UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	Construction Permit Nos. CPPR-139
UNION ELECTRIC COMPANY	)	CPPR-140
(Callaway Plant, Units 1 and 2)	)	

WILLIAM SMART'S NOTICE OF HIS REINSTATEMENT

On November 1, 1978, William Smart won the grievance pursued on his behalf by his union. The arbitrator's opinion (Exhibit 1) found Mr. Smart's discharge unjustified and ordered him reinstated with back pay. Mr. Smart was informed of the decision by his union on November 3, 1978. On November 15, 1978, Mr. Smart returned to work for the Daniel Construction Co. (Daniel) on the Callaway nuclear plant construction project.

While Mr. Smart has thus been reinstated through his union grievance mechanism, his appeal of the Licensing Board's failure to decide whether the NRC has the authority to order remedial action when it finds retaliatory firing of a construction worker who has provided the NRC with safety-related information is not moot. He and other workers who are watching the treatment of his case by the NRC need to know what protection he will have if he continues to cooperate with the NRC. While he won one round, after a long layoff, with the help of his union, this remedy may not always be available to him and other workers.

The newly-enacted section 210 of the Energy Reorganization Act of 1974,*/ which is to be enforced by the Department of Labor, has not yet been implemented and tested. A worker asked to rely on this provision to get his job back might well expect a long delay while it is implemented and litigated. On the other hand, he would have more confidence that establishment of the NRC's authority to get his job back would have a deterrent effect on his being fired in the first place because of licensees' awareness of the broad scope of the NRC's regulatory power. Because of his continuing need for knowing whether the NRC can protect him and the NRC Staff's position that it cannot, Mr. Smart's appeal is not moot. This proceeding is the only avenue for Mr. Smart to get prompt review of the NRC Staff's misapprehension.

Even if the Appeal Board disagrees with Mr. Smart's position on the NRC's remedial authority (or his position on the need to decide the issue in this proceeding), the NRC investigation of the cause of his firing must still be allowed to continue. In undertaking that investigation, the NRC Staff had reasonable grounds to suspect that Daniel had acted to impair the NRC's access to information about construction defects at Callaway. If

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*/ President Carter signed the NRC FY 1979 Authorization Act into law, P.L. 96-601, on November 6, 1978. Section 10 of the Act, amending the Energy Reorganization Act of 1974, is included as Appendix A to William Smart's appeal brief of November 2, 1978.

this were so, the NRC needs to investigate, even if it could not do anything for "poor Mr. Smart," as such interference might well call Daniel's dedication to quality control into question and require more intensive investigation of the Callaway construction by the NRC.

The NRC's suspicion (or probable cause) is heightened by the arbitrator's decision which found that Mr. SMart was not fired for good cause (Exhibit 1 at 13), but rather was fired on a pretext because of the general foreman's perception that Daniel wished to be rid of Mr. Smart. (Id. at 11.) Indeed, Daniel argued in the grievance proceeding that it should not be required to take Mr. Smart back because of his "disloyalty." (Id. at 13-14.) The arbitrator correctly noted that this legal argument "casts additional doubt upon the Company's motivation for the original discharge last March." (Id. at 14.) These findings, although not binding on the NRC, imply that it is not an academic question for Mr. Smart to ask this Appeal Board whether the NRC Staff is right about what it can do for Mr. Smart if he risks Daniel's wrath again by communicating with the NRC.

In light of the events which have occurred since the submission of his appeal brief on November 2, 1978, Mr. Smart submits that neither his appeal nor that of Union Electric (as to the NRC's authority to investigate) is moot.

Respectfully submitted,

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November 17, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	Construction Permit
UNION ELECTRIC COMPANY	)	Nos. CPPR-139
(Callaway Plant, Units 1 and 2)	)	CPPR-140

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing notice to the following persons, this 17th day of November, 1978.

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In the Matter of the Arbitration between

Daniel Construction Company,
Callaway Project, A Division of
Daniel International Corporation,
Employer

and

International Association of
Bridge, Structural, Ornamental
Ironworkers, Machinery Movers
and Riggers, Local Union No. 396,
Union

FMCS Case No. 78K/17143

Appearances

For the Company

H. J. Starr, Project Manager
L. Lloyd Laughlin, Attorney
G. Daniel Ellzey, Attorney

For the Union

Barry J. Levine, Attorney
Joseph J. Hunt, Business Representative
William Smart, Grievant

ARBITRATOR'S OPINIONS AND AWARD

This arbitration arises under the collective agreement between the Company and the Union (and several other unions) entered into September 30, 1975 for the duration of the construction of the Union Electric Company's Callaway County Nuclear Units 1 and 2.

