penalty. I find nothing in the General Enforcement Policy which purports to alter or invalidate the last Appeal Board decision in Atlantic Research Corp., ALAB-594, 11 NRC 241 (1980). Atlantic Research Corp., supra, authorizes mitigation of a civil penalty

where the evidence fails to establish management culpability. The evidence in the instant matter shows an absence of management culpability in the commission of this violation. The radiographer had been properly trained. Consolidated's procedures were not alleged to be faulty. While a civil penalty is appropriate in this case to encourage compliance with the law, I find that the base civil penalty should be mitigated or reduced by \$1,500 because of the absence of management culpability. I conclude that the \$4,000 civil penalty assessed by the Director of the Office of Inspection and Enforcement should be reduced to \$2,500.

Findings of Fact

I adopt Stipulations 1 through 23 (attached as Appendix) as my Findings of Fact.

Conclusions of Law

Based upon the entire record compiled in this proceeding and for the reasons set forth above, I make the following Conclusions of Law:

1. I have jurisdiction over the parties and subject matter of this proceeding.
2. Consolidated X-Ray, the licensee, violated 10 CFR § 34.23 and Condition 17 of License No. 42-08456-02.
3. The foregoing violation is properly classified under the NRC General Statement of Policy and Procedure for Enforcement Actions

(hereinafter General Enforcement Policy) as a Severity Level III violation under Supplement VI, "Fuel Cycle and Materials Operations."

4. Under Tables 1A and 1B of the General Enforcement Policy, a base civil penalty in the amount of \$4,000 is established for this violation.

5. Consolidated X-Ray failed to establish that the base civil penalty should be mitigated or reduced because of the prompt identification and reporting or corrective action to prevent recurrence.

6. The evidence of record fails to establish management culpability or negligence of Consolidated X-Ray.

7. The absence of management culpability or negligence is not considered in the determination of a base civil penalty pursuant to the General Enforcement Policy but such fact is relevant and establishes that Consolidated X-Ray is entitled to mitigation or reduction of \$1,500 of the base civil penalty.

8. A civil penalty in the amount of \$2,500 is appropriate for this violation.

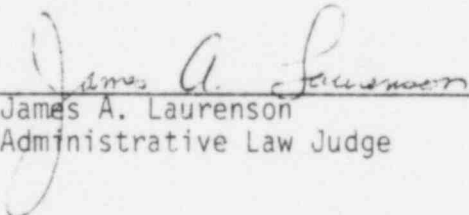
9. Consolidated X-Ray is assessed a civil penalty of \$2,500 for this violation.

ORDER

WHEREFORE, IT IS ORDERED that Consolidated X-Ray Service Corporation pay a civil penalty in the amount of Two Thousand Five Hundred Dollars (\$2,500) within thirty (30) days of the date of this

order, by check, draft, or money order, payable to the Treasurer of the United States and mailed to the Director of the Office of Inspection and Enforcement.

IT IS FURTHER ORDERED, in accordance with 10 CFR §§ 2.760, 2.762, 2.764, 2.785, and 2.786 of the Commission's regulations, that this Initial Decision and Order is effective immediately and shall constitute the final action of the Commission thirty (30) days after the date of this Order, subject to any review pursuant to the above cited rules and the Commission's Order of November 1, 1982. Exceptions to this Initial Decision may be filed by any party within ten (10) days after service of this Initial Decision. Within thirty (30) days thereafter (forty (40) days in the case of the Staff) any party filing such exceptions shall file a brief in support thereof. Within thirty (30) days of the filing of the brief of the Appellant (forty (40) days in the case of the Staff), any other party may file a brief in support of, or in opposition to, the exceptions. This enumeration of appeal provisions is subject to the complete schedule in that regard made by the regulations of the Commission which are controlling and to which reference has heretofore been made in the ordering clause.


James A. Laurenson
Administrative Law Judge

Issued:
April 28, 1983
Bethesda, Maryland

STIPULATIONS

The parties to this proceeding, Consolidated X-Ray Service Corporation (Consolidated X-Ray or the licensee) and the NRC Staff (Staff), hereby stipulate as follows:

FACTS

1. Consolidated X-Ray Service Corporation, also d.b.a. Consolidated-Chugach Inspection, Inc., is holder of NRC license number 42-08456-02. The address of Consolidated X-Ray is 10931 Indian Trail, P.O. Box 20195, Dallas, Texas 75220.
2. On January 15, 1982, Mr. Gary Thomas Kelly was a radiographer in the employ of Consolidated X-Ray.
3. On that day, he was assigned to work on radiography of a gas pipeline running through Oil City, Pennsylvania. At approximately 7:00 a.m., he checked in with his one-site supervisor.
4. The radiographer drove to the area of the first weld, set up his exposure device (or camera) and film, and made the exposure. The pipeline ran across a stream at this weld. While the exposure was in progress, the water level around the device started to rise. After the exposure was finished, Mr. Kelly found that the control cable and key were frozen in place, attached to the camera. He forced the guide tube off the exposure device and placed the front safety plug in the camera.
5. The radiographer then placed the exposure device in his truck, underneath the airblower from the generator, so that the cables would

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warm up. The tailgate of the truck was left down. After developing the film from the exposure, he went to report the test results to the on-site superintendent (who was not an employee of Consolidated X-Ray). While he was there, he received permission to leave the site until the next exposure, scheduled at noon. He then got in the truck and drove away.

