U. S. NUCLEAR REGULATORY COMMISION

REGION IV

Investigation: 50-445/82-10; 50-446/82-05

Docket: 50-445; 50-446

Licensee: Texas Utilities Generating Company (TUGCO)

Facility: Comanche Peak, Units 1 and 2

Investigation at: Glen Rose, Texas, and Dallas, Texas

Investigation conducted: April 13-14, 26, 28, 30, and May 10, 1982

Investigator: _____ 6-30-82
D. D. Driskill, Investigator — Date

Approved by: E.H. Johnson 6/30/82
E. H. Johnson, Director, Investigation and Enforcement Staff — Date

Summary:

Investigation conducted on April 13-14, 26, 28, 30, and May 10, 1982 (Report 50-445/82-10; 50-446/82-05).

Area Investigated

On April 13-14, 1982, Individual A was interviewed and alleged he identified weld defects in Chicago Bridge and Iron (CB&I) pipe whip restraints in January 1982, and prepared an NCR which was apparently disregarded (never logged and dispositioned) by QA management personnel. Individual A also alleged that subsequent to submitting several more NCR's in March and April 1982, he was fired for "getting involved in other areas outside his scope" of inspection responsibility. This investigation involved 38 hours by one NRC investigator and one NRC inspector.

Results:

Investigation of Individual A's allegation that a Nonconformance Report written by him, in about January 1982 concerning weld defects in a number of CB&I pipe whip restraints, was never documented or resolved, disclosed that the NCR prepared by Individual A was not properly submitted by him; therefore it was never entered into the corrective action system. Interview of his immediate supervisor disclosed that the topic of defective welds in some CB&I restraints was discussed with Individual A; however a draft NCR was never submitted to the supervisor for approval and formal submittal. Interview of the non-American Society Mechanical Engineers (ASME) NCR Coordinator disclosed Individual A did discuss with her, the format of an NCR, regarding CB&I restraints, during approximately the January 1982 timeframe, however it was never submitted.

Investigation of Individual A's allegation that he was terminated for writing NCR's could not substantiate or refute the allegation. A review of NCR's submitted by Individual A, to which he attributed his termination, disclosed all were appropriately documented and each was pending review or in final disposition. Interviews of Texas Utilities Generating Company (TUGCO) and Brown and Root (B&R) Managers disclosed that they had been dissatisfied with Individual A's performance, however these concerns were never documented nor was he counseled regarding his performance. Interviews with two former supervisors disclosed that they considered his performance "good" to excellent. The B&R Quality Assurance (QA) Manager stated Individual A had requested transfer from the TUGCO non-ASME Quality Control (QC) staff at the same time that TUGCO management had decided that it was necessary to transfer Individual A out of their group back to ASME QC staff. Since no position was open in this group, Individual A was terminated.

Individual A filed a complaint with the U. S. Department of Labor alleging discrimination and a hearing is currently pending. Depending on the results of this proceeding, further action by Region IV on this matter may be considered.

With regards to the CB&I supplied pipe whip restraints, the investigation disclosed that previous problems had been noted on material supplied from this vendor. The applicant has initiated corrective actions to ensure that material received from this vendor will perform its intended function, however the NRC inspector was not able to verify the adequacy of these actions. This item was identified as unresolved (8205/8210-1) and the applicant agreed to provide additional information with respect to the vendor verification program at CB&I.

DETAILS

1. Persons Contacted

Licensee Employees

D. N. Chapman, QA Manager, TUGCO
R. G. Tolson, Site QA Supervisor

Other Persons Contacted

Individual A through K

2. Investigation of Allegations

Allegation No. 1

In January 1982, Individual A wrote a draft NCR which was submitted to the TUGCO NCR coordinator; however, the NCR was never given an NCR number nor was it ever appropriately processed and dispositioned.

Investigative Findings

On April 13-14, 1982, Individual A was interviewed. Individual A stated in January 1982 he identified rejectable weld defects in approximately 20 CB&I pipe whip restraints. He stated he had discussed his findings with his supervisor (Individual B), who told him that weld quality problems with CB&I restraints had been identified on previous occasions. Individual A stated Individual B said this problem was previously discussed with Individual C (a former ASME project QA manager) who had said the restraints were vendor-supplied components which were inspected by the vendor, the TUGCO vendor release inspection personnel, and the CPSES receiving QA inspection personnel; therefore, they were not subject to further inspection by site QC personnel. Individual A stated Individual B verbally approved his submission of an NCR regarding the weld defects on the restraints, but said he (Individual B) didn't think it would be accepted, based on the rationale the restraints had been previously inspected and found acceptable. Individual A stated he had submitted the draft NCR, concerning the weld defects on the 20 restraints, to the non-ASME NCR coordinator and had never again heard anything about it. He stated he had not obtained an NCR number prior to submission of the NCR draft. Individual A stated he believes the NCR was disregarded and never formally processed and dispositioned.

Review of Non-ASME Log

On May 10, 1982, a review of the non-ASME NCR log was conducted for December 1981, January 1982, and February 1982. No NCR was identified as having been submitted by Individual A.

Interview of QC Mechanical Equipment Supervisor

On May 10, 1982, Individual B was interviewed. Individual B stated he recalled Individual A's identification of some weld defect problems with CB&I restraints in about January 1982. Individual B stated he believed that these were on restraints in the Unit 2 Auxiliary Feedwater System or the Unit 2 Main Steam System. Individual B stated he has been aware of weld quality problems with CB&I supplied restraints for several years. Individual B stated he brought this matter to the attention of Individual C about 18 months ago and Individual C stated that these restraints were vendor-supplied items which were previously inspected and approved by CB&I, the TUGCO vendor release inspection personnel, and the site QC receiving personnel. He stated Individual C told him they were acceptable as manufactured and not to write NCR's concerning them. Individual B stated he does not recall Individual A's having written a draft NCR concerning the approximately 20 restraints identified during the January 1982 timeframe. He stated if Individual A had written an NCR he (Individual B) would have been required to initial it, prior to submission and this was never done.

Interview of Non-ASME NCR Coordinator

On May 10, 1982, Individual D, the TUGCO non-ASME NCR coordinator, was interviewed. Individual D stated she recalled Individual A's bringing a draft NCR to her office in about January 1982 which identified weld defects in about 10 pipe whip restraints. Individual D stated Individual A did not obtain an NCR number for the draft NCR, nor had it been approved by his supervisor (which is required prior to formal submission). Individual D stated Individual A had just requested she review it for proper format, clarity, and completeness, which was done. Individual D stated Individual A took the draft NCR with him and she never saw it again.

Allegation No. 2

Individual A stated that in late March 1982 and early April 1982 he submitted several NCR's which brought him into disfavor with site QA management and resulted in his termination.

Investigative Findings

On April 13-14, 1982, Individual A was interviewed. Individual A stated that in late March 1982 he prepared an NCR regarding four CB&I manufactured

pipe whip restraints containing excessive weld defects. Individual A stated the defects were inspected to AWS code requirements and mapped on drawings. He stated it was later determined that they were to be inspected to the ASME code requirements, so the NCR was revised. Individual A stated during the course of this inspection it became apparent to him that his supervisors (aside from Individual E) were unhappy with his performance. Individual A also related that he submitted NCR's concerning a pipe whip restraint being installed without the proper documentation and another regarding a perceived deficiency in the non-ASME training manual. Individual A stated on April 12, 1982, he was called to the office of Individual F (the B&R QA manager), where he was told that he was being terminated. Individual A stated Individual F said the termination was based on a "speed letter" from Individual G (the CPSES non-ASME Mechanical/Civil QA/QC Supervisor), which stated "subject employee has been assigned the responsibility of inspection of pipe whip restraints installation. Subject employee has demonstrated a lack of ability in performing assigned task, in that he refuses to limit his scope of responsibility to pipe whip restraints, and insists on getting involved in other areas outside his scope. Consequently, his services are no longer required." Individual A stated his termination sheet indicated his performance rating was "excellent" and that he was being terminated for "failure to obey instructions." Individual A stated that none of his activities were performed without the knowledge and approval of his immediate supervisor (Individual E), nor had he been counseled regarding any unsatisfactory performance on his part. He stated he believed he was being terminated as a result of his identifying problem areas (writing NCR's) with which management did not want to deal.

Interview of Non-ASME QA/QC Supervisors

On April 26, 1982, Individual E (Individual A's former immediate supervisor) was interviewed. He stated Individual A worked for him as a QC inspector, conducting inspections of pipe whip restraints installation, since early March 1982, and that his performance was "good." Individual E stated that during this time, Individual A's performance was questionable only on two occasions, which he (Individual E) did not believe was adequate justification for his termination. Individual E stated that in late March 1982, Individual A had reported to him an inspection of four pipe whip restraints containing numerous unacceptable welds and that he (Individual E) had advised Individual A to write a Nonconformance Report identifying the defects on those restraints. Individual E stated Individual A had prepared the draft NCR. Individual E stated it was then requested that he and Individual A also map the defects on drawings to be attached to the NCR. Individual E stated that after their doing this, it was then determined that the inspection had been performed in accordance with the wrong code so a reinspection and remapping was performed in accordance with the ASME code and the NCR was submitted. Individual E stated he was aware of no displeasure on the part of his supervisors regarding this effort. Individual E identified two additional

situations wherein Individual A had submitted NCR's during late March and early April, and stated he was aware of no supervisory dissatisfaction with Individual A's efforts during this inspection and preparation of NCR's. Individual E stated that on April 12, 1982, Individual A was summoned to Individual F's office. Individual E stated he accompanied Individual A to the meeting wherein Individual F informed Individual A that his services were no longer required and that he (Individual F) had no place on the ASME staff to assign Individual A, therefore, he was going to prepare termination papers. Individual E stated he told Individual F at that time that Individual A's actions did not warrant termination. He stated Individual F explained that since he did not have a place for Individual A on the staff, no other alternatives were available to him. Individual E stated that several days later Individual G had told him that other circumstances, which he (Individual E) was not aware of, related to Individual A's termination. Individual E stated that he was aware of no adverse information regarding the work or character of Individual A which justified his termination.

On April 26, 1982, Individual F was interviewed. Individual F stated that Individual A was employed by Brown & Root (B&R) and worked as the ASME training coordinator on the QA department's staff. He stated that in early 1982 Individual A requested a transfer to the field QC group, subsequent to which he was transferred to the mechanical QC inspection staff where he was primarily responsible for the inspection of pipe whip restraints. Individual F stated that function was transferred to the non-ASME mechanical inspection group under TUGCO, and Individual A was transferred to that group where he continued to conduct inspection of restraints. Individual F stated that in about mid-February 1982 Individual G advised him they were having a problem with Individual A, in that he was not adequately qualified for the work he was doing. Individual F stated Individual G related Individual A was not consistently inspecting to the criteria which was required. Individual F stated that on several occasions subsequent to that, Individual G told him Individual A's performance was less than would be expected from a person holding his (Individual A) certification for the job. Individual F stated the problem with Individual A was that he was not able to follow instructions and conduct inspections within the scope of his responsibility. Individual F stated that on April 12, 1982, Individual G showed him an NCR which was accompanied by a note which gave the impression the NCR was going to be used as a tool by Individual A to receive a raise. He stated Individual A had previously made it known that he was unhappy with his current salary grade and wanted a pay increase. Individual F stated the note gave Individual H (the site QA manager), Individual G, and himself the impression that Individual A was willing to disregard the NCR if possible consideration would be given to his salary increase. Individual F stated Individual G indicated that he intended to forward a memo to him (Individual F) relating that Individual A's services would no longer be required in his department. Individual F stated he had talked

with several of the ASME supervisors on the staff to determine whether or not Individual A's past performance would warrant trying to create a job for him, however, these contacts determined that no jobs were available which Individual A was qualified to assume. He stated that subsequent to receipt of a speed letter from Individual G on April 12, 1982, Individual A was terminated.

On April 28, 1982, Individual G was interviewed. Individual G stated that in about early February 1982 a reorganization of site responsibilities occurred at which time he was appointed to his current position, and several members of the B&R ASME QC inspection group were transferred to his control. He stated Individual A was one of these individuals. He stated that during the next several months he recognized that Individual A's performance was not satisfactory as a Level II welding inspector. He stated that on several occasions during this period it was identified that Individual A's acceptance criteria for welds exceeded that required by the AWS code. Individual G stated that on several occasions he personally observed instances in which Individual A's rejections of welds required construction personnel to perform unnecessary weld surface preparation prior to performing NDE. Individual G stated he discussed Individual A's less than satisfactory performance with Individual A's supervisor, Individual E, but did not personally counsel Individual A concerning his performance. Individual G stated that in late March 1982, the B&R Subcontract Administrator asked him to look at four recently received CB&I pipe whip restraint assemblies. Individual G stated he looked at them and determined that there were rejectable weld indications on these restraints and decided that an NCR should be written. He stated he instructed Individual E to prepare an NCR on these restraints subsequent to which Individual A was sent to conduct the inspection. Individual G stated the NCR was submitted to him at which time he further advised Individual E to map the rejectable indications. Individual G stated Individual A was sent to do this task and the mapping was returned to him upon completion. Individual G stated he noted the map contained large numbers of welds with rejectable porosity. Individual G stated he asked Individual E to insure that the porosity was indeed rejectable, subsequent to which it was found that some were indeed not rejectable. Individual G stated the complete inspection effort took about four days which he felt was excessive for a qualified weld inspector. He stated that based on Individual A's unacceptable performance during this inspection and his previous observations regarding Individual A's performance, he advised Individual F that he would not be needing Individual A's services much longer. Individual G stated that on the morning of April 12, 1982, he was given a memo from Individual A requesting a transfer to the ASME Inspection Group which he approved. He stated several minutes later he received another request from Individual A requesting a transfer to Individual B's ASME QC group. He stated that soon thereafter he was given a stack of documentation which included an NCR with a note from Individual A to Individual E attached, which stated that no NCR number had been obtained for the NCR and that Individual A was open to "pow wow" regarding the subject.

Individual G stated that the issuance of NCR's is not open to negotiation. He said he interpretated the note as a definite attempt on Individual A's part to use the NCR as leverage to obtain a pay increase. He stated that it was at that time he wrote the note to Individual F indicating Individual A's services were no longer required in the non-ASME inspection group. Individual G stated the note was intended to notify the B&R site QA manager of Individual A's inability to satisfactorily complete required inspections, and his inability to limit the scope of his inspection to the area to which he had been assigned; i.e., pipe restraint installation. Individual G stated it is not his policy to discourage the identification of problems with any safety-related component/structure; however, he did object to unnecessary random reinspection of items which had been previously inspected and accepted. Individual G stated that on the morning of April 13, 1982, he received a copy of Individual A's termination interview form and noticed that Individual E had rated Individual A's performance as "excellent" on the form. He stated he called Individual E to his office to discuss this and Individual E stated that in his rush to get Individual A's processing completed he merely signed the form which had been prepared by someone in the time office. Individual G provided no additional pertinent information.

On May 10, 1982, Individual B, the QC ASME Mechanical Equipment Supervisor, was interviewed. Individual B stated Individual A formerly worked for him as a QC inspector from about late October 1981 until late Janaury 1982, at which time he was transferred to the non ASME group which was taking responsibility for the inspection of pipe whip restraints. With regard to Individual A's performance, Individual B stated his performance, during the period he worked for Individual B, was excellent and that Individual B would have been willing to accept him back into his group at the time the decision was made to terminate him.

Interview of Non-ASME NCR Coordinator

On April 28, 1982, Individual D was interviewed and the Non-ASME NCR log was reviewed. The review of the non-ASME NCR log disclosed that all NCR's identified by Individual A as having been submitted by him between March and May 1982 were recorded in the log and that corrective action had been taken or evaluation was pending. Individual D stated the non-ASME NCR program is accomplished in accordance with applicable procedures, to include the issuance of NCR numbers upon request of QC inspectors. Any NCR not issued subsequent to the QC inspectors obtaining the number, must be correctly voided and the document forwarded to the non-ASME NCR office for file retention.

