

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

Before Administrative Judges:
Ivan W. Smith, Chairman
Dr. Dixon Callihan
Dr. Richard F. Cole



SERVED JUN 22 1983

In the Matter of)
COMMONWEALTH EDISON COMPANY)
(Byron Nuclear Power Station,)
Units 1 and 2))

Docket Nos. 50-454 OL
50-455 OL
(ASLBP 79-411-04 PE)

June 21, 1983

MEMORANDUM AND ORDER
RULING ON INTERVENORS' MOTION
TO ADMIT TESTIMONY OF JOHN HUGHES

Introduction

The Joint Intervenors moved on April 27, 1983 to allow the testimony of John Hughes on the quality assurance and quality control issue. Mr. Hughes' affidavit was attached. He was employed as a QA/QC electrical inspector from October 1, 1982 to January 7, 1983 at Byron. Mr. Hughes was an employee of Pittsburgh Testing Laboratories, a quality assurance contractor, and was assigned to Hatfield Electric Company. He alleged fraudulent inspector qualification and testing, fraudulent inspection documentation and implied that he had been discharged for refusing to sign the fraudulent documents. He also alleged improper welding practices. The evidentiary record on that issue, except for a

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potential intervenors' rebuttal witness, had been closed since April 11. After considering the responses of the Staff and Applicant with their respective affidavits, we provided for a further inquiry into Mr. Hughes' allegation and set out the applicable legal standards in our order of May 12.¹

In particular we noted that Mr. Hughes' affidavit was not sufficiently specific but was concerned with important safety matters. We then compared Mr. Hughes' affidavit with the responding affidavits of the Applicant and Staff. Mr. Tuetken for the Applicant could not address specifically Mr. Hughes' non-specific allegations but had provided an apparently well-reasoned response to the gist of Mr. Hughes' concerns. We noted that Mr. Hayes and Mr. Connaughton of the NRC Staff, who were previously aware of the specifics of Mr. Hughes' allegations, had provided specific and detailed reasons why they believe that the Hughes' allegations do not present a significant safety problem. Accordingly we found very useful guidance in the approach approved by

¹ See Memorandum and Order Setting Special Deposition Session, May 12, 1983. We ruled that relaxed standards for reopening the evidentiary record should apply and cited Pacific Gas and Electric Company (Diablo Canyon, Units 1 and 2), CL1-81-5, 13 NRC 361, 362 (1981) (reopening on TMI-related issues); Public Service Company of Oklahoma (Black Fox, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979) (motion filed after record closed but before decision); Kansas Gas and Electric Company (Wolf Creek Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978) (motion filed after initial decision); Public Service Company of New Hampshire (Seabrook, Units 1 and 2), ALAB-422, 6 NRC 33, 64 n.34; Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523 (1973).

the Appeal Board in Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523 (1973), and ruled:

Faced with the three affidavits and in view of the vagueness of Mr. Hughes' statement, Intervenors now have the responsibility to respond as if defending against a motion for summary judgment. In other words, Intervenors must demonstrate that a triable issue remains either by a factual response or by showing that no factual response can be made. 10 CFR 2.749(c); Vermont Yankee, supra, at 524.

May 12 Order at 6.

To provide Intervenors an opportunity to support their position, we presided over Mr. Hughes' deposition on May 26, 1983 and signed subpoenas for two asserted corroborative witnesses, Messrs. Ogsbury and Souders, to appear on behalf of the Intervenors. After having considered the record of the deposition, including its attendant exhibits and the oral and written arguments of the parties, we deny in part and grant in part the motion to allow Mr Hughes' testimony. In a separate order the Board will provide for further inquiry into certain aspects of Mr. Hughes' allegations.

Discussion

While the Board excused, because of time strictures, the brevity and lack of specificity in Mr. Hughes' original affidavit containing his allegations, Mr. Hughes and Intervenors had sufficient time at least to identify Mr. Hughes' concerns. Accordingly, we ruled at the outset that Mr. Hughes' affidavit established the scope of Intervenors' motion to present his testimony.