In accordance with that agreement, the parties selected the undersigned arbitrator through the Federal Mediation and Conciliation Service. By mutual agreement, the hearing was held in Jefferson City, Missouri on Friday, September 22, 1978. The parties appeared as set forth above, presented witnesses and documentary evidence and cross-examined the other's witnesses.

Exhibit 1

The arbitrator tape recorded the proceeding and, on the request of the Company, provided it with a copy. It was agreed that the parties would file briefs postmarked no later than Saturday, October 14 and they were received by the arbitrator on October 16 and 17, thus closing the hearing.

Re Arbitrability

At the outset of the hearing, the Company contested the arbitrability of the grievance on the grounds that the Union's request for arbitration came too late. The Union argues that the Company's objection comes too late because it was never raised prior to the arbitration. While both sides vigorously pursued this argument, I find it unnecessary to resolve because another element in the case disposes of the issue of arbitrability.

The discharge occurred on March 21, 1978. Article VII of the Project Agreement provides, in pertinent part, after setting out the several steps from 1 to 5:

> "Sec.2 In the event the dispute is not resolved by the procedures provided above within twenty (20) days after the filing of the written grievance, either party may, within the following ten (10) days, serve upon the other written notice requesting that the dispute be resolved by arbitration."
>
> and
>
> "Sec. 6 Any grievance not filed in writing with the Employer within ten (10) days from the day of the occurrence on which the grievance is based shall be forever barred."

Initially the Union took the position that it formally grieved the matter only in May so that it met the Section 2 time limits. However, when I inquired about the impact of Section 6, which requires filing of a grievance

within 10 days of its occurrence, it asserted that the grievance was timely filed by the Union's March 22, 1978 letter to Mr. T. C. Smith of Personnel from Joseph J. Hunt, Jr., the Union's Business Agent. That letter states in part:

> "This is an official notice that we intend to invoke the grievance procedure as authorized in our Project Agreement in the termination of our member, William Smart, on March 21st."

However, the Union's request for arbitration (Joint Exhibit No. 3) was dated May 12, 1978.

The Company vigorously contends that this filing far exceeds the time limits specified by the Project Agreement in Section 2. Under Section 2, once a timely grievance is filed, there are 20 days within which the grievance procedure operates. If by the expiration of that 20 days, the dispute remains unresolved, either party "may, within the following ten (10) days, serve upon the other written notice requesting that the dispute be resolved by arbitration". This means that if a party seeks arbitration, it must do so within these time limits. The Union's written request for arbitration clearly falls outside the formally specified time limits.

However, as so often is the case, management and union practice departs substantially from the formalities of the agreement. The Project Personnel Director, who handled this and other craft grievances under this Project Agreement, testified without contradiction that the practice went as follows for discharge cases. As soon as the Company received any notification of Union dissatisfaction with a disciplinary action, he (the Personnel Director) and a Union official would get together as soon as possible but in no event later than 10 days after the disputed occurrence was handled in the 4th step. The several steps are set out in Section 1 of Article VII.

"Section 1. In the event that any dispute arises out of the interpretation or application of this Agreement, exclusive of questions of jurisdiction on work, the following procedures shall be pursued as the exclusive means for resolving the dispute:

"Step 1. The Steward shall meet with the foreman involved.

"Step 2. If the grievance is not settled in Step 1, the steward and the foreman shall meet with the area superintendent.

"Step 3. If the grievance is not settled in Step 3, the Business Representative of the Union shall meet with the general superintendent.

"Step 4. If the grievance is not settled in Step 3, the Business Representative of the Union shall meet with the general superintendent or the project manager.

"Step 5. If the grievance is not settled in Step 4, an International Representative shall meet with a representative of the Employer's Corporate Labor Relations Group, upon prompt request of either party.

In this case, Mr. Hunt called him and wanted to get together about this grievance on March 23. But, the Personnel Director was unable to do so. Mr. Hunt expressed concern over meeting the 10 day time limit imposed, not by the formal Project Agreement, but by the parties' (including other craft union parties) practice. The Personnel Director assured Mr. Hunt that he would waive any time beyond the ten days by adding whatever delay was caused by his inability to meet. In fact, they met within the ten days. However, this episode is significant to show that the parties operated under the Project Agreement quite differently from its formal time requirements. Delays caused by inability of the parties' representatives to get together were added to the time limits and the agreement-prescribed limits were waived.