(Investigator's Note: During the initial interview of Individual A he identified several other NCR's he had submitted in late March and early April 1982 which he believed were contributing factors to his termination. A review of the non-ASME NCR log disclosed these NCR's were issued and that they were in the review cycle or had been properly dispositioned.)

Department of Labor Referral

On April 15, 1982, Individual A filed a complaint with the U. S. Department of Labor, Mr. Robert J. Fortman, Assistant Area Director, Fort. Worth, Texas, under the provision of the Energy Reorganization Act (PL 95-601). Mr. Fortman provided a copy of the complaint and a copy of Regulation 29 CFR Part 24 to B&R on April 26, 1982. Mr. Fortman participated in interviews of pertinent CPSES employees on April 26, 1982, as reported herein, and has been provided with copies of all statements and documentary evidence pertinent to Individual A's complaint obtained during this NRC investigative effort. On May 14, 1982, the Department of Labor, Fort. Worth, Texas forwarded a letter to B&R, Houston, Texas, advising them that "the weight of evidence to date indicates that (Individual A) was a protected employee engaging in a protective activity within the ambit of the Energy Reorganization Act, and that discrimination, as defined and prohibited by the statute, was a factor in the actions which comprised his complaint." The letter additionally identified actions necessary to abate the violation and provide appropriate relief and apprised B&R of its rights and the means for filing an appeal to the decision.

Other Investigative Aspects

In September 1980 NRC Investigation Report No. 50-445; 50-446/80-22 addressed an allegation concerning CB&I components identified during the investigation as moment restraints, which were waived (by Individual C, herein) for shipment to CPSES despite their having been identified at the vendor site by a B&R QC inspector as containing deficient welds. Examination of four of these moment restraints disclosed that "unsuitable weld surface conditions" were present. An NRC Notice of Violation (NRC report 50-445; 50-446/80-20) was issued to TUGCO concerning this matter.

On March 22, 1982, TUGCO NCR M-82-00296R.1 was written identifying weld surface defects on four CBI pipe whip restraints. Individual A alleged and Individual B recalled that similar problems with CB&I restraints were

identified in January 1982. Individual B additionally related that during the past "several years" welding and material problems were identified on CB&I restraints and on these occasions a former B&R QA supervisor (Individual C) had refused to allow NCR's to be submitted concerning the weld defects identified on CB&I restraints, based on the contention that previous inspections by CB&I and TUGCO found the restraints to be acceptable.

On April 30, 1982, the TUGCO QA Manager, was interviewed. Individual I stated he is responsible for the supervision of the QA program at CPSES as well as the QA Vendor Surveillance Program. When questioned concerning the results of the TUGCO corrective action to NRC Notice of Violation 50-445; 50-446/80-20, reference supra, Individual I provided B&R NCR N2512, dated September 22, 1980, which indicated 49 of the 112 CB&I manufactured restraints inspected, at that time, required rework in order to meet welding and inspection criteria.

He then provided TUGCO vendor inspection and release documents which were reviewed. Accompanying each trip report is a vendor QA rating form which provides a means of calculating a performance score or rating (95 to 100 is excellent; 90 to 95 equals acceptable; 80 to 90 is marginal; and below 80 equals unacceptable). The following are performance ratings for 1982 inspections at CB&I:

Date	No. of Items Released	Rating
02-10-82	24 Pipe Whip Restraints and Miscellaneous Material	-8.9
03-03-82	13 Pipe Whip Restraints and Miscellaneous Material	21.6
03-16-82	8 Pipe Whip Restraints	16.9
04-02-82	31 Pipe Whip Restraints and Miscellaneous Material	-588.9

The TUGCO QA Manager indicated that actions have been previously implemented to correct the apparent deficiencies in the CB&I QC program. For example he indicated that several previous shipments had been inspected at the vendor shop and had been refused authorization for shipping until corrective action was completed. However, unlike previous occassions where TUGCO QA inspectors would identify all nonconforming conditions needing correction, the present plans were to reject the shipment without detailing specific deficiencies, thereby forcing the inspection burden onto the vendor's QC staff. These problems have been the subject of discussions between TUGCO QA and CB&I management.

On April 30, 1982, Individual J, the TUGCO QA vendor compliance supervisor, was interviewed. Individual J related in recent months release inspections at CB&I have identified increasing problems with their products and their QA/QC program. Individual J stated the TUGCO vendor inspections include inspection of components welds and dimensional checks in addition to reviewing of NDE records. He stated all noted deficiencies must be corrected by the vendor prior to shipment. Individual J stated he participated in the April 2, 1982 inspection at CB&I and noted that 30 of the 31 pipe whip restraints inspected had weld problems which required rework prior to acceptance and shipment. Individual J stated he met with the CB&I QA Manager during that inspection trip and related his dissatifaction with CB&I performance.

On April 30, 1982, Individual K, a TUGCO vendor inspector, was interviewed concerning his March 3, 1982, vendor release inspection at CB&I during which he inspected the pipe whip restraints which were identified, in late March 1982 at CPSES, as having weld defects. Individual K stated he had inspected all welds on these restraints during his inspection, and had identified no weld defects. He stated that subsequent to the identification of the weld defects at CPSES he went there and observed most of the defects were "only marginally deficient, if that." Individual K stated he obviously had overlooked some rejectable welds during his March 3, 1982, inspection. When questioned concerning his review of NDE records on these restraints, Individual K stated he did not review the NDE records, only the certificate of compliance certifying satifactory NDE was performed. Individual K stated that during the past several years, CB&I QA/QC performance has been less than satisfactory. He stated they have had serious problems meeting dimensional requirements on components and that the quality of their welding is frequently inadequate.

Subsequent to the inspection the NRC inspector was provided a memo detailing the results of TUGCO's inspection of 56 CB&I supplied pipe whip restraints. These included the four identified on NCR M-82-00296R.1. Out of a total of approximately 55,000 inches of welding some 350 inches of nonconforming weld were identified. Deficiencies such as overlap and undercut were noted. These deficiencies were evaluated for reportability under 10 CFR Part 50.55(e) and determined not to be significant and therefore not reportable.

In a phone conversation with the TUGCO QA Manager on June 28, 1982, the NRC inspector discussed the results of the above inspections and was informed of the steps that had been initiated at the CB&I factory to verify proper QC was being performed. The NRC inspector acknowledged the actions that the applicant had taken and indicated that the matter of whether these steps were adequate to ensure that the restraints arriving at the CPSES were capable of performing their intended function would

remain unresolved until the NRC had an opportunity to review this program in detail. The TUGCO QA Manager indicated that he could assist by sending a letter to the Region IV office which would describe this program in detail.

Unresolved Item

An unresolved item is an item about which more information is needed in order to determine whether that item is a violation, deviation or a clear item. One unresolved item is identified in the preceeding paragraph:

Item	Description
8205/8210-1	CB&I Supplied Material

Mark

U.S Department of Labor

Room 7A12, 819 Taylor St.
Fort Worth, Texas 76102

May 14, 1982

Brown & Root, Inc.
Stephen L. Hoech
Manager of Employee Relations/Compliance
P. O. Box 3
Houston, Texas 77001

Re: Charles A. Atchison
vs. Brown & Root, Inc.

Dear Mr. Hoech:

This letter is to notify you of the results of our compliance actions in the above case. As you know, Charles Atchison filed a complaint with the Secretary of Labor under the Energy Reorganization Act on April 16, 1982. A copy of the complaint, a copy of Regulations, 29 CFR Part 24, and a copy of the pertinent section of the statute were furnished in a previous letter from this office.

Our initial efforts to conciliate the matter revealed that the parties would not at that time reach a mutually agreeable settlement. An investigation was then conducted. Based on our investigation, the weight of evidence to date indicates that Charles A. Atchison was a protected employee engaging in a protected activity within the ambit of the Energy Reorganization Act, and that discrimination as defined and prohibited by the statute was a factor in the actions which comprise his complaint. The following disclosures were persuasive in this determination:

The company records and interviews of company employees revealed that Mr. Atchison's performance throughout his entire employment with Brown & Root, Inc. was "good" to "excellent". In fact, his discharge paper completed on his final day (4-12-82) by his supervisor says that his performance rating was excellent.

The facts developed during the investigation showed that Mr. Atchison's filing of several nonconformance reports (NCR) on possible safety problems led to his discharge on April 12, 1982. NCR's submitted on March 23, 1982 and April 12, 1982 were directly responsible for his discharge. Those NCR numbers are M-82-00296 (3-23-82) and M-82-00361 (4-12-82).

On the date of Mr. Atchison's discharge (4-12-82) his Counseling and Guidance Report signed by Gordon Purdy stated he was discharged for "lack of ability to perform assigned tasks and follow supervisory direction."

Mr. Purdy was following orders given to him that same day in a written message which said "Subject employee has demonstrated a lack of ability in performing assigned task, in that he refuses to limit his scope of responsibility to pipe whip restraints, and insists in getting involved in other areas outside his scope. Consequently, his services are no longer required".

As an employee working on the Commanche Peak Nuclear Project and especially as a quality control inspector, Mr. Atchison was performing his duties and his responsibilities by reporting possible non-conforming conditions on the job site. It clearly was his responsibility to report all nonconforming items even if they were not within his pipe whip restraint area.

This letter will notify you that the following actions are required to abate the violation and provide appropriate relief:

1. Reinstatement to his position and pay at the Commanche Peak Project exactly as it existed before April 12, 1982.

2. Payment of all wages and benefits that he has lost since his termination on April 12, 1982 to the date he is reinstated.

3. Payment for all expenses incurred for his attorney and other expenses which have been incurred because of his termination and period of unemployment.

4. Removal of all references to his termination from his personnel files.

This letter will also notify you that if you wish to appeal the above findings and remedy, you have a right to a formal hearing on the record. To exercise this right you must, within five (5) calendar days of receipt of this letter, file your request for a hearing by telegram to:

The Chief Administrative Law Judge
U. S. Department of Labor
Suite 700, Vanguard Building
1111 - 20th Street, NW
Washington, DC 20036

Unless a telegram request is received by the Chief Administrative Law Judge within the five-day period, this notice of determination and remedial action will become the final order of the Secretary of Labor. By copy of this letter I am advising Charles A. Atchison of the determination and right to a hearing. A copy of this letter and the complaint have also been sent to the Chief Administrative Law Judge. If you decide to request a hearing it will be necessary to send copies of the telegram to Charles A. Atchison and to me at 819 Taylor Street, Room 7A12, Fort Worth, TX 76102, phone 817 334-3417. After I receive the copy of your request, appropriate preparations for the hearing can be made. If you have any questions do not hesitate to call me.

It should be made clear to all parties that the role of the Department of Labor is not to represent the parties in any hearing. The Department would be neutral in such a hearing which is simply part of the fact-development process, and only allows the parties an opportunity to present eveidence for the record. If there is a hearing, an Order of the Secretary shall be based upon the record made at said hearing, and shall either provide appropriate relief or deny the complaint.

Sincerely,

Curtis L. Poer
Area Director

cc: Charles H. Atchison
NRC

CASE EXHIBIT 738

U. S. Department of Labor

Office of Administrative Law Judges
211 Main Street
San Francisco, California 94105
Suite 600

(415) 974-0514
FTS 8 454 0514

12/3/82

In the Matter of

CHARLES A. ATCHISON
Complainant

v.

BROWN AND ROOT, INC.
Respondent

CASE NO. 82-ERA-9

Kenneth J. Mighell, Esq.
Cowles, Sorrells, Patterson & Thompson
1800 One Main Place
Dallas, Texas 75250
For the Complainant

Peter R. McClain, Esq.
Brown & Root, Inc.
P. O. Box 3
Houston, Texas 77001
For the Respondent

Before: ELLEN M. O'SHEA
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This is a proceeding under § 210 of the Energy Reorganization Act of 1974, as amended (42 U.S.C. §5851), hereafter called the Act. The Act (42 U.S.C. §5851(a)) prohibits a Nuclear Regulatory Commission (NRC) licensee from discharging or discriminating against an employee who has commenced a proceeding to carry out the purposes of the Act. The Act is implemented by regulations designed to protect so-called "whistle-blower" employees from retaliatory or discriminatory actions by their employers (at 29 C.F.R. Part 24). An employee who believes that he or she has been discriminated against in violation of that section may file a complaint within 30 days after the violation occurs.

The complainant on April 16, 1982 filed a complaint under the Act and regulations with the Secretary of Labor. Following an investigation the Area Director of the Department's Employment Standards Administration issued a May 14, 1982 determination that complainant was a protected employee engaging in a protected activity within the Act's ambit and that discrimination prohibited by the Act was a factor in the actions of which he complained, warranting the Director's notice to respondent to abate their violation of the Act and provide specified appropriate relief to complainant, including his reinstatement and payment of back wages and expenses incurred because of his termination and unemployment.

Respondent timely appealed this determination, as a result of which by July 8, 1982 notice, this matter was scheduled for formal hearing held in Dallas, Texas on August 19, 1982, August 20, 1982 and August 21, 1982. The parties were both represented by counsel at hearing, and at counsel's joint request an opportunity to submit written briefs was afforded. The record was closed on October 6, 1982, with the receipt of briefs.

Hereby admitted into the record is complainant's counsel's September 1, 1982 letter, submitted in accord with my instructions at trial, which also encloses an identifying exhibit list of the Claimant's 26 Exhibits admitted at trial, as well as an identification list of the contents of Claimant's Exhibit 26, the Department of Labor file. Counsel's fee petition, included with his September 1, 1982 letter, is admitted.

An identifying description of the contents of respondent's three volumes of Exhibits conditionally admitted at trial, then marked and identified as Respondent's Volumes A, B, and C, was received with respondent's counsel's September 1, 1982 letter. It, and counsel's September 1, 1982 letter are hereby entered into the record. Given complainant's counsel's September 1, 1982 lack of objection, all of respondent's exhibits are finally admitted into the record. Respondent's counsel's September 22, 1982 letter with his enclosed motion to correct the transcript is admitted, and this motion is granted. Complainant's counsel has not objected to this motion since service; most of the changes are minor spelling corrections, the remainder consistent with the sense of similar testimony, and the page 452 correction is in accord with this witness' omitted response.

To the extent possible, for ease and clarity in review of a voluminous and unwieldy record, this decision's references to the evidence will attempt to conform to respondent's counsel's method of reference described in footnote one of his post-trial brief.

Both parties having been afforded full opportunity to be heard and to present evidence and arguments on the issues, this

recommended decision, and the findings of fact and conclusions reflected below, are based on the entire record of the proceedings, and on consideration of their briefs.

Complainant's Credibility

In reaching the following findings of fact and weighing the credibility of the witnesses' testimony, the fact that complainant lied on his application for Brown and Root employment when he stated he received an associate's degree from Tarrant County Junior College has been carefully considered. In this regard, Brown and Root was construtively aware of the complainant's false statements as to his educational achievements no later than sometime in the summer of 1980, when they received such advice in response to their apparent routine inquiry (NCR Exs. 134, 137; NCR 3199-3469.) However, no action in accordance with their standard advice to potential employee job applicants that any misrepresentation of application facts may be a cause for dismissal was taken at any time prior to the April 12, 1982 termination at issue. Apparently this was because this filed reply (NCR Ex. 134) indicating complainant's false statements, was overlooked or unread on receipt . It is clear that neither Mr. Purdy nor Mr. Brandt was aware of any of the claimant's false representations as to his educational achievements until they came to light in connection with the July 1982 Nuclear Regulatory Commission (NRC) hearings.

However, Brown and Root's inaction does not alter the fact of complainant's initial misrepresentation; and further, the record establishes complainant also physically altered a copy of the Tarrant County Junior College reply to Brown and Root to reflect his achievement of a degree and then used this altered form as part of his January 1982 application for TUGCO employment. These facts as to the complainant's document alteration were elicited from him in connection with post termination activities, and his testimony before the NRC (NCR 3199-3469), and were also unknown to Mr. Brandt and Mr. Purdy at his April 12, 1982 termination.

Careful consideration has been given to these misrepresentations, not under oath, including the circumstances thereof; as well as complainant's misstatements at points under oath. (NCR 3199, at 3277: 15-18, RCK Ex. 200). While they are not, in my opinion, weighing the entire record to decide the issues before me, determinative of complainant's total lack of credibility, these serious, unbelievably explained actions, of necessity, are of considerable significance in assessing his credibility vis-a-vis respondent's witness' where their testimony conflicts.