Mr. Hughes' original affidavit is also important because it bears upon whether the Board was correct in applying the analogy of Intervenor's defending against a motion for summary disposition. Intervenor's complain strongly that applying that test from Vermont Yankee, supra, was unfair.²

To establish clearly the scope of the motion and to afford perspective as to the fairness of our summary disposition analogy, Mr. Hughes' original substantive allegations concerning the activities at Byron are set out below verbatim:

My training at Byron was by Hatfield and consisted of reading procedures and being tested.

I failed my first exam and was retested about 1/2 hour later and was given the answers for the questions which I missed the first time before taking the test for the second time.

I was ask[ed] to sign off Documentation for inspection I did not perform.

I did this until Dec. 1 then I refused to do this any more.

My supervisor ask[ed] me if I did not like their program. I replied it is not your program it is the way you are going about it. After refusing to sign documentation, I was given other tasks and then laid off after about a month.

While I was at Byron I saw many problems with welding including welding brace to a pressure pipe, also welding cable tray support while cable was laying in tray.

I also saw welds with uneven profile, excessive under cut and [peening] of welds.

John Hughes' affidavit, April 25, 1983.

² Joint Intervenor's Brief in Support of Motion to Admit Testimony of John Hughes, June 7, 1983.

The Board remains convinced that, when Mr. Hughes' allegations are compared with the responsive affidavits of Messrs. Tuetken, Hayes, and Connaughton, Intervenors fairly were assigned the burden of establishing that a genuine triable issue exists. In any event, any unfairness in the Board's approach was obviated when we provided both the Board-conducted depositions and NRC subpoena power to Intervenors to make their case.

A few evidentiary considerations broadly cut across the specific issues raised by Mr. Hughes' allegations. Intervenors did not comply very well with the Board's directive to respond to the Tuetken, Hayes and Connaughton affidavits as if defending against a summary disposition motion. Where Intervenors attempted to comply, it was by analytical argument (e.g., Brief at 16-19) rather than by factual response. We recognize that Mr. Hughes had neither the information nor expertise to address fully the responding affidavits. But we are nevertheless faced with a record where Mr. Hughes' frequently uncertain memory often must be weighed against carefully reasoned responding affidavits and documentation. For example, we thought that it was noteworthy that Mr. Hughes could not recall which of the six inspector qualification examinations he initially failed even with the passed examinations before him. Nor could he recall the location of the pressure pipe mentioned in his affidavit even though the location of the pipe would be an important aspect of its safety significance.

On May 6, 1983 Intervenors requested and received subpoenas directed to Irvin Souders, a welding inspector, and Junius Ogsbury, lead

welding inspector, at Byron during Mr. Hughes' employment there. IntervenorS alleged that Messrs. Souders and Ogsbury would corroborate some of the allegations made by Mr. Hughes.

At the deposition counsel for IntervenorS and counsel for Applicant stipulated the testimony which would have been given by Messrs. Ogsbury and Souders if they had been called as witnesses. Tr. 7020.³ Now IntervenorS urge the Board to disregard as unreliable the stipulated testimony when it differs from Mr. Hughes' deposition on the grounds that the absent declarants are still employed in the nuclear industry.⁴ We are aware of no legal or factual basis for IntervenorS' position and decline to make such a weighting. Particularly where the evidentiary issues are the statements, states of mind, and the actions of the absent declarants, we believe that IntervenorS cannot now be heard to argue that Mr. Hughes' memory and hearsay testimony is more reliable than the stipulated testimony.

³ The NRC Staff could not join the stipulation because it had no independent knowledge that Messrs. Ogsbury and Souders would have testified as stipulated. The Staff agrees that the stipulation may be used by the Board, however. Tr. 7024. We ruled that the stipulation is highly reliable because it had been entered into by adversary parties. Tr. 7025.

⁴ IntervenorS' Brief at 7, 8, and 14.