So, the Personnel Director testified, the Union had 10 days within which to request arbitration starting after the Director of Labor Relations denied the grievance at the 5th Step. The Union made that request on May 12, when it received the Company's oral decision denying the grievance.

The Company's formal notification of that action was in its letter of May 19, the completion of the 5th Step. Hence, the demand for arbitration was timely and the dispute is arbitrable.

The Issues

The sole questions before the arbitrator are:

(1) Was the Grievant, William Smart, discharged by the Company for disobeying a foreman's order?

(2) If he was, was termination proper?

(3) If he was not, what is the appropriate remedy?

Evidence, Findings and Discussion

The Grievant, Mr. William Smart, had worked in various capacities -- General Foreman, Foreman and Journeyman -- in the Ironworkers craft at the construction of the Callaway Generating Plant, a nuclear plant, being constructed for the Union Electric Company. The discharge in dispute occurred on March 21, 1978 based upon events of the prior day. This account focuses upon the events of those two days; earlier events will be discussed later for their possible utility in explaining actions and decisions that occurred on March 20 and 21, 1978.

On March 20, the Grievant worked as a Journeyman Ironworker in the Pump House under the direction of Foreman David Smashy who was directing a gang of journeymen Ironworkers laying rods for reenforced concrete. The Pump House is a large building and the rod laying and

tying was being done about 30 feet below ground level in a hole about 200 feet by 200 feet. At the time in question, about 4 P.M., Mr. Smashy stood several feet above where the gang was working

A General Foreman directs several Foremen, who, in turn direct thei gangs. Mr. Charles Hathcock, was the General Foreman directing Mr. Smashy's gang (among others). Mr. Hathcock and Mr. Smashy testified that the General Foreman, talking across a considerable distance of about 40 feet from 10 feet above, told Mr. Smashy to have someone on his gang straighten a bent rod. Mr. Smashy testified that he called Mr. Smart by name, that Mr. Smart stood up from the work he was doing, tying rods, and looked at him. He said that Mr. Underwood, a "permit man" (not an Ironworker in the local whose members were doing the job), was working next to Mr. Smart and also stood up. Mr. Smashy said that he told Mr. Smart, from a distance of about 10 to 20 feet, to straighten the rod and indicated which one, but that Mr. Smart "smirked", that he thinks Mr. Smart shrugged his shoulders, shook his head <u>once</u> from side to side and went back to the work of tying rods. (Mr. Hathcock had left the Pump House by this time, apparently.) Mr. Smashy did not repeat the order. The Foreman also testified that a Laborer Foreman, Mr. Mellor, standing nearby said something like, "He's not going to do it". Mr. Smashy told two other Ironworkers (Hennich and Simmons) to straighten the rod and they did so.

In addition to the gang of Ironworkers, Carpenters and Laborers were at work in the Pump House, but, Mr. Hathcock and Mr. Smashy testified that no machinery was going and that it was "dead quiet". As the Company brief states and I observed, Mr. Smashy speaks very quietly, unusually so. Nonetheless, Mr. Smashy "assumed" that Mr. Smart heard him and that the alleged head shake indicated a purposeful refusal. (For the reasons noted below, I do not fully

credit Mr. Smashy's testimony.) Mr. Smashy did not tell anyone of the incident that evening (quitting time was 4:30 P.M.) although he testified that he regarded the incident as a challenge to his authority of a kind which could not be permitted. If one such successful challenge takes place, he said, his authority as Foreman would be undermined. However, there was no testimony that any Ironworker observed the incident. A Laborer Foreman, Mr. Mellor, reportedly observed the exchange but later, according to the Assistant Project Manager, said he did not want to be involved in any way.

After the starting time the next day, Mr. Smashy told Mr. Hathcock that "Bill Smart refused to straighten the rod". (He did not on this occasion tell Mr. Hathcock that a short time earlier Mr. Smart had allegedly been insubordinate; nor did he tell anyone else. That supposed incident could not have influenced Mr. Hathcock's decision to discharge Mr. Smart.) Mr. Hathcock asked him if he would be willing to sign papers discharging Mr. Smart. Mr. Smashy indicated that he would and later did so when Mr. Hathcock (not he) decided to discharge Mr. Smart. Soon after the Smashy-Hathcock conversation, they took Mr. Smart from the Pump House and went with him to Robert Cross, the Ironworker Steward.

