

6/3/86

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of:)	
)	
COMMONWEALTH EDISON COMPANY)	NO. 50-456
)	50-457
(Braidwood Nuclear Station,)	
Units 1 and 2))	

INTERVENORS', BRIDGET LITTLE ROEM, ET AL., RESPONSE
TO APPLICANT'S MOTION IN LIMINE - PUCKETT SETTLEMENT AGREEMENT

Applicant's Motion in Limine asks the Licensing Board "to enter an order barring all parties, their counsel and their witnesses from making any reference to, or submitting any evidence of, a settlement agreement entered into between Mr. Worley O. Puckett and Comstock Engineering", Edison Br. 1. That agreement was in settlement of a retaliatory firing charge brought under the Energy Reorganization Act of 1974, 42 U.S.C. 5851, on September 11, 1984.

Applicant contends that such evidence should be excluded under Federal Rule of Evidence 408, contending that it is not relevant to the allegations of harassment and intimidation of Comstock Quality Control ("QC") inspectors at Braidwood, and that the public policy favoring facilitation of settlements would be undermined by permitting introduction of the settlement agreement into evidence in this proceeding.

However, the Federal Rules of Evidence do not necessarily apply to NRC Licensing Board proceedings, but are merely looked

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to for "guidance." Southern California Edison Co. (San Onofre), ALAB-717, 17 NRC 346, 365 n. 32 (1983). In the circumstances of this case, Rule 408 should not be applied.

Rule 408, when applicable, precludes introduction of a settlement as evidence of admission of the validity of a claim. The policy underlying the Rule is two-fold: "(1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) ... promotion of the public policy favoring compromise and settlement of disputes." Advisory Committee's Note to Rule 408.

In this case, the first policy is not applicable, because the facts indicate that, in fact, Comstock settled Mr. Puckett's claim not because of a desire for peace, but rather as a "concession of weakness of position." And the favoring settlements policy, while applicable here, is outweighed by the more important public interest in the disclosure and determination of safety and quality assurance violations on a nuclear plant construction site. Cf. U.S. v. Gonzalez, 748 F.2d 74, 78 (1984).

The Facts

Mr. Worley O. Puckett, a witness for the intervenors, was hired by Comstock in May 1984 in the newly created position of Level III QC Inspector, whose duties included conducting a review

of Comstock procedures, test requirements for the more than 50 Level II QC Inspectors, review of the Level II's inspection work, and the resolution of inspection disputes. During the course of his employment with Comstock Mr. Puckett identified numerous instances of improper construction procedures, improper qualification of welders, and material traceability deficiencies. He ultimately recommended a complete stop work order for all welding activity to permit effective corrective action.

Mr. Puckett was subjected to harassment and retaliation because he raised these safety and quality concerns and was terminated on August 27, 1984. He filed a complaint with the U.S. Department of Labor ("DOL"), alleging violation of the employee protection provisions of the Energy Reorganization Act, 42 USC 5851. Puckett Letter, September 5, 1984, Exhibit 1 hereto.

On October 17, 1984, a conciliation of this complaint was attempted. However, Comstock refused, "indicating that any agreement to conciliate would be viewed in the industry as an admission of guilt and negatively impact the firm's competitive standing." Statement of Facts, R. Wyzguski, Compliance Officer, Exhibit 2 hereto.

Thereafter the U.S. Department of Labor Area Director sustained Mr. Puckett's complaint finding unlawful discrimination by Comstock against Puckett and ordered relief. Notes of Decision, November 6, 1984, Exhibit 3 hereto.