Training and Certification

Mr. Hughes alleged in his original affidavit that his training at Hatfield Electric consisted (solely we assume) of reading procedures and being tested. However Region III special inspection seems to disclose substantially more training than that recalled by Mr. Hughes in his affidavit. Hayes and Connaughton Affidavit at 4. Mr. Hughes' own deposition testimony revealed that, in fact, he recalled two hours of classroom training and on-the-job experience. Tr. 7055.⁵ But, significantly, he testified "[o]ther than that, they were -- I really don't recall all of the training." Id.

The Region III report was apparently based upon a Hatfield QA/QC memorandum of October 29, 1982 reporting that between October 5 and October 29, 1982 Mr. Hughes had received a minimum of 8 hours of classroom training and 64 hours of on-the-job training on Procedure #9A. Staff Deposition Exhibit 4. Additional on-the-job training would be required for procedures #9B and #9E but other training on the latter two procedures also may have been completed. Id.

Given the disparity between Mr. Hughes' original affidavit and his testimony on his training, we would normally be satisfied with the

⁵ Intervenors' statement that Mr. Hughes had no on-the-job training is not accurate. He testified that "... [his training] also consisted of on various occasions being asked to accompany a level 2 Inspector on certain inspections." Tr. 7055.

contemporaneous record of his training and Region III's reliance upon it. But there were other facets of the deposition record on this issue that are troubling. While Mr. Hughes' memory of many aspects of his original allegations was poor, as we have noted elsewhere, he seemed to be rather positive in his memory that he was certified as a QA inspector and began working in that capacity within two weeks of his assignment to Hatfield on October 1, 1982. Tr. 7059-60; Tr. 7208-09, 7216. If this is the case, Mr. Hughes' testimony that his training was only perfunctory gathers more credibility. He would scarcely, if at all, have had time for the training reflected in the Hatfield records. Applicant's effort to demonstrate that he could not have been certified to work as an inspector before October 29 centers around Mr. Hughes' GED (high school equivalency) certificate bearing that date. Applicants Deposition Exhibit 37. High school or its equivalent is essential to certification as a QA inspector. However the GED certificate indicates that Mr. Hughes passed his equivalency test on October 14 and he stated that he received informal notification of that fact about then. Tr. 7201-02.⁶

In reviewing the record surrounding Mr. Hughes' allegation the Board has focused again on the investigation of Hatfield Electric QA/QC

⁶ Applicant has not provided a copy of its Exhibit 37. The Board is depending upon its memory of the certificate. We are confident that Intervenor's are correct in that it shows the test was administered in mid-October.

inspectors certification and testing procedures by Region III Office of Inspection and Enforcement. The criminal implications of those procedures are under investigation by the Commission's Office of Investigations. E.g., Hayes and Connaughton Affidavit. Mr. Hughes' persistence in his claim that his pre-certification employment was very brief and his specific reference to at least two documents which could corroborate his claim has persuaded the Board that a further inquiry is appropriate.⁷ Therefore that portion of Mr. Hughes' testimony relating to his certification training will be received into evidence in accordance with our order below.

Testing

Mr. Hughes alleged that "I failed my first exam and was retested about one-half hour later and was given the questions which I missed the first time before taking the test for the second time."

We ruled at the deposition hearing that, given the fact that Mr. Hughes took six tests, passed five, and failed one (which he could not identify) by only two points; given the fact that Mr. Souders' stipulated testimony established that he, Souders, reviewed the "pertinent procedures" with Mr. Hughes before he took the second exam, as

⁷ Mr. Hughes testified that the QA supervisor sent him a small brief memo telling him that he was certified as a Level II Hanger Inspector. Tr. 7208-09. He also testified that he had received a preliminary notification card that he had passed the GED test. Tr. 7201.

compared to simply providing the answers; and recognizing that the tests were rather simple,⁸ we ruled orally that the testing issue does not present a significant and triable safety issue. Tr. 7211-12. Accordingly the Applicant did not brief the issue. However, in light of new information and after a review of the deposition transcript, the Board has reconsidered the reach of that ruling.