When the alleged incident was recounted to Mr. Cross in Mr. Smart's presence, the latter said that he had heard no such order. Mr. Smashy asked Mr. Smart if he was hard of hearing. Mr. Smart said, "That's none of your goddam business". I regard Mr. Smashy's question as a bit schoolmarmish and rhetorical, if not sarcastic. Mr. Smart's sharp reply was, in such a setting, mild stuff. (In an office, it might be another matter.) Moreover, in the construction trafts, journeymen and foremen frequently change roles. Indeed, in the past, Mr. Smashy had played Journeyman to Mr. Smart as Foreman. Personal formal deference plays no part in these relationships. Of course,

the Journeyman must perform his job as the Foreman directs and may not undermine the Foreman's authority. But, in this setting, Mr. Smart's response does not convey an insubordinate attitude; it expresses no more than irritation and carries the message,"Don't treat me like a schoolboy". And Mr. Smashy must not have taken offense because, after Mr. Smart asserted that he had not heard the order described, Mr. Smashy asserted that he was willing to take Mr. Smart back on his gang. This willingness suggests that Mr. Smashy either credited the good faith of Mr. Smart's denial or, possibly had some doubt whether Mr. Smart had heard him. That willingness certainly is inconsistent with the view that Mr. Smart had been insubordinate, because Mr. Smashy was quite firm that a successful insubordination would be fatal to his authority. It also is inconsistent with the alleged earlier insubordination, the alleged "smirk" and the one negative wag of the head he attributed to Mr. Smart. Indeed, as I heard those testimonial details, they immediately struck me as embellishments designed to strengthen a questionable story.

The record does not affirmatively establish that Mr. Smart heard the order, if it was given. I find it unbelievable that it was "dead quiet" in a work place where 5 or 6 Ironworkers are tying rods, and a gang of Laborers and a gang of Carpenters all are doing their thing. Although Mr. Hathcock and Mr. Smashy testified that the compressor and other machines were not operating (although they often were operating in the Pump House), I find that the record does not establish that Mr. Hathcock effectually communicated his order across a distance of 40 feet and a height differential of about 10 feet or that the softspoken Mr. Smashy gave a direct order to Mr. Smart that effectively communicated itself to his hearing and consciousness.

Nor does conscious, purposeful disobedience of Mr. Smashy's alleged order make sense in view of Mr. Smart's other undisputed conduct that day.

Mr. Smart, who testified last in the proceeding, said that at the time of the alleged order and insubordination, he was in fact directing the crew, at Mr. Smashy's request, to fix up the rods so that they lay properly spaced and aligned after Mr. Smashy could not get them straightened away. Mr. Smart undertook that task. Mr. Smashy confirmed the incident but said that it had occurred earlier in the day. I find it unbelievable that Mr. Smart would be so industrious, obliging and workmanlike early in the afternoon and insubordinately refuse a simple, direct order soon thereafter.

It is true that Mr. James Underwood, a "[illegible] man" no longer employed on this project, testified that Mr. Smashy called Mr. Smart's name at about the time of the alleged order and that he (Underwood) and Smart straightened up from tying rods and looked at Mr. Smashy, who then said nothing. When I heard this testimony, I did not believe the last part of it. It appeared to me (even before I heard Mr. Smart's differing version) that Mr. Underwood was trying to be helpful to Mr. Smart; but he was not convincing in the role. At first, in the discussion with Mr. Cross, Mr. Underwood denied any knowledge of the incident. Mr. Underwood heard some of the story during the discussion with Mr. Cross and Mr. Hathcock on March 21. Just what he concocted and when and what was true, I could not figure out. Unfortunately, it is not uncommon for fellow employees to try to provide obliging testimony. However, it often does not fit the circumstances. Mr. Underwood's partial substantiation of Mr. Smashy's version (as well as his partial contradiction) did not persuade me.