By telegram, Comstock moved to appeal the decision by the DOL. Comstock telegram, Exhibit 4 hereto. Only after Mr. Puckett presented his full case at an appeal hearing before an

Administrative Law Judge, did Comstock, before putting on its case, initiate discussions and subsequently settle Mr. Puckett's claim for a significant amount.*/

Argument

Applicant in support of its motion relies in large part on Rule 408 of the Federal Rules of Evidence. Rule 408 of the F.R.E. states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Applicant's two fundamental arguments with respect to F.R.E. 408 are," that settlement negotiations agreements and statements made in the course of settlement negotiations, are not relevant to prove the validity of the disputed claim and that the strong public policy of encouraging settlements must be facilitated." Edison Br. p. 5.

*/ The actual amount is shown in the settlement agreement, Exhibit 5 hereto, which is filed in camera in view of Applicant's request that it be kept confidential.

Relevance

Applicant's dubious point respecting the relevancy, or lack thereof, of the settlement agreement, rests upon a supposition that such an "offer and settlement may be motivated by a desire for peace rather than from any concession of weakness of position." Edison Br. p. 5, citing the F.R.E. 408, Advisory Committee note. However, the Committee note goes on to say, "The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances." Advisory Committee's Note to Rule 408.

In the Puckett case, the facts do indeed indicate Comstock's "concession of weakness in its position". This is evidenced by the combination of the following four facts:

(1) Soon after Mr. Puckett filed a complaint with the DOL, a conciliation was attempted by the DOL Area Director. However, as stated earlier, Comstock refused, indicating that an agreement to conciliate would be viewed as an admission of guilt.

(2) Comstock settled only after an adverse determination by the DOL area director.

(3) Even then Comstock settled only after it had observed the presentation of Mr. Puckett's full case on appeal, and in the midst of trial.

(4) Comstock settled Mr. Puckett's claim for a significant amount.

Clearly, the foregoing facts evidence a settlement by Comstock not because of a desire for peace, but rather as a "concession of weakness of position."

Public Policy

While it is true that a fundamental principle behind F.R.E. 408 is the public policy encouraging settlements, the vital public interest in the disclosure and determination of safety and quality assurance violations on a nuclear construction site outweighs the public interest in the settlement of civil disputes.

An analogous case, U.S. v. Gonzalez, 748 F.2d 74 (1984), involved a defendant who claimed that his conviction should be reversed because the trial court, in violation of F.R.E. 408, admitted statements the defendant made during negotiations to settle a potential civil claim that arose out of the identical set of facts. In affirming the admission of the statements. The Court of Appeals reasoned:

Rule 408 is premised on the idea that encouraging settlement of civil claims justifies excluding otherwise probative evidence from civil lawsuits. Fed. R. Evid. 408 advisory committee note. However, encouraging settlement does not justify excluding probative and otherwise admissible evidence in criminal prosecutions. The public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of civil disputes.

748 F.2d, at 78.

Similarly, the principles of Gonzalez should apply to the case at bar. The vital public interest in the disclosure and

determination of safety and quality assurance violations on a nuclear construction site "is surely greater than the public interest in the settlement of civil disputes." Id.

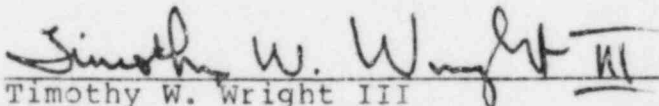
Conclusion

It is well settled that the Federal Rules of Evidence do not necessarily apply to NRC licensing Board proceedings but are merely looked to for "guidance". The facts of this case are inconsistent with the policies behind F.R.E. 408. The facts indicate that Comstock settled Mr. Puckett's claim not because of a desire for peace, but rather as "concession of weakness of position". While the public policy encouraging settlement is operable here, it is outweighed by the more important public policy respecting the disclosure and determination of safety and quality assurance violations on a nuclear plant construction site. In the circumstances of this case, Rule 408 should not be applied.

For the foregoing reasons, Applicant's Motion in Limine - Puckett Settlement Agreement should be denied.

Dated: June 3, 1986

Respectfully Submitted,


Timothy W. Wright III
One of the Attorneys for
Intervenors Rorem, et al.