However, complainant's credibility does not determine his establishment of a prima facia case of discharge for a protected activity; the internal Brown and Root written documents do. In

reaching factual findings where attestions conflict I have looked to, and particularly weighed the other evidence surrounding the events in question to judge the actuality of the situation presented, giving weight to complainant's representations only when corroborated by other evidence of record over which he had no control, including reasonable inferences therefrom.

The findings reached below are made because the other surrounding evidence in this case persuades of the issue-determinative averments of one who misrepresented; lied; and altered a college record. My evaluation of the respondent's witnesses' testimony itself, and when analyzed with their pre April 13, 1982 records, and their pre and post April 12, 1982 statements, convinces that their proffered explanation of the non-protected reasons for complainant's termination is not reasonable nor credible and is pretexual. The question of complainant's credibility plays little, if any, part in this finding and conclusion.

Complainant's Background with Brown and Root and His Firing

Brown and Root, the respondent, hereinafter B&R, is the constructor of the Commanche Peak Steam Electric (CPSE) Nuclear Project at Glen Rose, Texas for Texas Utilities Generating Company, herein (TUGCO). Complainant was employed by Brown and Root at the Commanche Peak Nuclear Project on February 28, 1979, and at all times since, and until his April 12, 1982 termination was Brown and Root's employee. He was hired as a QA/QC[1]/ document specialist. As such he was responsible for insuring that all required documentation was completed and accurate in accordance with applicable procedures and standards. He held this job until the fall of 1979 when he became a Quality Assurance Engineering Specialist where as such he was involved in reviewing reports of nonconformance against the appropriate applicable standards and requirements; and which ultimately resulted in his being assigned the job title of Project Training Coordinator, writing, instructing and teaching courses to certify personnel of Brown and Root as qualified to perform a variety of inspection functions involved in documentation/inspection for compliance. He also, as of 1981, was certified as an auditor and was involved in vendor audits.

He had held his project training coordinator position for more than a year as of late 1981 when, as a result of a management reorganization at Brown and Root, affecting a number of respondent's employees, he was transferred, in compliance with his specific request and desires, and appparently on the recommendation of Jim Hawkins, a prior site QA manager, to a field job as a quality control inspector on the project. Organizationally in this field position he was assigned to what is known within Brown and Root as

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1/ Quality Assurance/Quality Control. Hereinafter Quality Control will be referred to as QC, as in QC inspector.

the ASME[2]/ side of the project, the mechanical QC inspection staff, where he worked under the immediate supervision of Richard D. Ice, the QC ASME Mechanical Equipment Supervisor. His primary QC inspector job function responsibility from the time of his 1981 transfer to the field and during the organizational changes of his position thereafter, until he was terminated April 12, 1982, was inspection of pipe whip restraints.

As complainant's supervisor from December 1981 until late January 1982, Mr. Ice found complainant's performance as a quality control inspector excellent, (NRC Ex 5A) and he testified he would have willingly accepted complainant back into his group, if he had any say in the matter, despite the one questioning incident reflected at TR 275-277 where complainant was concerned because the certification paper-work for the job he was being asked to perform was not completed. Mr. Ice's testimony as to complainant's field work performance is not dissimilar to the prior good work performance evaluations he received from earlier Brown and Root rating supervisors, albeit they assessed him in the different job titles he held prior to his transfer to the field (Exhibits within Plaintiff's Exhibits 3-15; within Plaintiff's Ex. 26).

Sometime in late January 1982 another management realignment of project site responsibilities took place which affected complainant. A decision was made to transfer several employees of the Brown and Root ASME QC inspection group, including complainant, to a non-ASME mechanical inspection group organizationally under TUGCO, in connection with a transfer of inspection of pipe whip restraints responsibilities from Brown and Root to TUGCO.

Mr. Gordon Purdy is the Brown and Root Site QA Manager at Commanche Peak, and at all times since his assignment to this position in late 1981, has organizationally been complainant's ultimate supervisor, many layers removed. As such he was the responsible Brown and Root official who made the April 12, 1982 decision to fire the complainant, and it was Mr. Purdy who personally orally advised him of this decision on April 12, 1982. It would appear that the Brown and Root management reorganization of late 1981 was connected with Purdy's transfer to the project from a corporate entity in Houston. It was Mr. Purdy who was responsible for advising Mr. Brandt, the Ebasco Services employee of TUGCO's subcontractor, of just which Brown and Root employees would be transferred to Brandt's group in connection with the 1982 transfer of pipe whip restraints inspection responsibilities from Brown and Root to TUGCO.

Mr. Brandt was the project's non-ASME Mechanical/Civil QA/QC Supervisor. When advised by Purdy that Atchison was being transferred to his group, Mr. Brandt objected. He told Purdy he did

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2/ American Society of Mechanical Engineers

not want complainant in his group. While complainant had never previously worked for, or under Brandt; or for anyone who reported to Brandt who would have personal knowledge of complainant's work performance, or job habits, Mr. Brandt had formed an opinion, for reasons stated below, that complainant was unqualified as a, and to test welders, and spent his time as training coordinator job seeking for, and "stiring up" the project's quality control inspectors. Brandt had previously conveyed this opinion of Atchison to Purdy prior to complainant's 1981 transfer to the field. Purdy nevertheless advised Brandt that Atchison would be transferred to his group.

As a result of this transfer, sometime in February 1982 complainant organizationally came under the direct and immediate supervision of Randall D. Smith, the non-ASME Mechanical QC Lead Supervisor, a Brown and Root employee. Between Brandt and Smith, Smith reported to a Mr. Foote, an Ebasco employee, (not qualified as a welder) who reported to Brandt.

On April 2, 1982 Smith evaluated complainant's job performance and job habits, in connection with the promotion from QC Inspector B to QC Inspector A that Smith then recommended to Brandt, through Foote, at complainant's request, a request apparently generated by Purdy's February 12, 1982 memorandum as to salary adjustments for QC inspectors and complainant's achievement of the certification necessary to qualify for the promotion it described. (Pt Exhibit D, PX Exs. 18, 19). Complainant was outstanding to exceptional in five of the six rated items, average in only one - leadership potential. The quality as well as quantity of his work was, in Smith's judgment, outstanding. When called upon to initiate and process the paperwork to effectuate Purdy's April 12, 1982 termination decision Smith had to again rate complainant's job performance. He reiterated it was excellent. (PX Ex. 24).

According to what Smith was told by Purdy April 12, 1982 complainant was being fired because Brandt told Purdy his services were no longer required and Purdy had no place to assign Atchison on the ASME Staff. The counseling and guidance report which Purdy signed in connection with complainant's termination stated his termination was recommended because of Atchison's "lack of ability to perform assigned tasks and follow supervisory instructions" in his work performance (PX Ex. 22); an obvious reflection of Brandt's April 12, 1982 written advice to Purdy that complainant's services were no longer required by him because while Atchison was assigned the responsibility for inspection of pipe whip restraints installation he

> "has demonstrated a lack of ability in performing assigned task, in that (emphasis supplied) he refuses to limit his scope of responsibility to pipe whip restraints, and insists on getting involved with other areas outside his scope." (PX. Ex. 23).

Complainant in commenting as requested on Brown and Root's April 12, 1982 internal counseling report, above Purdy's signature that day and assumedly prior to such signature (TR 711-714), stated that his termination in fact resulted from his reporting of unsatisfactory, vendor-supplied[3]/ pipe whip restraints being installed on this nuclear project, and a personal conflict with Mr. Brandt and Mr. Foote over his reporting this noncompliance (PX Ex. 22).

Brown and Root's Trial Contentions As To Termination

Brandt's, Purdy's and Brown and Root's post April 12, 1982 statements as to the reasons for Atchison's firing vary from and are inconsistent with those reflected in their April 12, 1982 internal communication, the Brown and Roote termination forms that day and some of Purdy's April 12, 1982 statements to Atchison and Smith. Brandt's later statements indicate that in fact the complainant's firing resulted from a combination of Brandt's perceptions and evaluations of Atchison's job performance inadequacies and mistakes personally observed on two occasions in March 1982, one in connection with the nonconformance report reported and logged in complainant's name, #M-82-00296 (hereinafter NCR 296); and TUCO's and Brown and Root's belief that complainant's April 12, 1982 nonconformance report #M-82-00361 (hereinafter NCR #361) was an attempt to leverage or secure a promotion through the attached "pow wow" note. However, Purdy attested complainant was fired because of the circumstances attendant on his April 12, 1982 filing of NCR #361, including Purdy's belief complainant's "pow wow" note to Smith was an attempt to use a nonconformance report to secure a promotion and Purdy's unsuccessful efforts to place complainant in any other Brown and Root job after Brandt's PX Exhibit 23 advice.

APPLICABLE LAW - ISSUE FOR DECISION

The respondent's position is that the complainant has failed to state a proper cause of action for which relief may be granted under § 210 of the Act, 42 U.S.C. 5851. This section provides:

> "Sec. 210(a) No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -
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> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of

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3/ Vendor referred to was CB&I, Chicago Bridge and Iron.

1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended."

Complainant asserts he was discharged by respondent April 12, 1982 because of, and following his actions to report construction deficiencies, and to give information as to quality control violations under this Act or the Atomic Energy Act of 1954, i.e., because he filed NCR #296 and NCR #361. In effect, the quality control procedure under which he was functioning when these NCRs were averredly filed by him, (10 C.F.R. Part 50, § 50.34(a)(7), Appendix B), and in, and for, the performance of which he alleges he was fired, in my opinion in themselves constitute an action or a proceeding for the administration or enforcement of the Acts' requirements; and further, in such performance, giving rise to the averred discriminatory firing at issue, the complainant was carrying out the Acts' purposes. Thus, in my opinion, and it is so found, the complainant's activities giving rise to his April 12, 1982 firing, that is his averred filing of NCR #296 and his filing of NCR #361, were protected activities within this Act's meaning to which the protected activity provisions of §5851 apply.

I also find from Smith's testimony that in connection with his work on NCR #296 complainant mentioned he would, as he had in the past, go to the Nuclear Regulatory Commission with his unanswered concerns about a backfit program, knowledge as to which Smith conveyed to Foote. (TR 430-433). I also infer from the total circumstances presented in this record that he voiced these concerns to other inspecting personnel at the worksite. Nevertheless I do not believe in the circumstances here, where the filing of NCR #296 and NCR #361 themselves constitute protected activity under the Act, that complainant's stated intent to approach the Commission, or knowledge of this statement by Brandt and/or Purdy, determines whether complainant was engaged in a protected activity when fired.

Brandt and Purdy's testimony establish complainant's firing resulted from his filing NCR #361, and the circumstances surrounding and resulting from the complainant's filing of this report, a report which in and of itself was an action to carry out the Act's

purpose. The argument that the NCR itself did not precipitate and result in the complainant's firing, but that the "pow wow" note alone resulted in his firing, divorced from the NCR to which it was attached; and that the latter is an activity beyond the ambit of the Act's protection, is totally illogical and unconvincing. Reason dictates that the "pow wow" note is meaningless absent NCR #361.

Therefore the 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.

I am of the opinion that under the case law applicable to this issue under the Act; Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274; Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089; TRW, Inc. v. NLRB, 654 F.2d 307 and Consolidated Edison Company of New York, Inc. v. Donovan, Dkt. No. 81-4215, 2nd Circuit Court of Appeals, 3/8/82; this record must be analyzed and findings made in accord with the following principles. The complainant must make a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision to terminate him. Having so established, which as indicated below I find from this record, the employer must articulate a legitimate business reason for the action taken against complainant, demonstrate that the same action would have taken place even in the absence of the protected conduct; and the complainant must then persuade by substantial evidence that the protected activity was the moving cause for the dismissal or other complained of discriminatory action under §5851.

With the background facts noted above, and this concept of the legal framework against which the issue before me is to be decided, all the evidence gathered and reflected in this record, including that not recited below, is analyzed to reach specific findings of fact and conclusions determinative of the issue of whether complainant was discharged for engaging in activity protected by the Act.

FINDINGS OF FACT

Non Conformance Reports (NCRs) Procedures

The record establishes that in September 1980, complainant advised the NRC of welding deficiencies in vendor manufactured (CB&I) pipe moment restraints which on NRC investigation resulted in their issuance of a Notice of Violation. Complainant's averment that these defects, identified by a Brown and Root QC inspector at the CB&I vendor site, were waived for shipment to the Comanche Peak nuclear plant by Brown and Root personnel was not substantiated by the NRC's 1980 investigation. (NRC Ex. 199).

In January 1982, Atchison discussed his identification of rejectable weld defects in a number of CB&I vendor-supplied pipe whip restraints with his then supervisor, Ice. He was advised that similar problems with such items having been identified on prior occasions, these vendor-supplied restraints were not subject to further inspection by site QC personnel, having been inspected by the vendor, the TUGCO vendor release inspection personnel, and the CPSES receiving QA inspection personnel.

Ice verbally discussed Atchison's submission of an NCR[4]/ Atchison had drafted regarding these restraints but told him he did not believe it would be accepted because of the previous acceptable inspections and the response Ice had received from upper level supervision to the same question he had posed on these CB&I vendor supplied pipe whip restraints. Complainant did not take the action necessary to commit this noted nonconformance to the system, i.e., secure an NCR number from the appropriate NCR Coordinator. (NCR EX 199)

The record establishes that under the procedures in effect at this project, it is the issuance of this NCR number by the NCR Coordinator which commits the NCR to the system. Once an NCR number is taken or assigned the deficiency or nonconformance logged has to be acted on to disposition, or voided by management, with a record maintained solely because the NCR number was or is taken or assigned. There was no way in which complainant, or any employee who took or was assigned an NCR number in similar circumstances could retract or withdraw the NCR so issued, that is, issued in the sense of the number being issued.

There is a written procedure to be followed for the documentation, handling and disposition of NCRs. (Respondent's Ex.Z-2). It has been carefully considered in conjunction with the witnesses' testimony as well as the testimony of the NRC Staff Members, Taylor and Driskill, at the July 1982 NRC hearings, as to how, in practice at this project site, the NCRs were in fact handled in accord with these procedures, including the reworking and rewriting of NCR #296 to comply with Brandt's directions after this NCR was committed to the system upon NCR number issuance.

I do not find that the use of the words "issue" or "issuance" of NCRs at this project had any specialized, procedurally-directed meaning such that its use would convey to employees working within this system any impression other than that the NCR had been finally typed by the NCR coordinator, and was ready to proceed through the supervisory line of command to ultimate disposition or voiding. It is clear from this record that depending on the particular circumstances of the nonconformance item being questioned or identified, discussions of NCRs could and were had between the

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4/ Nonconformance Report (Exhibit R-Z.2).

originator of the NCR (person in whose name NCR number logged) and his supervisor both prior to the assignment of an NCR number, as well as after the number was assigned or taken and while the draft NCR was being written.

Incident at Pressurizer Tank Room, Reactor Building 1, 822 level.

The complainant's specific responsibility was inspection of modification areas of pipe whip restraints, site modifications, or additions to, or installations of pipe whip restraints that could be vendor fabricated. The reporting by NCR of obvious defects, located outside Brown and Root's modification areas, using AWS D1.1 inspection criteria, was also within complainant's scope of job responsibility (PX. Ex. 21).

Sometime in March 1982, but prior to March 23, 1982 the complainant was performing his inspection testing, in an area where site welders had complained to him of bad vendor item welds they were seeing. He noted, about 18 inches to his right according his attestions, through paint, a number of defects he believed were rejectable under the standards to which he was inspect (AWS D1.1).[5]/ He drafted an NCR and advised Smith of his findings.

This incident provided the first occasion for Brandt to have any supervisory contact with Atchison's work activities. Brandt's concern, on viewing the problem raised by Atchison through Smith and Foote was the fact that the vendor defects Atchison visually noted were "at the closest 3 to 4 feet away from the weld he was suppose to inspect," (UEA, page 10) and the rejectable porosity Atchison noted was within acceptable limits.[6]/ Brandt told Foote that the porosity defects Atchison noted and mapped on his one page sketch were not unacceptable porosity defects, but as to the other welding defects noted by Atchison, Brandt could not make a judgment unless the paint was removed.