Mr. Smart's testimony struck me as direct, candid and not fashioned for the occasion. I think it most likely that he was involved in the realigning task at the time of the disputed incident. But even if he were tying rods, it appeared to me that his denial that he heard and refused a direct order (which

I am not at all sure was given) was candid. Mr. Smart is a bright, quick and strong-minded person. His single mindedness fits his description that when he is immersed in an activity, he becomes oblivious to what is happening around him. So that, if the order were given (and I'm somewhat dubious about that), it makes sense that it might not have registered. Especially given Mr. Smashy's quiet manner, it would very likely not penetrate Mr. Smart's consciousness when he was engrossed in a task. It takes an actually communicated order, one apprehended by the employee, before insubordination can take place. The record does not affirmatively establish, as it must to justify a dischsrge for insubordination, that such an order was in fact given or effectively communicated. Mr. Smashy's testimony alone does not establish the requisite showing and Mr. Smart's testimony casts serious doubt upon it. Nor do I find confirmation in Mr. Mellor's statement. Although Mr. Smashy, Mr. Cross and Mr. Sykora each reported Mr. Mellor's assertion that Mr. Mellor said, "He's not going to do it" (or some such thing), it doesn't confirm that Mr. Mellor did so candidly nor that he would testify that the circumstances indicated that Mr. Smart probably heard and comprehended an order. Lacking an opportunity to explore what Mr. Mellor would say he heard and saw, I cannot attach any probative weight to the substance of the report of what he said to others.

But, even if the record did establish an order communicated and actually defied (about which I entertain some doubt), Mr. Hathcock, the General Foreman who decided upon Mr. Smart's discharge, clearly did not make the decision to discharge Mr. Smart because of that alleged insubordination. He testified that he reached that conclusion immediately after talking to Mr. Smashy and before the conference with Mr. Cross. Early in his testimony, the General Foreman also asserted that this decision was influenced by Mr. Smart's allegedly inadequate performance a few weeks earlier when Mr. Smart was a Foreman. But

that story came in so many versions by the witness, that it became unbelievable and made it appear that the witness was casting about to give greater substance to his decision to fire Mr. Smart for insubordination. As that version began to unravel, it emerged that soon after Mr. Smart was assigned as a Foreman under Mr. Hathcock's jurisdiction, the latter observed a yellow truck driven by the project's Assistant General Superintendent repeatedly circling the area where Mr. Smart worked. In Mr. Hathcock's opinion, that activity could only have the purpose of keeping Mr. Smart under surveillance, a surveillance unusual for its intensity. In addition, Mr. Hathcock was instructed not to allow Mr. Smart to work in several areas, a situation Mr. Hathcock found hampering to the performance of his job as a General Foreman. So, he testified that he deduced that Mr. Smart would have to "toe the line pretty close", that Mr. Smart had to be "extra careful" and was in a "special position" because of the allegations Mr. Smart made to the Nuclear Regulatory Commission (although he also testified that Mr. Smith, the Company's Project Personnel Director, told him to treat Mr. Smart the same as anyone else). He testified that no one "ever came right out" and told him to fire Mr. Smart, but quite clearly that is what the sum of the Company's special attention to and restrictions upon Mr. Smart added up to for Mr. Hathcock. The probability that Mr. Hathcock decided to use the incident as an excuse is reenforced by Mr. Hathcock's reference to Company pressure on him about Mr. Smart at the conference with Mr. Cross. So that when the situation arose on March 21, he agreed, he was just as happy to get rid of the headache that Mr. Smart represented and gave the Company the decision he thought it wanted. Also, the record casts some doubt upon the Company assertion that discharge without some warning would be the normal treatment of a non-flagrant failure of a Journeyman to follow a Foreman's order. The Union established that several separations for insubordination were in collusion with the foremen involved to enable the employees to collect their pay

immediately whereas a quit would entail a delay of a week or so. And, the record shows, a verbal warning would be the appropriate sanction for a non-serious failure to follow an order, with the seriousness left to the Foreman's discretion.

Mr. Smart also alleged that, at the interview with Mr. Cross, it was agreed by Mr. Smashy and Mr. Hathcock to take Mr. Smart back but that Mr. Hathcock decided to fire him when Mr. Smart said that he would prefer to work elsewhere as a journeyman and so he was fired, not for insubordination, but for his desire to transfer. However, it appears to me that, while Mr. Smashy clearly expressed his willingness to take Mr. Smart back on his gang, Mr. Hathcock (as he himself asserted) never did more than keep silent, did not actively agree, and did not depart from his first decision to discharge Mr. Smart. After the conference with Mr. Cross, Mr. Wallace L. Sykora, Assistant Project Manager, was informed of the General Foreman's decision to discharge Mr. Smart for alleged refusal to follow Mr. Smashy's order. Mr. Sykora testified that he took special pains in inquiring whether adequate evidence existed to show the refusal (although he did not talk with Mr. Smart) because he was aware that that action would be publicized and subject the Company to possible criticism if seemingly unjustified. When he inquired whether Mr. Smart had heard the order, it was Mr. Hathcock who assured him that he had. But, Mr. Hathcock was not present and at this juncture would be trying to justify his decision. He also spoke to Mr. Smashy who told him, as he had testified, that he had assumed Mr. Smart heard him. But, it is not at all clear that Mr. Sykora was told that Mr. Smashy was willing to take Mr. Smart back on his gang; while the evidence is inconclusive, it seems more likely that Mr. Sykora was not told of this. The Laborer Foreman reportedly told Mr. Sykora that he had told Mr. Smashy that Mr. Smart was not going to do what he had been told to do, but that soon thereafter he called Mr. Sykora to say that he had a wife and baby and did not want