Mr. Hughes testified that his supervisor provided him with the failed test with the correct answers circled and that the failed test was available to him when he was retested. Tr. 7057. However, Mr. Hughes testified later that he didn't use or need the provided answers because there were only a few questions involved and that he "had researched them over in my own mind" Tr. 7169. This latter testimony reinforces the Board's original opinion that, with respect to Mr. Hughes' competence, the testing incident raises no significant safety issue. He had clearly mastered the subject matter before taking the test again.

The fact that the failed test with the correct answers marked on it was available to Mr. Hughes on the retesting is not disputed. Mr. Souders' stipulated testimony supports that fact. In addition, we became aware after the close of the deposition record that the NRC Office of Investigations is in possession of the failed test and is

⁸ Tests were received in the deposition record as Applicant Deposition Exhibits 29-34.

using it in an ongoing NRC investigation. Apparently the information is so sensitive that the Office of Investigations will not release the test to counsel for Intervenors for use in this proceeding.⁹

In light of the importance of the failed test to the NRC investigators, the Board examined again the deposition evidence on that subject. Mr. Hughes testified, albeit somewhat ambiguously, that other inspectors were tested in the same manner. The location of his desk provided an opportunity for him to observe. Tr. 7059.

Therefore the Board reforms and supplements its oral ruling with respect to the tests given to Mr. Hughes and others. We adhere to our original ruling that reviewing the correct procedures with Mr. Hughes after he failed the first test and re-examining him some thirty minutes later was not unreasonable under the circumstances. That procedure in itself has no safety significance. Tr. 7211-12. However, the basis for that ruling did not include the fact, which was overlooked at the time, that the QA supervisor permitted Mr. Hughes to have the corrected failed test before him and that Mr. Hughes had observed others being tested in that fashion. Further inquiry into that procedure is required. That aspect of Mr. Hughes' testimony will be received into evidence in accordance with our ruling below.

⁹ Letter of May 13, 1983 from Eugene T. Pawlick to Jane Whicher attached to letter from Steven C. Goldberg to Board, dated June 14, 1983.

Welding Quality

Mr. Hughes stated that "I also saw welds with uneven profile, excessive under cut and [peening] of welds."

Mr. Hughes was not certified as a welding inspector at Byron, but he had welding inspector experience from other nuclear facilities. The Board believed that it was commendable for Mr. Hughes to be concerned about poor welding quality which he observed during his work as an electrical hanger inspector. There were in fact problems with the welding quality at Byron.

The particular issue is whether Mr. Hughes' allegations and his deposition testimony on welding quality might have a material effect upon the evidentiary record as it now exists. We think not. Mr. Hughes testified that he reported welding problems to Mr. Ogsbury, the lead welding inspector, who, according to Mr. Hughes and Mr. Souders, was conscientious. Further, Mr. Hughes did not know if the welds had yet been inspected by quality control inspectors; and had no reason to believe that Mr. Ogsbury failed to take corrective actions.

Tr. 7149-53. Mr. Ogsbury's stipulated testimony indicates that there were problems with the weld profiles but, by the time he left Byron, the welding problems generally had been corrected and that the welding inspection program was in the hands of a conscientious lead inspector.

Intervenors, however, would have us discount Mr. Ogsbury's testimony because Mr. Hughes perceived Mr. Ogsbury to be disparaging the welding program at the time of Mr Ogsbury's departure from Byron and

because Mr. Ogsbury is still employed in the industry. Brief at 7-8. As indicated above, we are not inclined to discount Mr. Ogsbury's stipulated testimony on that account, but the issue does not depend solely on such an indefinite point. The affidavits of Messrs. Tuetken, Hayes, and Connaughton describe a very substantial QC reinspection program at Byron which is said to cover the area of Mr. Hughes' concern. In sum Mr. Hughes' testimony and affidavit point to welding problems conceded by all to have existed. Although we are directing a further evidentiary showing on the QC reinspection program, Mr. Hughes' deposition does not add any new or useful information to the record.