Analysis of the witnesses' attestions at trial as to what comments Brandt made following this inspection, at which Atchison was not present, referable to Atchison's work, differ. According to Brandt he casually and without emphasis and perhaps in Smith's hearing mentioned to Foote that Atchison was requiring excess preparation for his liquid penetrant testing. Atchison testified Smith conveyed to him that the vendor weld items he questioned were

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5/ American Welding Standards.

6/ Brandt's testimony as to the specifics, however, at TR 535: 3-7 raises a question as to whether in fact "porosity" is what was noted by Atchison. Note the conditional statement as to porosity at TR 535: 21-23. Brandt did not have the draft NCR at that examination; he had only the one-page sketch to work from.

not nonconforming and he was outside the scope of his responsibility in his reporting these items, and this information was coming from Brandt. While it is clear Smith as a result of the circumstances of this incident, at this time conveyed to Atchison his concern about the porosity acceptance criteria he was using, it is also clear to me on an analysis of this record that through Smith's statements to him, which I infer came from upper management involved in this incident, i.e., Brandt and/or Foote, complainant was given to understand he was exceeding the scope of his inspector responsibilities in reporting what he believed were vendor weld defects, i.e., they were beyond his testing area, (PX. Ex. 26.14); and complainant then initiated his request for information as to his responsibilities in this regard.

I believe from the total information in the record as to the circumstances in connection with this incident that Atchison was, at some time during it, given to understand that over and above the porosity reading problems upper management found with his inspection, upper management also found that in noting vendor item defects he was exceeding the scope of his responsibility, which message triggered his request for written clarification of his responsibilities in this regard (PX. Ex 21, 21A). I also find that no information was conveyed to Atchison as to Brandt's casual comments as to his overpreparation for testing.

No further action was thereafter taken on the question of the non-porosity defects Atchison questioned about which Brandt could not make a judgment, absent paint removal.7/ Atchison apparently accepted his supervisors' judgment, advice and instructions as to this particular problem. He did not secure an NCR number for the possible deficiency, did not pursue the matter. The NCR drafted by Atchison was never logged into Respondent's NCR system until after the July 1982 NCR licensing hearings during which it was learned that Atchison's draft NCR on this problem was found at home by the non-ASME NCR Coordinator, somehow scooped into a Tupperware packet on her desk and carried home. (TR 538).

Brandt's judgment based on this incident that Atchison was not inspecting to acceptable porosity criteria and was overpreparing (polishing the welds), and his attestion that this first of two observed job performance deficiencies was the basis for complainant's firing, and not his protected activities in filing NCRs, has been viewed in the light most favorable to the respondent in determining whether he and Brown and Root had a legitimate reason for firing complainant prior to his reporting NCR #296. According to Brandt's own attestions on this point at trial and at the UEA

7/ Counsel's October 4, 1982 representation at page 9 of his brief as to Brandt's post August 17, 1982 determination, in connection with NCR M-82-01236, that Atchison also accepted rejectable defects, is not in evidence.

hearing, he clearly did not. Further Brandt's testimony as to how off-handed and generalized his comments were to Foote after he descended from the scaffold in the tank room (TR 534-536) are indicative of the insignificance of his attested observations of Atchison's job performance deficiencies.

It is noted that this was the sole occasion for such job performance observation by Brandt, as Atchison's supervisor, prior to NCR #296. There were not, prior to NCR #296, "several" occasions which gave him opportunities to so observe after Atchison's assignment to his group, which unquestionably is the thrust of his written statement to the NRC. Further, if as he advised in PX. Ex. 26.15 he discussed these Atchison job deficiencies with Foote and Smith, that is not in accord with the picture presented by his testimony. However, weighing all the testimony as to what was said and conveyed between the parties and ultimately conveyed to Atchison, I am convinced that statements were conveyed to Atchison through Smith his supervisor indicating he was exceeding his responsibilities in noting vendor defects.

NCR Number 296

It is Brown and Root's contention that in fact this NCR originated with Brandt as a result of the defects being noted and brought to his attention by Brown and Root's Subcontract Administrator. It is their position that Atchison was merely the QC inspector assigned to perform the inspection and work necessary to document and write up this NCR. Brandt attested that during the course of his review of Atchison's work in connection with this NCR he, for the second time, noted defects in Atchison's work peformance as a welding quality control inspector in that he overinspected: reported as unacceptable, porosity defects acceptable for the standards and criteria under which Atchison was to measure; and he took an unnecessary length of time to perform this inspection.

These job performance deficiencies of Atchison are posited by Brown and Root as among the reasons for Atchison's termination, in conjunction with their contention that by his "pow wow" note to Smith, Atchison was attempting to use NCR #361 to leverage a promotion, for which Purdy fired him. As noted above, none of these explanations for Atchison's April 12, 1982 termination was conveyed to Atchison or Smith when he was terminated on April 12, 1982; they are not reflected in the written termination reasons Brown and Root gave Atchison that day, and were first voiced in the post April 12, 1982 NRC/DOL investigation.

Given these inconsistencies, all of the evidence documentary and testimonial, has been carefully analyzed to reach factual determinations; and in evaluating the evidence, all of the factors by which the credibility of testimonial evidence is adjudged have been

most carefully considered, weighing the complainant's attestions against the other evidence and its inferences which I find corroborative of his version of the events.

NCR #296 dated March 23, 1982 is issued in complainant's name and reflects that this nonconformance was reported by complainant. To the extent that Brandt's testimony conflicts with Atchison's attestions that Atchison was solely responsible for the initiation of the actions which resulted in the issuance of NCR #296, to report the welding defects in the four CB&I vendor-supplied pipe whip restraints in the Reactor 2 lay down area, I credit Atchison's testimony which is corroborated by the manner of reporting the first NCR Brandt received and reviewed; the logging in Atchison's name, the thrust of Smith's testimony, the black markings Brandt described, and the unconvincingly explained delay in NCR number issuance if the defects were actually first found and reported and directed to be committed to the NRC system by Brandt following Hutchison's call. Further, given Brandt's opinion as to Atchison's competency as a welding inspector, and the sensitive nature of the question raised by the defects of NCR #296 (TR 440), I cannot believe that Brandt would have permitted Atchison's involvement in the defect reporting unless Atchison initiated the NCR.

The craft general foreman had brought these defects to Atchison's attention, since he would be responsible for inspecting the questionable items after installation. He asked complainant to look at the pipe whip restraints before installation because they thought a QC inspector would probably have a problem with them and told Atchison they would prefer to have the laid-down restraints inspected before they went through all the trouble of installing them and then had to take them back out again.

The Nuclear Regulatory Commission's July 7, 1982 Region IV investigation of NCR #296 resulted in a finding that the pipe whip restraints which were the subject of NCR #296 were deficient. Further the NRC's investigative report indicates that between February 10, 1982 and April 2, 1982, TUGCO's QA was experiencing increasing weld problems in the pipe whip restraints of their CB&I vendor, and with this vendor's QA/QC program. The deficiencies in these vendor-supplied pipe whip restraints, the subject matter of NCR #296, whether "the restraints arriving at the CPSES were capable of performing their intended function," would remain unresolved as of the July 7, 1982 investigative report, although evaluated not reportable under 10 C.F.R. Part 55(e), "until the NCR had an opportunity to review this program in detail." (NCR Exhibit 199).

Atchison marked the defects, consulted Smith who looked at them and a draft NCR was prepared by Atchison. Inferentially hold tags were applied (TR 426). After careful examination of the various statements, and testimony given by Atchison, Brandt and

Smith as to who first noted and reported the defects reflected on NCR #296, I not only am of the opinion, and find that the defects were initially reported by Atchison, but also find that when the subject matter of Atchison's NCR #296 was brought to Brandt's attention, the initial question raised was: "(h)ow did the inspector come to identify the defects". "They were concerned about how did he find them;" and that there was some questions raised as to whether Atchison in so reporting was inspecting outside his area of responsibility (TR 414-415).

After Brandt and Foote looked at the reported defects, Smith was advised to get several employees to work with him in detail mapping and documention of NCR #296. The second draft NCR #296, the first with the detailed documentation, was the second occasion where Brandt, as Atchison's supervisor, had an opportunity to judge his job performance. However the record establishes that the mapping containing the excessive rejectable porosity readings was in fact the joint work effort of four inspectors. Brandt attested he nevertheless attributed all the excessive porosity readings to Atchison, based on his suspicions arising out of the 822 experience, and until trial his statements attributed the delay in getting NCR #296 finally released to Atchison. In fact, as reflected at trial, Brandt's actual concern with the excessive time involved was directed to all his involved subordinates, although not so reflected in his statements at NCR Exhibit 5A (G), PX 26.15, or at the unemployment compensation hearing.

A subsequent reinspection of the restraints was ordered by Brandt, from which Foote directed Smith to exclude Atchison, when it was ascertained that the inspection criteria under which all believed they were operating was found not to be that applicable to these particular items. While Brandt attested at the unemployment compensation hearing that Atchison, as well as all involved including himself, should have known the appropriate inspection criteria to use, and that the delay in getting NCR #296 documented more timely was a reflection of Atchison's job performance inadequacies, testimony at trial established that in fact Atchison checked with Smith as to the appropriate criteria to use, and Smith went to his supervisor to make sure he was right in his advice to Atchison, an action Smith wanted to make sure he was correct on "due to the nature of the nonconformance" (TR 427). Nevertheless, and despite the fact that the work assignment was the work of four employees, it is clear that until trial Brandt's statements as to Atchison's job inadequacies on NCR #296 reporting were skewered, and not fully reflective of the actual facts as they occurred.

While Smith testified that the majority of the excessive porosity readings on the mapped NCR #296 team effort report were

made by Atchison[8/], he also testified that such errors by Atchison were judgment errors which in his opinion did not, even considering complainant's prior 822 judgment error, warrant any change in his April 2, 1982 evaluation of the quality and quantity of Atchison's job performance as good. Of the same opinion on April 12, 1982 when Purdy fired complainant, Smith was upset by a firing he believed unjustified by Brandt's problems with Atchison's job performance in the 822 and NCR #296 incidents, and on April 13, 1982 he asked Brandt if complainant was fired for reporting the CB&I pipe whip restraints defects on NCR #296, and was advised no. The two occasions where as Atchison's upper level supervisor Brandt noted problems with Atchison's job performance, the 822 incident and NCR #296, would not, by Brandt's own testimony, warrant firing an inspector for incompetency; yet inconsistently, on April 13, 1982 he told Smith Atchison was incompetent.

Brandt testified at the complainant's unemployment compensation hearing that if he fired, or recommended firing, of a QC inspector for one mistake, he would have no QC inspectors on the job site. He testified here that his perceptions of complainant's mistakes or job inadequacies based on the two March 1982 occasions he had an opportunity to examine complainant's work, the only such occasions he had prior to his advice to Purdy he would no longer use him, were not in and of themselves sufficient to warrant a recommendation to fire Atchison. Thus it is clearly established that the respondent prior to April 12, 1982 and NCR #361 had no legitimate business reason for removing complainant from his job with Brandt's group, or for firing him, and that to do so would be treating complainant in a manner dissimilar to other comparable employees.

However, even prior to the incidents of April 12, 1982 and as of April 8, 1982, Brandt told Purdy he would no longer be needing Atchison's services, yet he did not then take action, as he could have through Brown and Root's Personnel Manager, to terminate him. (UEA 35-36). Purdy testified Brandt, prior to April 12, 1982, twice advised him in very general statements that he had problems with Atchison's job performance but Purdy, because of his high regard for Brandt's expertise, at no time asked for any details and accepted Brandt's evaluation of Atchison's poor performance at face value. Purdy, at that time, knew of the following incidents, the basis for Brandt's earlier objection to Purdy's assignment of complainant to his group.

Prior to Atchison's February 1982 assignment to Brandt's group he had had one personal dealing with Atchison as training coordinator. A welder in whom Brandt was interested failed a practical

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8/ He also testified that he did not know who made all the excessive porosity readings; and Brandt testified he had problems accepting the rejectable porosity readings of the 25 year veteran inspector involved in the NCR #296 mapping. (UEA, pg 8-11).

examination which Brandt found incredible based on this welder's experience. Atchison had graded the failed applicant based on an answer key, signed and approved by Ragan, a supervisor above Atchison. According to Brandt "Atchison's rationale in explaining to me why things were acceptable and rejectable per the answer key . . . gave me occasion to question his qualification as a level II visual inspector . . ," although so certified by Brown and Root. Atchison conveyed this opinion to Purdy at the time. (TR 605-610). Then while functioning in a staff position for Mr. Tolson the site QA Supervisor of TUGCO, Brandt conveyed to Purdy "my observations and observations being made by other people, he was serving as Comanche Peak placement officer and was spending excessive amounts of time on the phone contacting other sites looking for jobs either for himself or other people;" and several inspection supervision personnel came to him as an ear for Mr. Tolson to tell him Atchison was creating "'a little bit of a morale problem'." . . he was "'stirring the pot to the extent that they [sic] were trying to get them all upset and trying to find other locations of employment for them'". (TR 605-606).

At the time Brandt conveyed these judgments to Purdy, Atchison was not Brandt's supervisor, had never been his supervisor, and Atchison was not under TUGCO's jurisdiction at the time. Whether Brandt conveyed to Purdy the basis on which he made these judgments as to Brandt's telephone and office conversations is unknown. The basis for Brandt's speculations as to Atchison's conversations and affect on site operating personnel, as described at trial, at a time when Atchison's supervisors were rating him well in his job performance, a job in which his communication skills strengths were noted, is so poorly founded; and his description of how he observed Atchison's activities while "passing down the hall," is so conjectural, that in conjunction with Brandt's advice to Purdy in 1982 that he did not want Atchison in his group, it is clear that his evaluation of Atchison was significantly colored by his adverse personal feelings.

Based on this record at all times during the period in which the events are being analyzed for a determination of the issue here, i.e., prior to April 13, 1982 and as of his April 12, 1982 decision to fire Atchison, Purdy was well aware of what can only be termed, in the circumstances presented at trial and in this record, of Brandt's conjecturally and speculatively founded prejudgment of Atchison's job incompetency prior to February 1982.

Incidents of April 12, 1982

On April 12, 1982 complainant reported another nonconformance condition at the jobsite. This condition was the subject of NCR

#361. This record establishes that at the time complainant left this handwritten NCR with Smith for processing, through Foote to Brandt, he had secured the NCR number from the appropriate NCR Coordinator, and this number was handwritten on his NCR.

Brandt's decision to turn Atchison's promotion request down was made prior to April 8, 1982, and while he then returned the request to Foote with his decision, the decision was not conveyed to Smith or complainant prior to his termination. Instead Foote took the promotion request to Purdy to see if he could do something to change Brandt's decision, but Purdy in effect told Foote the decision was up to Brandt. None of these facts was known to complainant. However he undoubtedly knew of Brandt's attitude toward him, and his promotion request, and had ... on April 12, 1982 requested permission to seek other site employment, which request was granted; as well as transfer out of Brandt's jurisdiction and back to Ice's group, a request Brandt granted but conditioned on Purdy's acceptance.

It is the handwritten NCR #361 and the "pow wow" note which precipitated, and ultimately resulted in the complainant's April 12, 1982 firing, according to the testimony of both Purdy and Brandt. The position of Brown and Root at trial was that complainant was terminated because of his job quality performance inadequacies known to Brandt, as well as his April 12, 1982 attempt to leverage a promotion[9]/ through inappropriate use of an NCR. Both these post April 12, 1982 stated reasons conflict with the statements and reasons Brandt and Purdy gave for his termination on April 12, 1982, PX 22, PX 23, the clear and plain meaning of which is that his lack of ability in performing assigned tasks and following supervisory instructions was demonstrated by his failure to limit the scope of his inspection responsibilities. To similar effect is respondent's PX 26.2 May 13, 1982 advice to the Department.

