

332

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DOCKET NUMBER
PROD. & UTIL. DIV. 50-445/446
02-2

APPLICANTS' MOTION TO OPEN THE RECORD
REGARDING DISMISSAL OF ROBERT HAMILTON

Texas Utilities Electric Company, et al., Applicants, have offered proofs to the Board regarding the reasons for, and the circumstances surrounding, Applicants' termination of Robert Hamilton's employment of Comanche Peak. Applicants move the Board to open the record to receive these materials into evidence.

The Board's Finding

Regarding Mr. Hamilton's termination, the Board has found that "we consider the grounds for dismissal to be pretextual."¹ The Board reached this conclusion, along with several subsidiary findings, on the basis of Mr. Hamilton's testimony alone.

¹ Memorandum and Order (Emergency Planning, Specific Quality Assurance Issues and Board Issues), LBP-83-60, 18 N.R.C. 672 (September 23, 1983).

Applicants' Offer of Proof

Applicants have submitted the following materials to the Board relevant to Mr. Hamilton's termination:

- Deposition of James N. Scarbrough and David Ethridge (as a panel) (Aug. 1, 1984); Deposition of David Ethridge (Aug. 19, 1984). Ethridge, now a QC inspector, was the craft painter who requested the inspection that Hamilton, Krolak and Shelton refused to perform. Scarbrough was Ethridge's foreman.
- Deposition of Samuel T. Hoggard (Aug. 1, 1984). Hoggard is, and was at the time Hamilton, Krolak and Shelton refused to perform their inspection, Senior Safety Supervisor for Comanche Peak. Hoggard responded to QA supervisors' queries regarding the safety of the rotating platform access rail, and personally inspected to rail to determine its condition.
- Deposition of Houston F. Gunn (Aug. 1, 1984). Gunn was the only other paint inspector working on the day shift at the time Hamilton refused to inspect work on the rail.
- Deposition of Neill A. Britton (Aug. 18, 1984). Britton was Hamilton's supervisor, and is familiar with all events leading to Hamilton's termination.
- Deposition of C. Thomas Brandt (Aug. 16, 1984) (part). Brandt was the non-ASME QA Supervisor, with day-to-day responsibility for directing the activities of protective coatings QC inspectors and supervisors. Brandt recommended that Hamilton, Krolak and Shelton be dismissed for refusal to perform assigned duties.
- Deposition of Gordon R. Purdy (Aug. 16, 1984) (part). Purdy, as the senior Brown & Root QA representative on site, accepted Brandt's recommendation and terminated Hamilton, Krolak and Shelton.

Significance of the Offer of Proof
to the Existing Record

Applicants' evidence contradicts numerous facts as to which Hamilton testified, and on which the Board relied in concluding that Applicants' reason for terminating his employment was pretextual. In summary:

Hamilton Allegation

Neither Hamilton nor Krolak nor Shelton had ever inspected areas on the rail; they were afraid for their lives to do so on the day they were terminated.

Krolak went to make the inspection, but returned and reported to Hamilton that the rail was unsafe; Hamilton physically climbed up there, looked it over, and concluded that it was unsafe.

There was no scaffolding on which to stand or walk, just the rail.

Applicants' Evidence (Witness)

Both Krolak and Shelton worked on the rail prior to the day they were terminated; indeed, they inspected the work performed by Ethridge when he was a painter (Scarborough/Ethridge); an inspection report signed by Krolak shows that he performed an inspection on the rail one week before he refused to work on the rail, and an inspection report signed by Shelton shows that he worked on the rail ten days before he refused to perform the inspection (Ethridge).

Neither Krolak nor Hamilton appeared on the rail that day (Scarborough/Ethridge).

Scaffolding had been placed between the rail and the liner plate; in fact, the craft painters could not have worked on the liner plate without scaffolding. Scaffolding was in place at the specific area that Hamilton, Krolak and Shelton refused to inspect (Scarborough/Ethridge, Britton, Brandt).

There were oil and grease on the rail.

The safety cable was slack, and a person slipping off the rail would have fallen at least eight feet before his lanyard caught him.

Hamilton was genuinely afraid to work on the rail.

A day shift QC inspector was available to perform this inspection, but was not asked to do so.

Not only were there no oil and grease on the rail, but it was free from any other debris; because craftsmen spent so much time working at that elevation, they were especially vigilant for contaminants on the rail (Scarborough/Ethridge, Hoggard, Britton).

The 10,000-pound test safety cable was taut, with little slack. A person would have fallen two feet before being caught by his safety lanyard (Britton, Hoggard).

Numerous craftsmen worked at that elevation, and three QC supervisors and the chief safety officer inspected the rail after Hamilton voiced his refusal for safety reasons; told of their findings and the possible result of his continued refusal, Hamilton commented, "They're bluffing" (Scarborough/Ethridge, Britton, Hoggard).

The only other ongoing QC protective coatings inspector on the day shift, Houston Gunn, worked in a fabrication shop and was never asked to perform field inspections. Gunn suffered from acrophobia so acute that, the first and last time he was asked to perform a field inspection at altitude at Comanche Peak, he had to be helped down. In seven years, Gunn was never again asked to perform inspection work involving climbing, and only once during that time, for one day, did he even work in the field (Gunn, Britton).

