UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Ivan W. Smith, Chairman
Sheldon J. Wolfe, Alternate Chairman
Gustave A. Linenberger, Jr.

In the Matter of	)	Docket No. 50-289-SP
	)	ASLBP 79-429-09-SP
METROPOLITAN EDISON COMPANY	)	(Restart Remand on Management)
	)	
(Three Mile Island Nuclear Station, Unit No. 1)	)	July 9, 1984

MEMORANDUM AND ORDER
FOLLOWING PREHEARING CONFERENCE

On June 28, 1984 the Licensing Board presided over a prehearing conference among the parties for the purpose of defining the issues and providing for prehearing procedures in the proceeding remanded by the Appeal Board's Decision of May 24, 1984, ALAB-772, 19 NRC ____.

I. Issues to be Heard

A. Training

The Appeal Board expressly remanded to this Board "that part of the proceeding devoted to training, for further hearing on the views of the licensee's outside consultants (including the OARP Review Committee) in light of both the weaknesses in licensee's training program and testing and the subsequent changes therein . . . ." Slip opinion at 76-77.

Counsel for Licensee described the broad issue on operator training as:

> The purpose of the remanded hearing is to obtain the present views of the OARP Review Committee and other Licensee consultants, who previously have testified on Licensee's training program, as to the adequacy of Licensee's current licensed operator training program taking into account the cheating incidents and other subsequently acknowledged deficiencies in the training program reflected in LBP-82-86 and ALAB-772. Their testimony should at a minimum address the questions raised by the Appeal Board in Section III.C of ALAB-772 as to the impact of the cheating incidents and other deficiencies on their view of the adequacy of the training program. Licensee personnel may supplement their testimony as necessary to provide details of the training program. Other parties may support or challenge, by testimony or cross-examination, any of the testimony of Licensee's consultants or personnel. No testimony is to be provided on Licensee's non-licensed operator training program or the adequacy of the NRC licensed operator examination process.

Ff. Tr. 27,217.

The NRC Staff essentially agrees with the Licensee's statement of the training issue but would emphasize the managerial competence and integrity implications of the cheating and other noted deficiencies in the training program. The Staff specifically agrees that the training for non-licensed personnel and the adequacy of the NRC operator training program examination should not be litigated.

The Intervenors argue a broader scope, essentially asserting that the entire training program should be relitigated on remand including the adequacy of the NRC licensing examination. The Union of Concerned Scientists (UCS) would have non-licensed operator training also included.

Our view of the scope of the training issue on remand is that the adequacy of the training program to prepare the TMI-1 licensed operators to operate the plant safely is the broad issue, but that the respective subissues are limited to the implications of cheating and other program

deficiencies specifically discussed in Section III.C of ALAB-772. While ALAB-772 would seem to remand the training issue solely for the views of Licensee's consultants (id. at 76-77), the right of the other parties to confront those views necessarily broadens the scope of the hearing on training to broader aspects of cheating and the other deficiencies noted in ALAB-772 as Licensee acknowledges. However this ruling is also limited by the recognition that the undisturbed findings of the Licensing Board on the training program and the Appeal Board's findings not included in the remand are res judicata in the remanded proceeding. For example, there will not be a new cheating litigation on remand.

Much of the dispute among the parties was a result of the confusion concerning the difference between the issues to be heard and the evidence to be considered relevant to those issues. For example, Three Mile Island Alert (TMIA) sought a ruling that the so-called "RHR" report must be included as a specific subissue.[1] That is a question of evidence, not of issues, and as such it is premature.

---

1 Rohrer, Hibler & Repogle, Inc. (RHR) were Licensee's consultants who issued a report "Priority Concerns of Licensed Nuclear Operators at TMI and Oyster Creek and Suggested Action Steps," March 15, 1983. While we have not studied the report, we can foresee the possibility that portions of it might be relevant to the remanded training issues. Staff's suggestion that the Appeal Board foreclosed any consideration of the RHR report in ALAB-774 (June 19, 1984), 19 NRC ____, is incorrect and misses the mark. The Appeal Board in fact noted the possible relevance of the report to management competence and operator cheating. Id. at 11-12. The Appeal Board's ruling pertained to Licensee's duty to inform, not the substance of the reports. Id. at 11-15.