The facts as to NCR #361 are that on the day it was handwritten by complainant, the day he had the NCR number issued for it, and logged into the system, he left it on Randall Smith's desk because Smith was off that day. Attached was a 3x5 handwritten note, the "pow wow" note which forms the basis for respondent's contention he was using NCR #361 to leverage a promotion. This note read as follows:

"Randy,

TAKEN Not issued yet.

9/ Post-trial, leverage of a transfer now also appears to be argued.

Open to pow.wow.
on subject

Black or white

No grey AREA'S

Chuck"

(NCR EXHIBIT 135)

Not withstanding respondent's witnesses' testimony, the record indicates that discussion between a QC inspector and his supervisor as to NCRs is not an unusual occurrence. Further once the NCR number was assigned, complainant had absolutely no control over its disposition. This record does not indicate that the complainant's NCR #361 could not be a valid concern of a QC employee, or that it was frivolous in nature (TR 422-425: 12; TR 453; TR 732-734; 742-745), although others at the site might and did differ with him. Respondent's articulation of its reasons for viewing NCR #361 as a leverage or arbitration attempt, its purported non-discriminatory reason for terminating him based on NCR #361, nowhere voices such contentions; nor do they contend that the substance of NCR #361 itself was an abuse by complainant of the nonconformance process of Respondent's Exhibit Z-2. Rather Respondent ties this NCR filing to his promotion request in explaining why it was viewed as a leverage attempt.

Smith had a discussion with complainant after he reviewed NCR #361 on April 12, 1982 and told complainant he would recommend it be voided by the upper management official responsible for ultimate disposition of this, or any such NCR, Brandt. However, from his conversation with Atchison, prior to bringing NCR #361 with the attached note to Foote, Smith was of the impression that Atchison was very certain he had found a problem in the training program, as reflected in NCR #361's content.

According to Brandt, Foote handed him NCR #361, with the "pow wow" note attached, as well as Smith's request for complainant's promotion, which Brandt had denied the week before. His testimony indicates that his immediate reaction was a lack of understanding as to what Atchison meant by "pow wow."[10/] TR 564. However, he thereafter determined in his mind that NCR #361 was an attempt to leverage a promotion, and testified that aftermeeting between himself, Purdy and Tolson as to complainant's intent, they decided it was such an attempt. Purdy testified that since Brandt would no longer use Atchison, after unsuccessfully trying to place Atchison

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10/ Any conference or gathering. The American Heritage New College Dictionary.

elsewhere in the Brown and Root organization, he decided to terminate him. However, when Purdy advised Atchison of his termination in effect he told him he was being terminated because of Brandt's statements that he lacked ability to perform assigned tasks, i.e., he failed to follow instructions in not inspecting out of his area of responsibility.(PX 22, 23) He never told him that he was being fired because of the "pow wow" note, and how it was perceived by himself, Brandt and Tolson. The note and what it meant, and NCR #361 was never discussed with complainant by Purdy or Brandt.

Prima Facie Case Established

The fact of the matter here is that the complainant's prima facia case for discharge for protected activity is established solely on the overwhelming weight of the documentary and other evidence he presented, and does not depend on any question as to his credibility. Brown and Root's records establish that he was an employee rated by his supervisor as excellent in performance April 2, 1982 and April 12, 1982 and rated satisfactory in performance by prior supervisors; he engaged in a protected activity April 12, 1982 when he filed NCR #361, and was that day fired, with the explanation he lacked ability to perform assigned tasks and follow supervisory direction because he failed to limit his scope of responsibility and insisted on "getting involved in other areas outside his scope" of responsibility. Further PX 26 indicates that a protected activity he engaged in three weeks before, i.e., filing NCR #296, formed the basis for his removal from his job assignment, and his ultimate firing April 12, 1982.

Evaluation of Respondent's Case

Since there are numerous statements in this record as to the complainant's job performance deficiencies uncovered by respondent and its client post April 12, 1982, it should be clearly understood that in analyzing the evidence it is the facts as they existed, and were known to respondent at the time the Act was averredly violated, April 12, 1982, that must of necessity control the findings here.

In my opinion, having heard their testimony, Brandt and Purdy's explanation for job removal and then termination of the complainant, i.e., their April 12, 1982 interpretation of the "pow wow" note, is unbelievable. It was never verbalized as a cause of complainant's firing until investigative statements were secured in connection with the later NRC and Department of Labor investigation; is inconsistent with their April 12, 1982 statements (Px 22, Px 23), as

well as Brown and Root's May 13, 1982 statement to the Department of the reasons for complainant's termination. (Px 26.2).

Aside from Brandt and Purdy's inconsistent explanations over time of the reasons for complainant's job removal/termination, I find their respective attested explanations and written statements as to why and how they concluded the "pow wow" note was an attempt by complainant to use NCR #361 to leverage a promotion (or transfer) unconvincing, unbelievable, and irrational - it just does not make sense - when considered with their total testimony, the note's verbiage, NCR #361's content and the other evidence of record.

They knew on reading NCR #361 that it was logged into the site's NCR control system. Thus its disposition and any leverage use was beyond complainant's control, or that of his immediate supervisor, to whom it was addressed. The note itself, in the context of what this record indicates as to the substance of the nonconformance reported, in my opinion does not provide any reasonable basis for the leverage conclusions of Brandt and Purdy. Their explanation of why they so believed, which took a three party meeting to arrive at, just does not ring true. Most importantly, if Purdy believed as he attested he would not have attempted to place complainant elsewhere with Brown and Root, actions contradictory of his words.

Brandt's attested interpretation of the note as a leverage or arbitration attempt is inconsistent with his stated initial reaction to the note; and I found his explanation as to how, and why, the denied promotion request was handed to him with NCR #361 and the "pow wow" note strange. Purdy's explanation of how he viewed the note, and why, indicates that in fact he did not know what it meant or intended. It is clear Purdy was told by Brandt the week before that he would no longer use Atchison; Brandt had made and conveyed that decision before NCR #361 was filed. Purdy then stated on April 8, 1982 he had no place to put complainant, yet at hearing he testified he probably would and could have placed him April 12, 1982 had any of his four supervisory contacts made that day been positive for Atchison. Purdy and Brandt's testimony as to why they did not state on April 12, 1982 that the job removal/termination was due to the "pow wow" note indicates they knew their stated interpretation was based on suspicions, speculations and conjecture; and in Purdy's case, analyzing his explanations, cryptic and unexplained conclusions and judgments as to complainant's personality.

These witnesses' testimony, in conjunction with what the entire record reveals were the circumstances existing April 12, 1982, convinces that the "pow wow" note explanation for job removal/discharge is incredible, false and pretextual; and it is so found. As

to respondent's other articulated business reasons for its April 12, 1982 job removal/job termination action the following is noted.

It is clear and established from this record that had not NCR #296 been filed by Atchison, a protected activity within the Act's meaning, Brandt would not have called Purdy the week prior to April 12, 1982 and told him he would no longer use Atchison. Such action by Brandt affected Atchison's terms, conditions and privileges of employment within § 5851's meaning. It is also clear and established by this record that Brandt would not have removed an inspector other than Atchison from his job, which is what in effect he did by his advice to Purdy, solely for the deficiencies Brandt noted on the two occasions he had a supervisory opportunity to observe Atchison's job performance, judgment call errors from the record in total.

When Brandt advised Purdy telephonically April 8, 1982 he would no longer use Atchison his motivation was dual-faceted. First, he did not want Atchison in his group prior to Purdy's assignment; and then his opinion was confirmed following his observation of Atchison's work in connection with the 822 incident and NCR #296. However, neither of these factors was a legitimate business reason for Brandt's decision he would no longer use complainant's services. Such lack of legitimacy is established by Purdy and Brandt's testimony. Purdy assigned complainant to Brandt's group despite Brandt's opinions and statements; and, by the impact of Brandt's testimony, he would not have removed any similarly situated inspector who erred in technicial proficiency as Atchison did after his assignment to Brandt's group.

Thus it is found that the job performance, job deficiency errors, including inspection reading errors, observed by Smith and Brandt, which Brandt gave for his April 12, 1982 actions removing complainant from his non-ASME employment position were not legitimate business, non-discriminatory, reasons for removing or terminating complainant as of April 8, 1982 and April 12, 1982; and that prior to April 12, 1982 and NCR #361 Brandt had no legitimate business reason to remove complainant from his shop. By Brandt's own testimony, as well as Smith's, they were not a legitimate reason and I so find.

Absent a legitimate business reason for Brandt's April 8, 1982 advice to Purdy he would no longer have a need for Atchison's services, prior to April 12, 1982 neither he, Purdy nor Brown and Root had any legitimate business reason for complainant's job removal and termination. I must therefore find that on this record complainant has established that his filing of NCR #296, a protected activity, was the circumstance, occasion and vehicle for Brandt's job removal action. But for the fact that Atchison reported and filed NCR #296 his condition of employment would not have been so affected and changed.

While Purdy attested he was unaware that some of the job deficiencies related to him by Brandt occurred in connection with NCR #296, and did not know that complainant contended he filed NCR #296, Purdy was aware when he fired complainant of the conflict between Smith's evaluation of his job performance and Brandt's. He knew Foote, over Brandt's head, disagreed with Brandt's rejection of complainant's promotion. Then Smith told Purdy at the termination interview that the firing was unwarranted (PX 26.14). Purdy, as well as all Brown and Root personnel who handled the April 12, 1982 conference report of termination, were on notice by it of Atchison's contention that Brandt's PX 23 statement to Purdy was a result of Atchison's reporting unsatisfactory CB&I vendor-supplied pipe whip restraints. Further Purdy had in hand PX 23 which, by its language, raises unasked and unanswered questions as to a written job removal justification inconsistent with what Brandt was telling him of Atchison's job deficiencies, i.e., patently unclear relationship of porosity, polishing problems to "refusal to limit his scope of responsibility to the pipe whip restraints" and "getting involved in other areas outside his scope." Notwithstanding his reliance on Brandt's statement of complainant's job performance inadequacies, these factors indicate Mr. Purdy knew or should have known that Brandt's language in Plaintiff's Exhibit 23 raised clear questions as to whether Brandt's action was based on complainant's engagement in protected activities.

Purdy's action under these circumstances, his unquestioning acceptance of Brandt's job removal decision, which in effect resulted in Atchison's job termination, was a knowing adoption of Brandt's protected activity violation resulting from complainant's NCR #296 filing, and Purdy, based on the job deficiency information conveyed by Brandt, had no legitimate business reason for terminating Atchison. I find this aspect of Purdy's explanation pretextual.

This record convinces that the reasons for job removal and termination which Brandt and Purdy committed to writing on April 12, 1982 were in fact the reasons for their respective actions; and that the reasons they thereafter voiced, their interpretation of the "pow wow" note and complainant's work performance deficiencies, were pretextual and not the true reasons he was removed from Brandt's group and ultimately terminated, and it is so found.

On April 12, 1982 Brandt specifically, not generically, stated that complainant's job removal and termination were due to his refusal to limit his scope of responsibilities to pipe whip restraint installation, and so defined his statement that complainant lacked the ability to perform assigned tasks and failed to follow instructions. Purdy's termination notice was based on this memorandum of Brandt, conveyed to Atchison and Smith as the partial basis

for his termination decision. By this action Purdy clearly adopted Brandt's stated definitions as his definitions, the only reasonable interpretation of his actions. I see no reason to disbelieve their April 12, 1982 contemporaneous written statements particularly when weighed with their later shifting interpretations of what they in fact meant by their April 12, 1982 statements (Brandt's at TR 576-577; 599-602; 604-605) including Mr. Purdy's testimony that when he signed to "lack of ability to perform assigned tasks and follow supervisory direction" as the reason for termination he was also attributing under this generic statement, as complainant's responsibility, 150 recently uncovered coordinator deficiencies Mr. Opelski, the site NDE level III who now supervised the maintenance and control of the training files, had found.

While Purdy stated these deficiencies may have been Atchison's predecessor's responsibility, Purdy attested they nevertheless reflected and demonstrated the termination reasons he signed to the April 12, 1982, as well as Opelski's reasons for telling Purdy "definitely not" during Purdy's contacts to ascertain if he should keep Atchison, and if Opelski would use him. Complainant, as of April 12, 1982, had not been involved in Opelski's shop's activities for five months, during which management and personnel changes had been made, and during which procedures were being changed as part of the reorganization described at trial. Complainant, while performing the job in which these cryptically described and dated errors were uncovered, was rated well in his job performance by his Brown and Root supervisors, and Opelski on February 24, 1982 certified him, based on his three years with Brown and Root, as warranting the certification at PX 18.

Jim Ragan is the same supervisor who supported complainant's field transfer. He is presently the supervisor of Ice and Patton who had no supervisory problems with Atchison returning to their shop. Yet Ragan told Purdy he did not want complainant because he found out he was not what he thought, a B inspector. Purdy did not otherwise explain this cryptic response of Ragan which is totally inconsistent with Ice and Patton's evaluations. Ragan's NDE records and whether the facts as to this reference are similar to the basis for the Opelski reference is unknown. Assumedly Ragan was the responsible upper level supervisor when these errors occurred, which have not affected his Brown and Root position.

Sanders told Purdy the complainant was "not really qualified to be a quality engineer," the job in which Brown and Root had placed, certified and permitted him to perform. Why he so stated is also unknown from the cryptic quotation of this supervisor's response.

The responses Purdy attested to just do not reasonably, believably, credibly explain why Purdy was unable to place an employee rated as complainant was rated throughout his Brown and Root

employment and who, according to what is in this record, had no reason to believe that his supervisors had any problem with his job performance or work habits until the 822 incident. (TR 742-743). In this light, Mr. Leigh's answer as attested by Purdy is the most unbelievable of all. He had no prior supervisory contact with complainant but advised that based on brief communications with Atchison, he did not feel he could effectively supervise his activities.

In determining whether Purdy's articulation of his inability to place Atchison in other Brown and Root components, after Brandt's effective removal, was in fact a legitimate business reason for Purdy's decision to terminate him, the following is noted. Purdy attested he could have, and would probably have retained complainant if any of the four supervisors' responses were positive. New hires were brought on in late April and May. Evaluating the credibility of his explanation as to why he did not place Atchison on April 12, 1982, and fired him on the basis he could not place him after Brandt removed him, the whole story does not make sense, given the complainant's past satisfactory to good and even excellent job evaluations, and his job history as related by his rating supervisors. To explain these ratings by a Brown and Root need to misrepresent because of pay problems, is unconvincing.

The evidence respondent presents in no way indicates complainant in job performance and work habits was a marginal employee, a problem to management for any reason prior to the 822 incident. If as Mr. Hoech related, complainant in his job performance caused "continual interruptions" and "warnings" were given, if much duplication of effort and turmoil was caused by complainant's job performance problems, what respondent has articulated and evidenced here, in response to complainant's case, does not so indicate.

I am therefore of the opinion, and find that Purdy's articulation of a lack of ability to place complainant after Brandt's removal as the reason for his decision to terminate was pretextual.

Weighing Brandt and Purdy's testimony with the facts found above as to the circumstances of complainant's filing NCR #296, I not only disbelieve and find pretextual respondent's proferred legitimate business reasons for complainant's termination, i.e., their interpretation of the "pow wow" note, complainant's job deficiencies and their inability to place him after Brandt's removal, I am also convinced of the following. The weight of the evidence supports a finding that as of his April 12, 1982 job removal by Brandt and job termination by Purdy, respondent had no legitimate business reason for his removal and termination, and that he was removed by Brandt and terminated by Purdy solely because he filed NCR #296 and NCR #361, protected conduct within the Act's meaning; but for this conduct complainant, as of April 12, 1982, would not

have been removed from his non-ASME job in Brandt's group, and terminated by Purdy. It is further found these protected activities were the sole bases for Brandt and Purdy's conclusion complainant was unable to perform his assigned tasks, and did not follow supervisory instructions and the motivating basis for Brandt and Purdy's evaluation and administrative response, Brandt to remove and Purdy to fire. It is so found.

I find and conclude that Brown and Root terminated complainant because he engaged in protected activities within the Act's meaning, and that respondent violated the Act and regulations in so acting.