A night shift QC inspector was asked to perform this inspection on the rail, refused, but was not terminated.

Hamilton was assigned a new supervisor three days before he refused to perform the inspection, which had something to do with his termination.

Hamilton's termination was based on something other than his refusal to perform duties as assigned.

Hamilton's termination did not follow established procedures.

The testimony of Applicants' witnesses, it is clear, contradicts Hamilton's testimony in virtually every significant respect.

Joe Fazi and Bill Dunham, the only two ongoing QC coatings inspectors on the night shift at the time, did not refuse to perform this work. In fact, the inspection was performed the night that Hamilton refused to do it. No other QC inspectors were asked to do this work, and no one other than Hamilton, Shelton and Krolak refused to do it (Britton).

The ongoing QC coatings inspectors and the backfit QC coatings inspectors were consolidated into a single group under Britton's supervision on the day before Hamilton's refusal to perform the inspection (Britton).

Brandt, who recommended Hamilton's dismissal after confirming the safe condition of the rail and giving Hamilton several chances to undertake the work, based his decision exclusively on Hamilton's refusal to perform duties as instructed. Purdy's approval of Brandt's recommendation was strictly limited to the same facts (Brandt, Purdy, Britton).

Hamilton's termination was directly related to the policy governing refusal to obey instructions; Hamilton left his supervisors little choice but to terminate him (Purdy, Brandt, Britton).

The Board Should Open The Record and
Admit Applicants' Evidence Regarding the
Reasons for Hamilton's Dismissal.

In candor, Applicants might have sought to introduce this evidence in response to Mr. Hamilton's allegations shortly after he presented his testimony to the Board. If we made a mistake in this regard, we can only contend that it was an honest mistake.

Intervenor CASE failed to file any proposed findings respecting any of Hamilton's testimony, much less the reasons for his termination. The Board's July 29, 1983 Proposed Initial Decision first identified the reasons for Hamilton's dismissal as an issue in this proceeding; like so many other issues discussed in that order, it appeared that the termination issue would remain open to further evidence. By the time the Board issued its September 23, 1983 Memorandum and Order, however, the Board had apparently closed the issue.

Perhaps the most pertinent authority supporting the admission of this testimony is this Board's statement regarding its responsibility with respect to defaulted issues (such as those raised by Hamilton's testimony):²

[T]he Board is not just an umpire calling balls and strikes. We must assure that relevant and material evidence bearing on the admitted contention is sufficiently well developed so that we can prepare a reasoned decision resolving the issues before us. In this case, we have sworn testimony concerning an admitted contention about quality assurance deficiencies; the Board must be satisfied that the allegations in this testimony have been adequately answered.

² Memorandum and Order (Reconsideration of Order of September 23, 1983), LBP-83-69, 18 N.R.C. 1084 (Oct. 25, 1983), slip op. at 2-3.

It is precisely to ensure that the Board has before it a full and complete record that it should admit Applicants' profered testimony. Two important factors support admission of this evidence.

First, the testimony of Applicants' witnesses fundamentally contradicts both the facts as to which Mr. Hamilton testified, and the inferences to be drawn from those facts. We believe that evaluation of these facts should lead the Board to reconsider its findings regarding the reasons for which Hamilton was dismissed.

Second, the Board itself has deemed the circumstances prompting Mr. Hamilton's dismissal as "particularly serious".³ As the Board later acknowledged, however, the record on Hamilton's termination is not complete.⁴ To the extent that the Board considers Mr. Hamilton's dismissal as serious, then we submit that it should possess all facts relevant to that matter in order to reach a reasoned decision.

To leave the Board's findings on this issue undisturbed in light of the evidence that Applicants offer would represent a distortion in the decision-making process. We suggest that for the Board to exclude these materials would be error amounting to a miscarriage of justice.

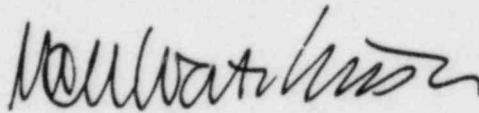
³ Memorandum and Order (Sept. 23, 1984) at 19.

⁴ Memorandum and Order (Oct. 25, 1983) at 6.

Conclusion

The Board should admit Applicants' offer of proof on this issue, consisting of the deposition testimony of Scarbrough, Ethridge, Hoggard, Gunn, Britton, Brandt and Purdy. Applicants will, of course, make these witnesses available for cross-examination at the request of the Board or any party.

Respectfully submitted,



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August 27, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion to Open the Record Regarding Dismissal of Robert Hamilton" in the above-captioned matter were served upon the following persons by hand-delivery,* overnight delivery,** or by deposit in the United States mail,*** first class, postage prepaid, this 27th day of August, 1984:

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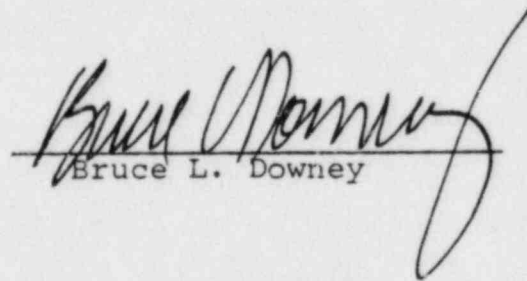
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