6. As he drove away with the camera in the truck, the camera was not secured to the vehicle, the rear safety plug was not inserted in the camera, and the key was left in the camera lock.

7. Mr. Kelly traveled about two miles on Route 57 and stopped. As he got out, he noticed that the exposure device was not in the truck.

8. He got back in the truck and drove back along his route, looking for the exposure device. Then his on-site supervisor drove the truck as Mr. Kelly retraced his route on foot, using his survey meter to search for the device.

9. The radiographer then called the Oil City Police asking if someone had found anything like the device. He did not at this time notify the police that the device contained radioactive material.

10. At 12:36 p.m., the radiographer notified the Oil City Police and the Pennsylvania State Police that an exposure device containing radioactive material was missing. He also notified his home office at this time.

11. The Oil City police searched the route which he had taken, but did not locate the camera.

12. The radiographer continued to search for the device. Media reports based on the NRC press release began to be broadcast. By approximately 3:30 p.m., a few members of the Civil Defense from Seneca, Pennsylvania, had started assisting in the search using civil defense survey meters.

13. At approximately 9:00 or 10:00 a.m., Mr. Clifford Woodworth, Jr., of RD Number 1, Seneca, Pennsylvania, found the device in the road and, thinking that the object looked like a plumber's snake, picked it up and put it into his Ford Granada. After he got to work, he threw it into a van belonging to Mr. Leroy Collins, of 1 Manning Street, Oil City, Pennsylvania.

14. At 5:45 p.m., responding to the media reports, Mr. Leroy Collins called the Oil City Police Department and informed them that he had the missing device in his van. The radiographer accompanied the police to the address of Mr. Collins where they found the device in his van. Mr. Kelly then checked and found that the device was not open. The key was in the lock, the lock was depressed, and the control cables and front plug were attached. Mr. Collins informed the radiographer that he had not unlocked the exposure device and had not cranked out the source.

15. The camera involved in the incident was a Gamma Industries "Gamma Century" camera, serial number 480, containing 24 curies of iridium-192.

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16. Upon inspection after the incident, no visible damage to the camera was found. A "Caution Radioactive Materials" label was attached to the side of the camera.

17. The radiographer, Mr. Gary Thomas Kelly, had received the training required by 10 CFR 34.31 and the licensee's procedures.

18. The licensee notified Region I of the lost exposure device at about 2:00 p.m. on January 15, 1982.

19. 10 CFR 34.23 requires that locked radiographic exposure devices and storage containers be physically secured to prevent tampering with or removal by unauthorized persons.

20. Condition 17 of License 42-08456-02 requires that licensed material be used in accordance with the procedures in the application dated March 28, 1979. In the section of those procedures entitled "Transportation of Radiographic Devices," it requires that no device be moved unless all safety plugs are inserted, and the device is locked.

21. As described in paragraphs 1 through 18, and contrary to the requirements set forth in paragraphs 19 and 20, on January 15, 1982 a radiographer in the employ of Consolidated X-Ray, at a field site in Oil City, Pennsylvania, transported a radiography device, containing 24 curies of iridium-192, which did not have the rear safety plug inserted and was not secured to the vehicle. In addition, although the device was locked, the key was left in the lock.

22. At all material times on or prior to January 18, 1982, Mr. Gary Thomas Kelly, an employee of Consolidated X-Ray, was properly certified,

and had received the training required by the regulations of the U.S. Nuclear Regulatory Commission and the licensee's procedures.

23. An Enforcement Conference was held on March 2, 1982, in full compliance of NRC regulations.

ISSUES

24. The sole issue in this hearing is that of whether a civil fine should be imposed for the violation described in paragraph 21 of these Stipulations and if so, in what amount.

25. The licensee's ability to pay a fine is not an issue in this proceeding.

PROCEDURES

26. The hearing before Administrative Law Judge James A. Laurenson, of the Atomic Safety and Licensing Board, U.S. Nuclear Regulatory Commission, is a trial de novo with respect to the issue presented in paragraph 24 of these Stipulations.

27. Counsel for the parties will submit to each other written but unsworn testimony, with oral testimony offered in summary at this hearing to affirm the written testimony presented.

28. Consolidated X-Ray, as a licensee, is generally responsible for the acts of its personnel and employees with respect to the requirements of the U.S. Nuclear Regulatory Commission.

29. Consolidated X-Ray Service Corporation is a non-destructive examination contractor performing inspection of various materials used

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in the manufacturing of power piping, pressure vessels, pumps and valves, compressor stations, aircraft pipelines, refineries and related components, and as such, are industrial users of radioactive by-products material.