Brace Welded to Pressure Pipe

Mr. Hughes stated that he saw a brace welded to a pressure pipe. He believed that this was an inappropriate practice because excessive welding heat could lead to "quenching or . . . a restructuring of the chemistry of the actual metal." Tr. 7073. He was unable to identify the location of the pipe, however. He reported his observation to Mr. Ogsbury and doesn't know if anything was done about it. Mr. Ogsbury can't recall the incident but Mr. Souders does. Mr. Souders does not believe that it was a safety-related pipe, because he believes that it was part of the flush system in the turbine building which does not house safety-related piping. Also, Mr. Souders is not confident that the brace was even welded to the pipe. They might have appeared to be welded because they were close together. Messrs. Hayes and Connaughton

of the NRC Staff state that welding associated with piping may be necessary and is not absolutely prohibited. Mr. Tuetken agrees.

Intervenors would have us infer that the piping necessarily was safety-related because they assert that Mr. Hughes did not go to the turbine building, therefore he could not have seen any piping there. Even Mr. Hughes does not suggest that is the case, however (Tr. 7148), and Intervenors offer no record citation for the inference. Brief at 9. Mr. Hughes' statements about the pressure pipe welding lead nowhere and present no reason to believe that his testimony on the matter would materially affect the record.

Welding Cable Tray Support

Mr. Hughes reported and testified about an incident when a cable tray support was apparently welded without protective measures with the cable laying in the tray. Mr. Souders was also familiar with the incident and it was he who wrote a discrepancy report on the matter. The central thrust of Mr. Hughes' testimony is that he, another inspector (apparently Souders) and the lead inspector had to argue approximately 4 or 5 hours to convince Hatfield Electric that a discrepancy report should be written, thus permitting an inspection for damage to the cables. Tr. 7075-77. Mr. Hughes states that the cable was found not to be damaged. Mr. Souders agrees that the incident caused the inspectors to raise a "fuss" with the contractor. Mr. Souders believes that the cable tray welding problem was not a recurring one, perhaps

because of the "fuss" raised by the inspectors. Intervenors argue that Hatfield's reluctance to accept a discrepancy report on the allegedly improper welding demonstrates a corporate attitude which lacks the willingness to maintain an effective QA program.

There was apparently some reluctance on the part of Hatfield to implement the inspection of the cables but we can't determine from this record definitely why that was the case. The affidavit of Messrs. Hayes and Connaughton provides one reasonable explanation. They state that Hatfield personnel reported that welding with cables in the tray, a permissible practice when cables are raised from the welded area, occurred once during Mr. Hughes' employment. Hatfield states that precautions had been taken to protect the cables during the welding work and that the cable tray welding procedure calls for an inspection of the cables for damage after the work is completed. Affidavit at 9-10. If this is the case, the QA inspectors were seeking, in Hatfield's view, an unnecessary reinspection.

On the other hand the inspectors felt that, because of dust on the cables, they had sufficient cause to believe that the precautions against damage were not taken, and presumably, that the post-welding inspection had not occurred.

However, the most important aspect of the issue is that the inspectors prevailed in their demand for the cable inspection. The QA system worked as it was intended. Moreover, Mr. Hughes testified that during his approximately three months of employment at Byron he wrote about 300 discrepancy reports. Tr. 7217-19. Although Mr. Hughes feels that only

the cut-and-dried discrepancy reports were easy to submit, we believe that the deposition record as a whole does not indicate a company policy on the part of Hatfield Electric to discourage discrepancy reports. The Staff has investigated the matter and has promised to pursue any further support for Mr. Hughes' allegation concerning the cable-tray welding.¹⁰ On the basis of the deposition record and the Staff's investigation, the Board does not believe that Mr. Hughes' testimony on this subissue would lead to a different result.

Misleading Inspection Form

Mr. Hughes alleges that he was asked to sign off on documentation for inspections he did not perform. The documentation in issue was Hatfield form HP-91-A.¹¹ The form required Mr. Hughes to sign at a place designated "Inspection Completed By", but he felt that the form was misleading because, as a Level II inspector, he did not physically inspect the work. He reviewed against specifications the information which was produced by Level I inspectors. Tr. 7076. Mr. Hughes would have been satisfied with the form if his sign-off line had indicated

¹⁰ Mr. Hughes' original statement did not mention Hatfield's resistance to the discrepancy report and the reinspection of the cables. We would expect this aspect of Mr. Hughes' allegations, which was supported by Mr. Souders, to be explored and a Board notification submitted if required.