REMEDIES

Reinstatement - Back Pay

Respondent urges that the remedies of the Act, § 5851(b)(2)(B), specifically reinstatement and back pay liability beyond mid-June 1982 should not be ordered because by this date Brandt and Purdy knew of Atchison's fraudulent representations and falsifications.

The complainant's lies, misrepresentations and document alterations are a most serious concern. However this record indicates that Brown and Root took no action based on NCR Ex. 134, and from the total evidence of record as to how this document was altered I can only infer that the unaltered response, as dispatched by the college in July or August 1980, was in Brown and Root's personnel records by that date and was thereafter not acted upon. If complainant had any control over this inaction, such is not clear from the record.

Whether in fact Brown and Root would have taken action to terminate complainant based on his application lies is not established here for several reasons. Brown and Root's statement on PX 2 as to dismissal for misrepresentation is conditional, as is Mr. Purdy's response at TR 682: 23-24. Mr. Purdy's testimony as to personnel practices in this regard at the site since his November 1981 assignment is not enlightening as to personnel practices as of mid-1980; and the record indicates there were changes in personnel practices after October 1981, e.g., the counseling and warning procedures prior to dismissal were changed.

Under these circumstances I do not believe that there is an appropriate basis for finding that respondent should not place complainant in the same position he was prior to the April 12, 1982 discriminatory firing, with reinstatement and back pay to reinstatement. This finding and complainant's reinstatement do not in any way preclude future action by respondent based on complainant's actions and conduct not protected by the Act.

Attorneys Fees

I have considered respondent's objection to complainant's counsel's fee request listing of services rendered complainant in connection with the NRC hearings. I do not agree that these services, or complainant's participation, was not reasonably related to the subject matter at issue. Therefore, for other than 30 hours of services listed for potential appellate work, I find the 87.6 hours counsel lists, as well as his billing rate, reasonable in the circumstances here. Accordingly a fee of $7,875.00 is awarded.

In accordance with the above findings of fact and resulting conclusions the following recommended ORDER is issued.

RECOMMENDED ORDER

Respondent, Brown and Root, shall take the following affirmative action to abate the violation:

1. Reinstate complainant to his position and pay at the Comanche Peak Project exactly as it existed as of April 12, 1982.

2. Pay complainant all wages and benefits that he has lost since his termination on April 12, 1982 to the date he is reinstated.

3. Pay to complainant's counsel, Kenneth J. Mighell, Esquire, all expenses incurred for his legal services in connection with this action, $7,875.00.

4. Remove all references to complainant's April 12, 1982 termination from his personnel files.

Ellin M. O'Shea

ELLIN M. O'SHEA
Administrative Law Judge

Dated: DEC 3 1982
San Francisco, California

EMO:ma

SERVICE SHEET

82-ERA-9

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DEC 3 1982
(Date)

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

rec'd
6/10/83
4 pm

Charles A. Atchison Complainant	)	
v.	)	82-ERA-9
Brown & Root, Inc. Respondent	)	

DECISION AND FINAL ORDER

Statement of the Case

Administrative Law Judge Ellin M. O'Shea submitted a Recommended Decision to me holding that Brown & Root, Inc. (Brown & Root) violated the employee protection provisions of the Energy Reorganization Act (42 U.S.C. 5851)(ERA) when it transferred and fired the complainant, Charles A. Atchison, from his job as a Quality Control Inspector on April 12, 1982. Brown & Root was the prime contractor of Texas Utilities Generating Company (TUGCO) constructing the Comanche Peak Steam Electric Station (CPSES) nuclear power plant at Glen Rose, Texas. Judge O'Shea held that Mr. Atchison had made out a prima facie case that his transfer and discharge were the result of his protected activities of filing Nonconformance Reports. Because she explicitly found that Brown & Root's stated reasons for its actions against Mr. Atchison were pretextual, the ALJ held that Mr. Atchison had proven that his protected activities were the sole cause of the adverse actions taken against him. She recommended

that the Secretary order reinstatement of Mr. Atchison to the same position and rate of pay he held before he was fired, with back pay to the date of reinstatement and expungement of his personnel record. Judge O'Shea also recommended the award of attorney's fees of $7,875. I agree with her finding that a violation occurred, but, for the reasons discussed below, I do not think it would serve the purposes of the Act to order reinstatement or back pay beyond June 15, 1982. Therefore, the Administrative Law Judge's recommended order is adopted in part and modified in part, as discussed below.

Facts

The facts in this case are set forth in considerable detail in the ALJ's recommended decision. I will summarize only the most salient facts here.

Charles Atchison was hired by Brown & Root to work as a documentation specialist at CPSES on February 29, 1979. No specific education or experience was required for that position. It is undisputed that Atchison misrepresented his education on his application form by stating that he had received an Associate of Arts degree from Tarrant County Junior College when in fact he had only attended courses there and had not received a degree. Each time he applied for promotion or took tests for certification in inspection techniques he repeated this misrepresentation.

Moreover, when he applied for a job with TUGCO while he was still working for Brown & Root, Atchison altered a copy of a letter from Tarrant County Junior College to show that he had received a degree.

He was promoted to instructor in nondestructive examination (NDE) of welds on April 9, 1980. In the same year, he was trained for and certified as a Quality Assurance Auditor, certified as a Level II Visual Inspector and Fabricator Inspector, and certified as a Lead Auditor. He was appointed training coordinator for the training of Brown & Root inspection personnel in 1980, a position he held until he was transferred, at his own request, to field inspections in late 1981.

In November, 1981 Mr. Atchison was certified as a Level III Mechanical Equipment Inspector "for training only." (This meant that his functions as a Level III Inspector were limited to signing the certifications of Level II inspectors who had taken inspection training courses.) He was certified in Level II Liquid Penetrant Examinations on February 23, 1982. In the course of obtaining these promotions and certifications, Mr. Atchison took a number of exams on which he always scored in the 90's, except for an 83 on the Fabricator Inspector test. Evaluations of his performance by his supervisors were always above average, excellent or outstanding, including the evaluation given on the day he was fired as part of the termination process.

When Mr. Atchison was transferred to field inspection in late 1981, his immediate supervisor was Richard Ice and his primary responsibility was the inspection of equipment called pipe whip restraints -- large steel structures attached to the walls of various parts of the plant which restrain the motion or movement of pipes when they are put under load or pressure, or in the event of a break. At that time, this inspection function was part of the Brown & Root ASME (American Society of Mechanical Engineers) inspection group. Mr. Ice testified that Mr. Atchison was a very thorough inspector who was relatively efficient and did a good job.

In February 1982, inspection functions were reorganized and inspection of pipe whip restraints was transferred to the supervision of TUGCO under its non-ASME inspection group. Several Brown & Root employees, including Mr. Atchison, were transferred to TUGCO's supervision, although they remained employees of Brown & Root. When he was transferred, Mr. Atchison's immediate supervisor became Randall Smith. Mr. Smith reported to Mike Foote of Ebasco Services, a subcontractor of TUGCO responsible for the non-ASME inspections. Mr. Foote, in turn, reported to C.T. Brandt of Ebasco Services who was the non-ASME Quality Control Manager at CPSES starting in February 1982.

Mr. Brandt's first contact with Mr. Atchison occurred in late 1981 when Mr. Atchison was still Brown & Root training coordinator. An acquaintance of Mr. Brandt was given a welding inspection exam by Mr. Atchison and failed. Mr. Brandt found that "incredible" because he felt the man knew a lot about welding. Mr. Brandt discussed the test score with Mr. Atchison, who had graded the test from an answer key provided to him, and formed an impression that Mr. Atchison did not know much about visual weld inspection.

Mr. Brandt next had direct dealings with Mr. Atchison in connection with a so-called "822 level" incident. In the course of inspecting installed pipe whip restraints at the 822 level in one of the buildings in March 1982, Mr. Atchison noticed what appeared to him to be defects in welds done by the company which had fabricated the restraints, several inches away from the area he was inspecting. (Mr. Atchison's assigned inspection responsibility was inspection of welds done by Brown & Root in the installation or modification of pipe whip restraints. Basic fabrication of these items was done by Chicago Bridge and Iron Company (CB&I) at its own plants.) Mr. Atchison drafted a nonconformance report (NCR) noting porosity and undercut defects and told his supervisor, Randy Smith, about it. Mr. Smith showed Atchison's drawing of the area to Mr. Brandt, and Smith, Foote and Brandt went to look at the welds. Although they were covered with paint, Brandt did not think there were porosity

defects; he thought the "linear indications" were caused by the paint, but he could not concur or disagree with the finding. He said to Smith and Foote that Atchison should have the paint removed if he wanted to follow up on the question. Atchison never did, and did not follow proper procedures for issuance of an NCR on this matter. It was not actually resolved until July 1982, when Atchison's draft NCR was found. Brandt reinspected the area at that time and found that some, but not all, of the porosity reported by Atchison existed.

When he first looked at the 822 level welds in March 1982, Mr. Brandt noted what he considered to be excessive grinding or polishing of the welds on which Mr. Atchison was performing liquid penetrant inspections. Brandt took no action to correct what he felt was Atchison's improper technique.

After Brandt, Smith and Foote had looked at the 822 level welds in March 1982, Smith told Atchison that Brandt thought Atchison was inspecting beyond the scope of his responsibility by checking the supplier's welds, and that Brandt did not think they were in nonconformity. Atchison wrote a memo on a standard Brown & Root form known as a Request for Information or Clarification asking whether defects noted in work done by suppliers should be reported at all, and if so, to whom and how should they be documented. It was answered by Randy Smith who told Atchison in writing that obvious defects located outside the Brown &

Root modification areas should be reported but should not be subjected to any tests.

Later in March 1982, Atchison was asked by a craftsman supervisor to look at the welds on some pipe whip restraints which had not yet been installed. He saw some defects, marked them and told Randy Smith. After Foote and Brandt looked at the welds, Brandt ordered that an NCR be written (which became NCR No. 296) and the defects mapped. Atchison was instructed to map the defects as part of a four-man team. When this was done the first time, Brandt was dissatisfied because he felt there could not be as much porosity as shown on the map. Brandt ordered the weld defects to be mapped again; Atchison was not involved in this second mapping of defects. Brandt still felt that the second map showed too much porosity; he was irritated that it was taking so long to resolve the question of how many defects there were in these pipe whip restraints. Then Brandt learned from the supplier, CB&I, that its contract called for the use of ASME welding standards whereas Brandt had told his staff to use American Welding Society (AWS) standards in inspecting these pipe whip restraints. Brandt acknowledged his mistake and ordered the defects to be mapped again under the correct standard. Some defects were found and they were repaired by CB&I; in addition, "back-fit" inspections were done on 56 CB&I pipe whip restraints already installed.

At one point during this "NCR 296 incident" Randy Smith was asked by Brandt or Foote how it was that an inspector came to inspect welds done by CB&I, which was beyond the scope of Smith's inspectors' responsibilities. Smith explained that the craft foreman had asked Atchison to look at the welds.

At about the same time as these incidents occurred, Atchison was taking tests to obtain the certifications which he believed would qualify him for promotion to Level III Inspector. He requested Randy Smith to recommend him for a promotion, which Smith did, giving him an outstanding performance evaluation. Prior to the events of April 12, 1982, the day Atchison was fired, Brandt, who had the authority to approve promotion requests, had already informally rejected it.

In early April 1982, Atchison was reviewing the TUGCO training manual and noted that there was no program to certify TUGCO inspectors in nondestructive examinations such as magnetic particle (MT) or liquid penetrant (PT) tests. This raised a question in his mind because EBASCO inspectors (who were under TUGCO's jurisdiction) had borrowed his liquid penetrant test kit to do these tests on a number of occasions. Atchison drafted an NCR (No. 361) stating that all MT and PT tests performed by these inspectors were invalid because they were not trained or certified to conduct them. He attached a note to Randy Smith asking for a "pow wow" on the NCR. Several days

later, when Smith discussed NCR 361 with Atchison, Smith said he was going to recommend voiding it, and Atchison had no objection. The NCR and the note were given to Brandt in a stack of papers that also contained Randy Smith's promotion recommendation for Atchison. This was the second time Brandt had seen the promotion recommendation.

Brandt interpreted NCR 361, accompanied by the "pow wow" note and the promotion request, as an attempt to gain leverage by Atchison to obtain a promotion. Brandt met with Ron Tolson, TUGCO site quality assurance supervisor, and Gordon Purdy, the Brown & Root site quality assurance manager, who agreed that Atchison was trying to use the nonconformance report as leverage to obtain a promotion. Brandt told Purdy he would not keep Atchison in his group and would transfer him back to Purdy immediately. Purdy tried to place Atchison with one of his quality assurance groups, but four managers whom he contacted refused to take Atchison. Purdy called Atchison in and told him he was being terminated for "inability to perform assigned tasks and failure to follow supervisory direction."

Discussion

There are two leading Supreme Court cases which, taken together, establish the overall framework for analyzing the evidence in a retaliatory adverse action case and allocating the respec-

tive burdens of production and burdens of persuasion of the parties. Under Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), plaintiff always bears the burden of proof that intentional discrimination occurred. If the employee carries that burden by a preponderance of the evidence, proving that his protected conduct was a motivating factor in the employer's action, the employer has the burden of proving, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected conduct. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Consolidated Edison Company of New York v. Donovan, 673 F.2d 61 (2nd Cir. 1982)(applying Mt. Healthy to cases under 42 U.S.C. 5851). The ALJ correctly applied these principles to the facts of this case in a manner consistent with my previous decisions under 29 C.F.R. Part 24.

Under Burdine, the employee must initially present a prima facie case by showing that he engaged in protected conduct, that the employer was aware of that conduct and took some adverse action against him which was, more likely than not, the result of the protected conduct. At this point, the employer has the burden only of producing evidence that it was motivated by legitimate reasons. The employee then has an opportunity to prove either that the employer's profferred reason is a pretext, or that retaliation was one motivating factor among others. Burdine, supra, 450 U.S. 248, 254-256. On page nine

of her opinion, the ALJ explicitly found that Atchison had made out a prima facie case that his protected activity was the likely reason for Brown & Root's action. She also held that all of Brown & Root's stated reasons for transferring Atchison out of the non-ASME inspection group and terminating him were not credible and were pretextual, and that the actions taken against him were caused solely by his protected activity of filing NRC's 296 and 361. Having found Brown & Root's reasons pretextual, it was unnecessary for the ALJ to consider whether Atchison would have been terminated in the absence of his protected activity because there was only one, improper, reason for Brown & Root's action.

If the employee proves by a preponderance of the evidence that protected activity was a motivating factor, the employee does not also have the burden, as suggested by Brown & Root, of proving that but for his protected activity he would not have been fired. A number of cases under other employee protection provisions, including the Occupational Safety and Health Act and the Federal Mine Safety and Health Act, have applied the Mt. Healthy prescription of burdens of proof where dual motives exist.*/

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*/ Wright-Line, A Division of Wright Line, Inc., 251 NLRB 1083, enforced 662 F.2d 899, cert. denied, No. 81-937 (March 1, 1982)(National Labor Relations Act); Marshall v. Commonwealth Aquarium, 469 F.Supp. 690 (D. Mass 1979)(Occupational Safety and Health Act); Pasula v. Consolidated Coal Co., 2 MSHC 1001 (1980), rev'd on other grounds, 663 F.2d 1211 (3rd Cir. 1981)(Federal Mine Safety and Health Act).

The FLSA and OSHA cases cited by respondent are not to the contrary. In addition, there is little, if any, support in the record for a finding that Atchison acted in bad faith or unreasonably. Even if I were to hold, which I do not (see discussion of protected activity, infra), that filing NCR's is not a protected activity, that would not support a conclusion that Atchison acted in bad faith.

One element of an employee's case under section 5851, of course, is to show that he engaged in protected activity. Filing non-conformance reports, which are the first step in identifying and resolving safety and quality problems, is clearly a form of protected activity under the ERA. Nuclear Regulatory Commission regulations require companies constructing nuclear power plants to establish quality assurance and quality control systems, including a program of quality inspection, and to report all deficiencies found in construction even if they have been corrected. See 10 C.F.R. Part 50, Appendix B, Part X, and 10 C.F.R. 50.55(e). Whether NCR's themselves do not have much significance in the quality control system, as asserted by Brown & Root, is immaterial to the legal question whether filing an NCR is protected activity. Respondent's quality control supervisor, Mr. Purdy, acknowledged that the internal quality control program in a nuclear power plant is one element of implementing the Energy Reorganization Act.