to get involved. (Mr. Cross had, without doubt, told Mr. Mellor that Mr. Smart might sue the Company, the Union and Mr. Mellor, the Laborer. But Mr. Smart testified that Mellor, the same day, apologized to him and told him that he was just trying to support the Foreman. As noted, I cannot attach much weight to the reports of what the Laborer Foreman said one way or another.

After this inquiry, Mr. Sykora ratified Mr. Hathcock's decision to discharge Mr. Smart. Nothing that Mr. Sykora said or did on March 21 indicates an improper motivation on his part or in his actions on behalf of the Company. But Mr. Hathcock made the basic decision on behalf of the Company to discharge Mr. Smart and that decision was not based upon "good cause". It is hard for the Company's decision to rise above this polluted source even though there is no evidence that the General Foreman advised Mr. Sykora of the real reasons for his decision.

Higher levels of supervision ordinarily do not disown the decisions of supervisors unless they have affirmative reasons for doing so. In this situation, Mr. Sykora relied on the General Foreman's version of what occurred. That version necessarily was shaped to justify the decision but did not disclose his actual motivation. The General Foreman is the agent of the Company; his motivation for the discharge is attributable to it.

Hence, I conclude that the Company did not sustain its burden of showing that it discharged Mr. Smart for refusal to follow a Foreman's order.

Remedy

In its brief, the Company urged that should the discharge be found not to have been made for good cause, back pay but not reinstatement would be the proper remedy. It based this suggested course on the ground of the Grievant's testimony at the hearing and his adamant opposition to the Callaway Project as

manifested in the "numerous allegations [he] made to the Nuclear Regulatory Commission". And, while the Company states that "It welcomes constructive criticism for employees and recognizes the right of employees to address their complaints to Government agencies...this does not provide employees absolute license to openly display their disloyalty to the Company...Such disloyalty flies in the face of all rational employer-employee relations".

The Company made no such argument at the hearing and so the issue was not effectively raised. This is no mere procedural pecadillo. The other parties did not address the issue with their proof or in the Union's brief. Indeed, in the considerable discussions of what factual question was at issue, both company and Union agreed that it was whether the Company had good cause to discharge Mr. Smart because he did not obey a direct order of this Foreman. At the hearing, the Company took pains to avoid the issue of whether its discharge was motivated by Mr. Smart's activities in relation to the Nuclear Regulatory Commission.

The Company's argument about remedy and the issue of what employee activity militates against reinstatement simply were not addressed. Had the Company desired to raise those issues, it could have done so at the hearing. It chose not to. The effort comes too late in the brief.

Moreover, the request seems tantamount to arguing that even if the Company failed to establish good cause for discharge, the Arbitrator should find good cause in Mr. Smart's alleged disloyalty as discussed and explored at the hearing. Alternatively, it amounts to the proposition that if the Company violated the agreement by improperly discharging Mr. Smart, it could use that as a springboard for being quit of him for an entirely different reason, a reason which it had not asserted as grounds for discharge and which it impliedly disowned in the testimony of Mr. Sykora. Indeed, as noted, the request casts additional doubt upon the Company's motivation for the original discharge last March.

For all of these reasons, I conclude that the usual remedy for unjustified discharge, reinstatement, should be ordered.

AWARD: The Grievance is granted on the ground that the Company did not establish that Mr. Smart had been discharged for being insubordinate by disobeying a direct order from his Foreman. He is ordered reinstated with back pay and all incidents of employment that otherwise would have been his from March 21, 1978 onward.

Respectfully submitted,

Merton C. Bernstein

Merton C. Bernstein,
Arbitrator

November 1, 1978
St. Louis, Missouri