¹¹ Applicant Deposition Exhibit 35.

"results evaluated by". There is no evidence whatever that the form was intended to mislead or that it did mislead. Mr. Hughes did not allege that anyone was lead to believe that he had physically inspected the work when in fact he hadn't. Tr. 7064-65; Tr. 7175-76; see also Souders' stipulation. This is not a significant safety issue.

Mr. Hughes' Discharge

Mr. Hughes states that ". . . after refusing to sign documentation, I was given other tasks and laid off after about a month." We thought the allegation was important because it implied that it was because he had declined to sign fraudulently inspection documentation that he was laid off. In their briefing, however, Intervenors state that he was laid off at the instance of the Applicant as retaliation for having reported problems at the Zimmer nuclear station to the NRC. Brief at 12. This switch in direction is inconsistent with the Board's earlier ruling that Mr. Hughes' original statement would scope Intervenors' motion to submit Mr. Hughes' testimony. Moreover the retaliation accusation is not supported by any evidentiary citation or any basis that we can observe from the deposition record.

Having found above that the signature designations on the inspection form HP-91-A was not intended to mislead and did not mislead, we necessarily, then, cannot find that Mr. Hughes was discharged for refusing to sign fraudulent inspection documents. Contemporaneous documentation indicates that Mr. Hughes was laid off for repeated

instances of lack of productivity, poor corporate attitude and inattentiveness to the tasks at hand. Intervenors Deposition Exhibit 22. Intervenors would have us infer a sinister reason and disregard productivity as a cause for discharging Mr. Hughes because, in their view, productivity is not a QA concern. Brief at 12. This is not sufficient basis for the Board to conclude that Mr. Hughes' discharge was not as stated in the discharge letter. Insufficient productivity on quality assurance inspections, if uncorrected, would necessarily lead to insufficient quality assurance. In sum, we do not find that the discharge of Mr. Hughes as a QA inspector at Byron permits the inference that the Applicant or its contractors attempted to frustrate appropriate quality assurance inspections.

Conclusion

Mr. Hughes' statements and testimony as it relates to the Hatfield Company training and certification procedures for QA inspectors and the possible use of supplied answers on inspector testing has significant safety implications. The respective portion of Intervenors' motion to admit Mr. Hughes' testimony and any related exhibits is granted. The Board is reopening the evidentiary record on these and other issues today in a separate order. The balance of Mr. Hughes' deposition testimony and associated exhibits do not present significant safety issues and are not likely to lead to a different result in the proceeding. Therefore the balance of Intervenors' motion is denied.

ORDER

Intervenors shall present to the Applicant and Staff on or before July 1, 1983, a proposed statement or identification of the testimony of Mr. Hughes and identify the exhibits which are to be admitted into the evidentiary record in accordance with the Board's rulings above. The parties shall attempt to stipulate the evidence. Failing that, Intervenors shall submit the matter for Board consideration by July 1.

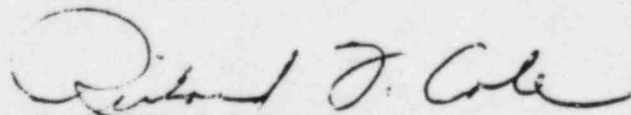
The portion of Mr. Hughes' testimony and exhibits rejected by this order shall not be used in proposed findings. However the rejected testimony and exhibits shall be placed in the rejected evidence file and shall be a part of the record of this proceeding.

Except for the issues to be considered in the reopened evidentiary hearing, proposed findings of fact and conclusions of law on Quality Assurance/Quality Control issues are due on or before July 20, 1983.

Applicant shall provide copies of the missing Applicant Deposition Exhibits.

Dr. Callihan joins in this action but was not available to sign the order.

ATOMIC SAFETY AND LICENSING BOARD



Richard F. Cole
ADMINISTRATIVE JUDGE



Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

June 21, 1983