Under the employee protection provision of the Federal Mine Safety and Health Act, which was one of the models for section 5851, (see S. Rep. No. 95-848, reprinted in 1978 U.S. Code Cong. and Admin. News 7303), the District of Columbia Circuit has held that a miner is protected from retaliation for notifying his foreman or union safety committeeman of possible safety violations, even though he never contacted federal mine

inspectors. Phillips v. Department of Interior Board of Mine Appeals, 500 F.2d 772 (D.C. Cir. 1974); Baker v. Department of Interior Board of Mine Appeals, 595 F.2d 746 (D.C. Cir. 1978). (See my discussion of these cases and the applicability of their rationale to section 5851 in Mackowiak v. University Nuclear Systems, Inc., 82 ERA 8, April 29, 1983.)

Furthermore, I cannot agree with Brown & Root's assertion that section 5851 has a narrower scope than the employee protection provisions in OSHA and MSHA. Section 5851, it is true, does not include a phrase parallel to OSHA and MSHA protecting employees for the exercise of "any right afforded" by these acts. The ERA, unlike OSHA and MSHA, is not concerned with protection of employees, beyond that provided in section 5851 itself. However, section 5851 does contain a broad "catchall" provision protecting an employee for "assist[ing] or participat[ing]...in any other action to carry out the purposes of" the Act. Filing an NCR certainly is such an action (see discussion above).

I find Brown & Root's arguments based on textual analysis and rules of statutory construction unpersuasive, as are the twin spectres of the "flood of litigation" and undue interference in management prerogatives. If it were necessary to apply formal rules of statutory construction to language which seems clear on its face (see 2A Sutherland Statutory Construction, 4th Ed. 1973, §46.01), I think Brown & Root misapplies the

rule of ejusdem generis. Its interpretation of the phrase "any other action" in section 5851(a)(3) would render that phrase itself meaningless, while reading the words "other action" with the following phrase, "to carry out the purposes of" the Act, is simple and straightforward. In applying the rule of ejusdem generis, "[w]here... the specification of those objects classed as inferior is exhaustive and general words are added, then objects of a superior nature are embraced within the general words so as to prevent their rejection as surplusage." Sutherland Statutory Construction, supra, §47.18. By specifying all the various means of participating or assisting in a formal proceeding, including assisting or participating "in any other manner" in a proceeding, Congress protected all activities connected with administration or enforcement proceedings and intended in the last phrase to do exactly what it said, protect any other conduct which carries out the purposes of the statute. Under Brown & Root's interpretation, an employee would not be protected, for example, if he were fired for talking informally with the NRC to find out what the Act requires, but not to initiate an investigation. While there may be some dispute in other cases about what conduct carries out the purposes of the Act, filing an NCR under quality control programs mandated by statute and regulations clearly does so.

Brown & Root raises the twin spectres of a flood of litigation and undue interference in management prerogatives if filing

an NCR will protect any incompetent or misbehaving employee. It will not. First, the employee must prove, by a preponderance of the evidence, that filing an NCR was a motivating factor in the adverse action, a considerable burden when the case involves an inspector who files NCR's all the time. Respondent will always have an opportunity to show that it had legitimate management reasons for its action and (if the employee carries his burden) would have taken the action anyway even if the NCR had not been filed. (See, e.g., Mackowiak, supra; Dean Dartey v. Zack Company of Chicago, 82 ERA 2, April 25, 1983.)

There is ample evidence in the record to support the ALJ's findings that Atchison made out a prima facie case that his protected activity was the likely reason for his transfer and discharge, and that Brown & Root did not meet that prima facie case because its profferred reasons were pretextual. Although I do not think it is necessary to restate here all the evidence which supports these findings, certain facts in the record and inferences reasonably flowing from them should be emphasized.

Atchison made out a prima facie case by showing he engaged in protected conduct (see discussion above) of which Brown & Root was aware and he was transferred and fired on the same day he filed NCR 361. Brown & Root argues that Atchison's prima facie case as to his discharge by Purdy lacks the element of knowledge by Purdy about NCR 296. Of course, Purdy did

know about NCR 361 and acted precipitously and without giving Atchison any chance to explain what he meant by it. Moreover, in these circumstances, Purdy can fairly be charged with constructive knowledge of NCR 296. In a whistleblower case under the Civil Service Reform Act, the District of Columbia Circuit, paraphrasing the employee's argument with approval, said that requiring direct knowledge by the final decisionmaker "conflicts with the purpose of the [statute] by permitting prohibited retaliation to be insulated by layers of bureaucratic 'ignorance'." Frazier v. Merit Systems Protection Board, 672 F.2d 150-166 (D.C. 19[illegible] We agree with [the employee]...that constructive knowledge of protected activities on the part of one with ultimate responsibility for a personnel action may support an inference of retaliatory intent." id. (Emphasis original) Moreover, Brandt's memo transferring Atchison, and Purdy's Counseling Report firing him, both suggest these actions were taken, at least in part, because Atchison reported defects outside his area of responsibility. At this point, Brown & Root had only to produce legitimate, nondiscriminatory reasons for its actions. This, the ALJ held, and I adopt that holding, it failed to do.

Complainant filed many NCR's before numbers 296 and 361, as Brown & Root points out, but the others apparently raised quality problems limited to the specific item involved (e.g., No. M-82-00216, "Bolt failure during torque procedure-pipe whip restraint,"

reported on March 10, 1982). NCR's 296 and 361, however, as well as the "822 level" incident, raised questions with broad implications for the quality control program. NCR 296 revealed the poor quality of the work being done by CB&I, a major supplier, as well as the inadequacies of CB&I's preshipment inspections and TUGCO's inspections upon receipt of pipe whip restraints. Backfit or re-inspections of 56 CB&I pipe whip restraints had to be done and CB&I had to be called in to repair the defects found. The "822 level" incident raised similar questions, and NCR 361 would have called into question many inspections previously completed. (It would appear that the basic question Atchison was raising in NCR 361, that official inspections may have been performed on non-ASME items by employees only trained for ASME inspections, was never answered. Responsibility for these inspections was formally assigned to Brown & Root non-ASME trained personnel, by the quality control manual, but Atchison was questioning whether other employees may have actually performed such inspections which were accepted as part of the official quality control system.)

Many of the reactions of Atchison's supervisors to these incidents are highly questionable in the circumstances and lend support to the ALJ's finding that the stated legitimate reasons for his transfer and discharge were pretextual. Mr. Brandt concluded that Atchison could not perform visual inspection of welds on the basis of the "822 level" incident in which

Brandt himself said nothing could be conclusively determined until the paint was removed. Brandt's opinion at the time was that the porosity did not exceed permissible levels, but when the matter was finally resolved several months later, some rejectable porosity was found, although not as much as Atchison first indicated.

After the "822 level" incident, Atchison followed regular procedures to get guidance on what to do if he observed defects outside his assigned area of responsibility. He was instructed that he should report obvious defects, which he did on NCR 296. Randy Smith testified that applying the AWS porosity standard is a matter of judgment and that Atchison acted properly in reporting the NCR 296 defects. Yet, because not all of the defects he reported turned out to be unacceptable, later after careful, formal inspections, Brandt concluded Atchison was "continually" rejecting acceptable welds. I note that the log of NCR's filed during December 1981 to April 1982 shows a number of defects which were marked void as not being a violation or not being a nonconforming condition. Apparently, it was not unusual for a supervisor to disagree with an inspector's judgment. Randy Smith, Atchison's immediate supervisor, disagree with Atchison's judgment on the "822 level" incident and some of the porosity indications on NCR 296, yet he rated Atchison highly, recommended him for promotion after these incidents, and on his own initiative told Brandt that he disagreed with

firing Atchison. Brandt asserts he was able on the basis of these incidents alone to make a judgment that Atchison was an incompetent visual inspector.

Brandt singled out Atchison as identifying too much porosity in connection with mapping the defects on NCR 296. But Atchison was only involved in the first map, not the second which Brandt also thought showed too much porosity. He reached this conclusion, moreover, because the pipe whip restraints had already been inspected several times, although he never looked at them carefully himself. He also was irritated about the mapping process taking so long, although he himself pointed out that these are large structures and every inch of every weld had to be inspected. Brandt himself had ordered the re-mapping; he also had to order a third inspection when he learned from CB&I that their contract permitted them to fabricate to ASME, rather that AWS, standards. Brandt acknowledged that he had been mistaken to order the mapping under AWS standards and that all the inspectors and supervisors involved were responsible for it taking so long, not just Atchison.

Brandt also claims he concluded Atchison's ability as a liquid penetrant inspector was questionable because, when Brandt looked at the welds at the 822 level which Atchison was supposed to be inspecting, Brandt thought they had been ground or "flapped" too much. One aspect of preparation of a weld for a liquid

penetrant test where necessary is to grind the surface to remove irregularities that might interfere with the test. (See ASTM (American Society of Testing and Materials) E 165, Section 6.2 "Surface Conditioning Prior to Penetrant Inspection," cross referenced in AWS D1.1. However, one must be careful not to grind the weld too much which can close over the discontinuities for which one is testing (See ASTM Appendix A1.1.1.7)) There would appear to be some fairly difficult lines to draw here, yet Brandt claims he was able to conclude, without further investigation, that Atchison, who had just recently been tested and certified in Level II liquid penetrant examination, receiving a composite score of 93.4, was using improper technique. Brandt's dismissal of all of Atchison's performance evaluations and inspection certificates as overinflated for pay purposes is not credible. It would call into question the good faith of at least four other supervisors who signed these documents.)

The parties vigorously dispute whether Atchison initiated and filed NCR 296 or simply signed his name to an NCR which Brandt ordered to be written. But Brandt knew that Atchison had initiated the process which led to NCR 296. When Brandt went to look at the pipe whip restraints he saw that some defects had been marked with a black marker. Brandt asked Randy Smith by whom and how the defects in CB&I welds, which were beyond his inspectors'

scope of responsibility, had been identified. Smith told him that Atchison had been asked by a craft supervisor to look at the pipe whip restraints before they were installed.

The reactions of Brandt, Tolson and Purdy to NCR 361 and the "pow wow" note do not seem logical. They all say they interpreted the note as an attempt to use the NCR as leverage to obtain a promotion. But the note was addressed to Randy Smith who had already recommended Atchison for promotion and who himself had no authority to grant promotions. Randy Smith himself did not interpret the note as an attempt to obtain a promotion. If Atchison intended to use the NCR as leverage, in order to get his point across, he would have been depending on the chance that Smith would send the note to Brandt, and the even more unlikely coincidence that Mike Foote would give Brandt the note, the NCR and the promotion recommendation together. None of them ever asked Atchison what he meant by the note, nor did they ask Smith what he thought Atchison was conveying by it. Brandt admitted that the evidence supporting his interpretation of the note was so slim he did not include it as a reason in his memo to Purdy transferring Atchison.

Both Brandt and Purdy gave varying, inconsistent explanations of the written reasons given for transferring and firing Atchison in documents written on that day. The ALJ's finding that these explanations are not credible is fully supported. Brandt's

memo to Purdy said "Subject employee has been assigned responsibility of inspection of pipe whip restraint installation. Subject employee has demonstrated a lack of ability in performing assigned task, in that he refuses to limit his scope of responsibility to pipe whip restraints and insists on getting involved in other areas outside his scope. Consequently, his services are no longer required." On its face, this memo appears to base Brandt's action on Atchison's reporting of defects beyond his inspection responsibility. (Since Atchison was told that he should report such defects, this virtually amounts to an admission that a motivating factor in Brandt's action was Atchison's protected activity.) At the hearing, however, Brandt said what he meant by "getting involved in other areas outside his scope" was that Atchison was wandering all around the plant, talking a lot on the telephone, talking to other inspectors, "stirring" them up, trying to help them find other jobs, and generally not attending to his inspection duties. Brandt's basis for this at the time was flimsy at best. Brandt saw Atchison in his office with other inspectors, saw him on the telephone, overheard pieces of conversations in which others said Atchison was stirring things up, and saw Atchison in various locations around the plant for what Brandt thought was nonbusiness activity. Brandt could not see how Atchison would have the time to review the TUGCO training manual when he was the only pipe whip restraint installation inspector. But if Atchison was the only such inspector, and, as he testified before the

NRC, he had from 8-13 crews' work to inspect, it would be understandable that he was in many different areas and that craft supervisors sometimes could not get inspections done right away. Brandt never made any efforts to verify that Atchison was conducting personal business during working hours, or that his phone calls and meetings with other inspectors were non-work-related. No evidence was presented to corroborate Brandt's assertion that Atchison was "stirring up" the other inspectors, and acting as "placement officer" to find them other jobs.

Brandt attempted to interpret the language of his memo to include Atchison's deficiencies as an inspector (perceived by Brandt). Brandt claimed that "lack of ability in performing assigned task" meant inability to perform visual inspections which Brandt had observed in connection with the "822 level" and NCR 296 incidents. Yet Brandt admitted that he would not have fired Atchison for the "822 level" and NCR 296 incidents, though he was leaning in that direction. Brandt claims that he could conclude on the basis of these incidents that Atchison was incompetent. But he would have been going contrary to the judgment of Atchison's supervisor, who observed his work every day, and the instructors who had given Atchison high marks

on formal tests which included practical application of knowledge of testing procedures.

At different points in his testimony, Purdy gave different reasons as the basic reason for firing Atchison. At one point, he said the reason was Atchison's refusal to limit the scope of inspections; later he said it was poor technical proficiency. Yet the only matter discussed on April 12 among Purdy, Tolson and Brandt was the "pow wow" note. As the ALJ pointed out, if Purdy were firing Atchison in part for incompetent performance, he could be expected to more carefully investigate Brandt's evaluation of Atchison. When Atchison worked in Purdy's group before being transferred to Brandt's group, his supervisor, Richard Ice, rated him as an efficient, very thorough inspector. He had scored high in all his tests and been rated excellent or outstanding by his supervisor under Brandt, Randy Smith. Indeed, Mike Foote, who was Randy Smith's supervisor and reported to Brandt, had gone to Purdy before April 12, 1982 to try to get Purdy to convince Brandt to promote Atchison. All these facts support the ALJ's conclusion that Purdy's reasons for his inability to place Atchison in his group and discharging Atchison were not credible and were pretextual. With respect to Purdy's claimed inability to place Atchison after Brandt transferred him, Richard Ice testified that he had an outstanding request for an additional inspector and would have accepted Atchison. Moreover, Purdy never explained why he could order

Brandt to take Atchison originally, but could not stop Brandt from transferring Atchison back less than two months later. Complainant therefore has proven that Brown & Root violated 42 U.S.C. 5851 when it transferred and fired him.

I cannot agree, however, with the ALJ's recommendation that Atchison should be reinstated to his former position and that Brown & Root's actual knowledge of Atchison's misrepresentations about his background should not act as a cut-off date for back pay. The ALJ emphasized that the warning on the application form is conditional. But, use of the conditional phrase "may be cause for... dismissal" on the application form only seems intended to provide flexibility so that dismissal would not be required in all cases for minor inconsistencies or misstatements. Similarly, when asked what would happen to an employee who falsified his education, Purdy's qualification of his response, saying "the employee would probably have been terminated" only indicates caution on his part not to make a blanket statement. Purdy's comment was that falsifying documents is "probably the most significant deficiency" with which a quality control inspector can be charged. Moreover, since this case involves whether Atchison should have been reinstated since his discharge in 1982, or whether June 1982 should be a cut off date for back pay, Brown & Root's personnel practices in 1980 are not particularly relevant. More relevant is Purdy's uncontradicted and unrebutted testimony that another employee was forced to

resign for falsification of an application form shortly before Atchison was fired. In comparable situations, courts and agencies have upheld the discharge, or have refused to order the reinstatement of, employees who have falsified information about their background. See Tube Turns, A Division of Chemetron Corp., 260 NLRB No. 82, March 1, 1982, 109 LRRM 1200; NLRB v. Huntington Hospital, Inc., 550 F.2d 921 (4th Cir. 1977). Atchison's transgression was not limited, as he suggests, to the act, "remote in time," of falsifying the application. He repeated the misrepresentation each time he was evaluated or certified for NDE testing procedures, including the promotion recommendation which he solicited from Randy Smith in April, 1982. In Chemetron Corp., supra, a very similar case in which an employee misrepresented his background on his application and later forged cards to show that he had taken certain courses, the NLRB held that the employer was justified in firing him even though he was a competent worker.