We easily dispose of UCS' motion to include the training of non-licensed personnel as an issue on remand, because we are without jurisdiction to consider that aspect of the training program. It simply was not a part of the remand order in ALAB-772 as UCS acknowledges.

However we cannot so easily resolve the dispute among the parties as to whether the adequacy of the NRC operator licensing examination should be included. At the outset of its discussion of Licensee's training program, the Appeal Board raised questions about the effectiveness of the NRC (and Licensee) operators' examinations to measure an operator's ability to run the plant, queried whether the format of the examinations encouraged cheating and noted that the record does not answer the questions. ALAB-772, Slip opinion at 63. However the Appeal Board noted later that it had no jurisdiction to require the Staff to adapt or abandon its examination duties (id. at 75) and did not mention the NRC examinations in the express remanding language (id. at 76-77). Thus the parties can find support in either direction.

It is true, as observed by the Appeal Board, that the adjudicating boards do not have jurisdiction to direct the Staff in the administration of the NRC examinations. But, in this proceeding, by virtue of the notice of hearing, the boards have the jurisdiction and the duty to determine the sufficiency of the NRC operators' licensing examinations in determining whether the unit should be permitted to restart. 10 NRC 141, 144. Moreover, the Licensing Board, exercising that jurisdiction, found in favor of restarting the unit partly as a result of a finding that the NRC operators' examination provides

reasonable assurance that the operators can safely and competently operate the plant. LBP-81-32, 14 NRC 364, 455. The Appeal Board could have returned that jurisdiction to the Licensing Board. The question is, did it?

The OARP Committee stated that one of its objectives is to "assure operators are fully qualified through the administration of the Company and NRC written and oral examination." Licensee Ex. 27, at 34. The Licensing Board noted that objective in its initial decision. 14 NRC at 451. Therefore a reasonable inference can be drawn that the Appeal Board intended a look at whether the OARP Committee's reliance on the NRC examinations is still sound in light of the demonstrated defeatability of the NRC examinations and other deficiencies noted by the Appeal Board.

On the other side of the question, there are several factors which indicate that the sufficiency of the NRC operators' examinations, as such, should not be considered on remand. First, as the Appeal Board noted, the sufficiency of the examination is a generic issue and it is beyond our jurisdiction to control. Second, the Appeal Board seems to have satisfied its concerns about the sufficiency of the NRC examinations by endorsing our earlier recommendation to the Commission to make the operator training and testing process a meaningful one. ALAB-772, slip opinion at 75-76. Finally, the Appeal Board gave very careful consideration to the NRC examination process and we are confident that, if it had intended to remand that matter as a discrete issue, it would have said so in certain terms.

Therefore we conclude that, whatever deficiencies the Appeal Board found in our handling of the NRC operators' license examination issue during the management phase of the proceeding, it chose not to disturb our relevant findings. For now at least, the issue is res judicata.

However, our ruling would not preclude the parties from challenging the evidence presented by Licensee's consultants to the extent that they continue to rely upon the NRC examination as a measure of operator competence, but any such determination must be made in the context of the particular evidentiary situation. Finally, the debate on the NRC operator examination process has served to better define the significance of cheating in the remanded proceeding. The remanded cheating issue is not about the cheating itself, but rather what do Licensee's consultants make of the need to cheat perceived by the operator license candidates.

B. TMI-1 Leak Rate Issue

The Appeal Board remanded as an issue the matter of "Leak Rate Falsification at TMI-1." Slip opinion at 149-154. Counsel for UCS proposed a statement of the issue which, with minor exception, captures the views of all of the parties. We borrow from UCS' proposal:

> The purpose of the remanded hearing on TMI-1 leak rate testing is to address allegations of leak rate testing falsification at TMI-1, prior to the TMI-2 accident, and the leak rate testing procedures and practices presently in effect for TMI-1 and to determine the implications of [any Board] findings on leak rate falsification with respect to the . . . competence and integrity of [Licensee's management].