The ALJ implies that Brown & Root should be estopped from taking action on Atchison's misrepresentation because it had in its possession since 1980 an unaltered copy of a response from Tarrant County Junior College showing that Atchison did not receive a degree. Brown & Root received this information in response to a routine inquiry, and there is no indication that it was ever seen or consciously disregarded by management officials. It seems clear that Brown & Root would have terminated Atchison

as soon as they discovered his misrepresentation even if he had not engaged in protected activity. Filing a complaint under the ERA, and even proof that the firing itself was improperly motivated, should not insulate him from other, legitimate, management actions. Therefore, I do not think it would be appropriate, under my authority to order affirmative action to abate a violation found (29 C.F.R. 24.6(b)(2)), to require reinstatement of an employee who repeatedly misrepresented material facts about his background, or to order back pay beyond the date of discovery of the misrepresentation.

Therefore, Brown & Root is ORDERED:

1. To pay complainant Charles A. Atchison back pay from April 12, 1982 to June 15, 1982, less interim earnings and all legal deductions;

2. To pay to complainant's counsel, Kenneth J. Mighell, the amount of $7,875.00 for fees and expenses.

3. To remove all reference to complainant's April 12, 1982 termination from his personnel files.

Raymond J. Donovan
Secretary of Labor

Dated at Washington, D.C.
June 10, , 1983.

CERTIFICATE OF SERVICE

Case Name: Charles A. Atchison v. Brown & Root, Inc.

Case No: 82-ERA-9

Document: Decision and Final Order

This is to certify that copies of the foregoing document were sent to the persons listed below on June 10, 1983.

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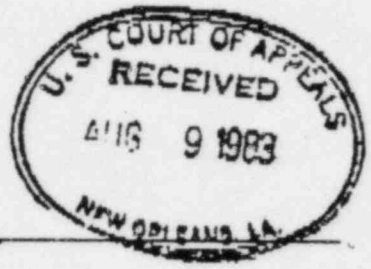
IN THE UNITED STATES
COURT OF APPEALS FOR
THE FIFTH CIRCUIT



BROWN & ROOT, INC., Petitioner,	:	
v.	:	PETITION FOR REVIEW
RAYMOND J. DONOVAN, SECRETARY OF LABOR, Respondent.	:	

Brown & Root, Inc., acting pursuant to Section 210(c)(1) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851(c)(1), and Rule 15 of the Federal Rules of Appellate Procedure, hereby petitions this honorable court for review of the Decision and Final Order issued by the Secretary of Labor in Atchison v. Brown & Root, Inc., 82-ERA-9, on June 10, 1983.

Respectfully Submitted,
BROWN & ROOT, INC.

Richard K. Walker
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(Tel.: 202-857-9800)
Attorneys for Petitioner

LAW OFFICES OF
DEBEVOISE & LIBERMAN

1200 SEVENTEENTH STREET N W
WASHINGTON, D C 20036
TELEPHONE (202) 887-0400

M E M O R A N D U M

TO: Michael D. Spence

FROM: Nicholas S. Reynolds
Richard K. Walker

DATE: August 11, 1983

SUBJECT: Commencement of Appeal in the Atchison Case

As we had planned, the Petition for Review (attached) of the Secretary of Labor's decision in the Atchison case was filed with the United States Court of Appeals for the Fifth Circuit in New Orleans on Tuesday, August 9, the last day of the 60 day period allowed for filing such a petition. If Atchison does not cross-petition by August 12, the issues before the court of appeals should be confined to those issues concerning points in the Secretary's decision that we contend are erroneous.

The administrative record in the case must be prepared and filed by the Department of Labor within 40 days after the Secretary is served with our Petition, and the record therefore should be filed by the fourth week in September. Our initial brief in the appeal will be due 40 days thereafter, or by the first week in November.

RKW:ee

cc: R.J. Gary
L.F. Fikar
T.R. Locke, Jr.
B.R. Clements
D.N. Chapman
H.C. Schmidt
(with attachment)

Enclosure

CERTIFICATE OF SERVICE

This is to certify that, on August 9, 1983, I served copies of the foregoing Petition for Review by first class mail, postage prepaid, on the persons listed below:

Charles A. Atchison
744 Timber Oaks
Azle, TX 76020

Curtis L. Boer
Area Director
U.S. Department of Labor/ESA
819 Taylor Street
Room 7A12
Ft. Worth, TX 76102

Virginia Dean, Esq.
Office of the Solicitor
U.S. Department of Labor
555 Griffin Square Building
Suite 707
Dallas, TX 75202

Kenneth J. Mighell, Esq.
Cowles, Sorrells, Patterson
and Thompson
1800 Main Place
Dallas, TX 75250

Administrator
Wage and Hour Division
Employment Standards Admin.
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Frederick J. Killion

Frederick J. Killion, Esq.

SEP 13 1982

U.S. Department of Labor

[illegible]
600 South Street, Room [illegible]
New Orleans, Louisiana [illegible]

September 7, 1982

SEP 10 1982

DON, IN CASE FOLDER

Mr. Larry Richardson
Quality Control Manager
Tompkins-Beckwith, Inc.
P. O. Box 390
Hahnville, Louisiana 70057

SUBJECT: Charles A. Atchison vs. Tompkins-Beckwith, Inc.

This letter is to notify you of the results of our compliance actions in the above case. As you know, Charles A. Atchison filed a complaint with the Secretary of Labor under the Energy Reorganization Act on August 9, 1982. A copy of the complaint, a copy of Regulations, 29 CFR Part [illegible], and a copy of the pertinent section of the statute were furnished in a previous letter from this office.

Our initial efforts to conciliate the matter revealed that the parties would not at that time reach a mutually agreeable settlement. An investigation was then conducted. Based on our investigation, the weight of evidence to date indicates that Mr. Charles A. Atchison was a protected employee engaging in a protected activity within the ambit of the Energy Reorganization Act, and that discrimination as defined and prohibited by the statute was a factor in the actions which comprise his complaint. The following [illegible] were [illegible] in this determination:

Mr. Atchison was terminated only after he testified at the hearing of the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission in connection with the licensing of Texas [illegible] Comanche Peak Steam Electric Station.

Although Tompkins-Beckwith maintains non-validity, the date of [illegible] of Mr. Atchison directly corresponded to the date of the hearing at which Mr. Atchison was scheduled to testify ([illegible]) thus potentially rendering his unavailability for testimony. This is reinforced with the fact that there were quite a few present and past connections between personnel of Tompkins-Beckwith and Brown and Root. For example, C. T. Brandt, Quality Assurance Manager for EBASCO at Comanche Peak and the man who requested Atchison's discharge at Comanche, formerly was with Tompkins-Beckwith at Waterford III; Jerry Wagner, the

man who solicited and processed Atchison's application, formerly worked for Brown & Root; and Pete Foscolt, Project Manager for Tompkins-Beckwith at Waterford III, up until approximately eight months ago was employed by Brown & Root at their home offices and at Comanche Peak.

Although the company maintains that Mr. Atchison was terminated because he was fired by his previous employer there are others still in the firm's employ in a like capacity, who were fired by their previous employers.

In spite of the company's position that there was a very crucial need to have persons with backgrounds beyond reproach for their reinspection program there seems to have been what could be called a deliberate avoidance, by the persons involved in the hiring of these inspectors, to check their background. Consider: (1) There was no background check made of the applicants; (2) There was no effort made to require a full disclosure of the reasons for Atchison's firing from Brown & Root although there was ample reason to question this by several persons in the employment process; (3) Information early on was available that there was some "question" about Atchison's former employment as he advised that he would have to attend a hearing; and (4) No questions were raised as to the "ambiguity" of Mr. Atchison's college transcript and no action was taken to reconcile same.

Lastly, although newspaper articles had appeared in local Ft. Worth-Dallas newspapers starting as early as June 7, [illegible] count of articles] running that Mr. Atchison had been fired from Brown & Root, the only ones that preceded Atchison's discharge were the ones of July 7 and July 30, 1982 - days corresponding to Mr. Atchison's return to or the hearing.

This letter will notify you that the following action is required to abate the violation and provide appropriate relief:

1. Reinstatement to his position and pay at the Waterford III project exactly as it existed before August 2, 1982.

2. Payment of all wages and benefits that he would have received since his termination on August 2, 1982 to the date he is reinstated.

3. Payment of all expenses incurred because of his termination and period of unemployment.

4. Removal of all references to his termination from his personnel files.

This letter will also notify you that if you wish to appeal the above findings and remedy, you have a right to a formal hearing on the record. To exercise this right you must, within five (5) calendar days of receipt of this letter, file your request for a hearing by telegram to:

The Chief Administrative Law Judge
U. S. Department of Labor
Suite 700, Vanguard Building
1111 - 20th Street, N. W.
Washington, D. C. 20036

Unless a telegram request is received by the Chief Administrative Law Judge within the five-day period, this notice of determination and remedial action will become the final order of the Secretary of Labor. By copy of this letter I am advising Mr. Charles A. Atchison of this determination and right to a hearing. A copy of this letter and the complaint have also been sent to the Chief Administrative Law Judge. If you decide to request a hearing it will be necessary to send copies of the telegram to Mr. Charles A. Atchison and to me at U.S. Department of Labor, Wage Hour Division, Room 701, [illegible] Street, New Orleans, Louisiana [illegible], phone [illegible]. After I receive the copy of your request, appropriate preparations for the hearing can be made. If you have any questions do not hesitate to call me.

It should be made clear to all parties that the role of the Department of Labor is not to represent the parties in any hearing. The Department would be neutral in such a hearing which is simply part of the fact-finding process, and only allows the parties an opportunity to present evidence for the record. If there is a hearing, an Order of the Secretary shall be based upon the record made at said hearing, and shall either provide appropriate relief or deny the complaint.

Thomas E. [illegible]
THOMAS E. [illegible]
Area Director

cc: Charles A. Atchison

Chief Administrative Law Judge

Nuclear Regulatory Commission

William Otter, Administrator
Wage-Hour Division

A. A. Fansey, ARA
Wage-Hour Division

Patrick D. Coleman, Attorney

U.S. Department of Labor

Room 7A12, 819 Taylor
Fort Worth, Texas 76102

April 22, 1982

Mr. Gordon Purdy
QA Manager
Brown & Root, Inc.
P. O. Box 1001
Glen Rose, Texas 76043

Dear Mr. Purdy:

This will notify you that the Wage and Hour Division of the U. S. Department of Labor has received a complaint from Charles A. Atchison alleging discriminatory employment practices in violation of the Energy Reorganization Act. This charge was received by our office on April 16, 1982. We have enclosed a copy of the complaint, a copy of Regulations, 29 CFR Part 24, and a copy of the pertinent section of the Act.

The Act requires the Secretary of Labor to conduct an investigation into the violations alleged. This case has been assigned to Assistant Area Director Robert J. Portman whose first action will be to try and achieve a mutually agreeable settlement through conciliation. If this is not attainable, the law requires that an investigation be conducted as soon as possible. You are encouraged, and will be given every opportunity, to present any relevant information or evidence to our representative.

Thank you for your cooperation in this matter.

Sincerely,

Curtis L. Pool
Area Director

Enclosures

cc: NRC

U.S. Department of Labor

Room 7A12, 819 Taylor
Fort Worth, Texas 76102

CERTIFIED MAIL NO. 2717047

April 22, 1982

Mr. Charles A. Atchison
744 Timberoaks
Azle, Texas 76020

Dear Mr. Atchison:

This will acknowledge receipt of your complaint against Brown & Root, Inc. alleging violations of the Energy Reorganization Act. Your complaint was received in this office on April 16, 1982.

The Act requires the Secretary of Labor to notify the person named in the complaint of its filing and to conduct an investigation into the alleged violations. Consequently, we are providing Brown & Root, Inc. with a copy of your complaint and advising of the Wage and Hour Division's responsibilities under this Law. We have enclosed a copy of the pertinent section of the Act, and a copy of Regulations, 29 CFR Part 24 for your information.

This case has been assigned to Assistant Area Director Robert Forman whose first action will be to try and achieve a mutually agreeable settlement through conciliation. If this is not attainable an investigation will be conducted as soon as possible. If you have further evidence, please give it to our representative who will contact you on this matter. If you have any questions do not hesitate to call me or our representative at 334-3417.

Sincerely,

Curtis L. Poer
Area Director

Enclosures
FLSA
Reg. 24

cc: NRC ✓

Form Approved
Budget Bureau No. 44-R0304

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION	EMPLOYMENT INFORMATION FORM

This report is authorized by Section 11 of the Fair Labor Standards Act. While you are not required to respond, submission of this information is necessary for the Division to schedule any compliance action. Your identity will be kept confidential to the maximum extent possible under existing law.

1. PERSON SUBMITTING INFORMATION

A. Name (Print first name, middle initial, and last name)
Mr. CHARLES
Miss
Mrs.
Ms.

B. Date

C. Telephone number: (Or No. where you can be reached)

D. Address: (Number, Street, Apt. No.)

(City, County, State, ZIP Code)

AZ

E. Check one of these boxes
☐ Present employee of establishment ☒ Former employee of establishment ☐ Other ______ (Specify: relative, union, etc)

2. ESTABLISHMENT INFORMATION

A. Name of establishment

B. Telephone Number

C. Address of establishment (Number, Street)

(City, County, State, ZIP Code)

D. Estimate number of employees

E. Does the firm have branches? ☐ Yes ☐ No ☐ Don't know
If "Yes", name one or two locations ______

F. Nature of establishment's business (For example; school, farm, hospital, hotel, restaurant, shoe store, wholesale drugs, manufacturer of stoves, coal mine, construction, trucking, etc.)

G. If the establishment has a Federal Government or federally assisted contract, check the appropriate box(es).
☐ Furnishes goods ☐ Furnishes services ☐ Performs construction

H. Does establishment ship goods to or receive goods from other States?
☐ Yes ☐ No ☐ Don't know

3. EMPLOYMENT INFORMATION

(Complete A, B, C, D, E, & F if present or former employee of establishment; otherwise complete F only)

A. Period employed (month, year)
From: ______
To: ______ (If still there, state present)

B. Date of birth if under 19
Month ______ Day ______ Year ______

C. Give your job title and describe briefly the kind of work you do

Form WH-3 (Rev. Oct. 1980)

D Method of payment

$_____ per _____
(Rate) (Hour, week, month, etc.)

L Enter in the boxes below the hours you usually work each day and each week (less time off for meals)

M	T	W	T	F	S	S	TOTAL

F CHECK THE APPROPRIATE BOX(ES) AND EXPLAIN BRIEFLY IN THE SPACE BELOW the employment practices which you believe violate the wage and hour laws. (If you need more space use an additional sheet of paper and attach it to this form.)

- ☐ Does not pay the minimum wage
- ☐ Does not pay proper overtime
- ☐ Does not pay prevailing wage determination for Federal Government or federally assisted contract
- ☐ Discharged employee because of wage garnishment (explain below)
- ☐ Excessive deduction from wages because of wage garnishment (explain below)
- ☐ Employs minors under minimum age for job
- ☐ Other (explain below)

Approximate date of alleged discrimination

_____

(NOTE: If you think it would be difficult for us to locate the establishment or where you live, give directions or attach map.)

COMPLAINT TAKEN BY:

_____

_____

It is requested that the Wage and Hour Division attempt to conciliate with my employer the matter about which I have furnished information and for this purpose, I authorize the Wage and Hour Division to use my name and the information I have furnished in such a conciliation effort.

_____
Signature

_____
Date