Tr. 27,270.

Mrs. Aamodt believes that present leak rate testing practices and procedures are irrelevant but we disagree with her. Counsel for Licensee asserts that the statement of the issue should have identified the allegations referred to. We agree, but the Appeal Board discussion of the TMI-1 leak rate background probably provides all of the specificity Licensee needs, and any remaining uncertainty can be cured during discovery. Accordingly we adopt UCS' proposal as the statement of the TMI-1 leak rate issue as it is modified above.

There is, however, one aspect of this issue overlooked by the Board and therefore not discussed at the prehearing conference. The Appeal Board expects this Board to consider the TMI-1 leak rate issue in conjunction with the remand to us on the Hartman allegations. ALAB-772, at 154. This is a logical association of topics. Since this Board is presently stayed by the Commission from proceeding on the Hartman allegations, we will defer proceeding on the TMI-1 leak rate matter until further guidance from either the Appeal Board or the Commission.

C. Mr. Dieckamp's Mailgram

Licensee proposed the language of the remand order as the statement of the Dieckamp mailgram issue:

> (1) whether anyone interpreted the pressure spike and containment spray, at the time, in terms of core damage, and (2) who or what was the source of the information that Dieckamp conveyed in the mailgram. [Emphasis in original.]

ALAB-772, slip opinion at 134.

T e Board believes that to implement fully the Appeal Board's intent, item (1) must be joined to item (2) more expressly. Therefore we add the third facet to the issue: (3) whether, when, and how any interpretation of core damage was communicated to Mr. Dieckamp. All parties agreed that the thread of any communication from the control room to Mr. Dieckamp must be traced. The Board also accepts other subissues proposed by Intervenors on the mailgram issue. Specifically, as proposed by TMIA, whether Mr. Dieckamp took steps to correct any misstatement upon learning the facts. Did he expect the telegram to be relied upon and to be important to the regulatory process? Tr. 27,277. TMIA also proposes that the issue encompass whether Mr. Dieckamp should have known the facts and whether he made any effort to discover them. Tr. 27,279. We agree. The Aamodts correctly note that the mailgram issue relates to Licensee's competence. Tr. 27,278.

TMIA also proposes that an inquiry should be made as to whether the mailgram (to Congressman Udall) was relied upon. Tr. 27,277. Absent a better showing of relevance by TMIA, we do not accept the actual effect of the mailgram as a subissue. The thrust of the issue as it has been considered by both boards and the various investigating organizations is the implication of the mailgram with its inaccuracies to Mr. Dieckamp's integrity. The information in the mailgram was patently material and had the capacity to influence action. The Board needs no help in understanding that aspect of the matter. Whether those receiving the mailgram believed it and acted upon it, or even refused to believe Mr. Dieckamp at all, cannot shed light on Mr. Dieckamp's state of mind,

thus his integrity, when he sent the communication. However, we note that TMIA was apparently distracted from its discussion of the matter at the prehearing conference (Tr. 27,277-78) and we do not now foreclose the possibility that the effect of the telegram could have some relevance presently unrecognized.

II. Schedule

The Intervenors will report to the Board their proposal for the assignment of lead-intervenor responsibilities by July 11, 1984 and we shall rule shortly after that. Discovery on the training and mailgram issues may begin immediately. All discovery requests and demands shall be served in time for completing responses and depositions not later than September 30, 1984. Direct testimony in written form shall be served not later than October 15, 1984. The Board shall provide by a later order for the commencement of the evidentiary hearing which we tentatively schedule for about November 1, 1984.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD

Sheldon J. Wolfe
ADMINISTRATIVE JUDGE

Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

July 9, 1984