Douglass W. Cassel, Jr.
Robert Guild
Timothy W. Wright III
109 N. Dearborn
Suite 1300
Chicago, Illinois 60602
(312) 641-5570

3672 Spring Grove Road
Beth, Ohio 45104
September 5, 1984

Exhibit 1

Dept. of Labor
Dept. of Wage + Hour Div.
Fed. Office Building - Room 2525
Cin., O. 45202 2 550 Main St.

Dear Sir :

I am writing in solicitation of your support.

It is my belief that I was unjustly terminated from my job at the Braidwood Nuclear Power Plant, Braidwood, Illinois.

I was hired by L.K. Comstock Engineering, Inc. on May 28, 1984 as a Level 3 Quality Control Inspector. I was terminated August 27, 1984.

It is a requirement within the Nuclear Industry that you take and pass prepared written ^{and} practical exams. I took these exams and received passing scores on all of them - most, with 100%. It is a fact that several QC Inspectors failed the exams more than once and are still employed. It is my understanding that I am the first QC Inspector to be terminated by L.K. Comstock, Inc. at the Braidwood Nuclear Power Plant. Their reason for termination was a low test score - 86%.

For a little better clarification as to why I feel that I was unjustly terminated, I will give you an outline of my qualifications and responsibilities as a QC Inspector.

I am a retired Navy Chief Petty Officer with twenty years service. My duties in the Navy were in Nuclear Repair as a Nuclear component welder. I have eight additional years in Nuclear Construction as a Qualified Level 2 Quality Assurance Inspector and Lead Mechanical Inspector. I also worked as a Project Weld Engineer.

I am very informed and ^{have} worked in all aspects with the various codes required in the Nuclear Industry - ASME, AWS, ANSI, and Con.

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Construction Federal Regulations. It is my contention that I was terminated because I was too quality-conscious. That would be like saying a person is too good a driver to drive on our highways.

I feel that I was being manipulated by L.K. Comstock Engineering, Inc., but as a professional in the Nuclear Industry, my every deed is governed by the codes and Construction Federal Regulations. These, along with my moral obligations to the surrounding communities of a Nuclear Power Plant, dictate that if work is being performed in direct violation of these codes, that I must take action to make corrections and report those items that cannot be corrected to be dispositioned. This is exactly what a level 3 QC Inspector is suppose to do, and I did.

In a review of L.K. Comstock procedures and documentation, I found numerous non-compliances. I reported these to management, and their first reaction was to try and justify them rather than initiate action to identify and correct them. I finally recommended, through a memo, that work be stopped, before any action was taken. Management was very upset that I recommended this stop-work order even though I am required to do so by the Construction Federal Regulations. I was terminated after I submitted the stop-work order due to management being quantity conscious rather than quality-conscious.

I have been contacted by the Nuclear Regulatory Commission, and may have asked me to come to the Region Three office for an interview. Based on this interview, a major investigation is forthcoming. I feel that this investigation will show that I was only doing the job that is required of a level 3 Inspector.

It is my sincere hope that if it is determined that I was unjustly terminated, that I will be reinstated in my position and receive full compensation for my loss of work and inconveniences.

I would like to add that during the three months I was employed with L.K. Comstock, I was never late or absent from work. I worked many hours of overtime and many Saturdays.

I am a professional - I know my job. I will appreciate any assistance you may afford me. Thank you.

Sincerely yours,

Coverage

The statute at issue is the Energy Reorganization Act. This Act authorized appropriations to the Nuclear Regulatory Commission for fiscal year 1970, among other purposes. The Act, per Sec. 210, covers subentrants of Commission licensees.

Comstock Engineering is a subcontractor of Commission licensee Commonwealth Edison Company. The Act, in Sec. 210(a)(1), refers to the Atomic Energy Act of 1954 and affords protection to any employee filing a complaint of violation of that statute. Therefore, any violations alleged under the Atomic Energy Act would be covered by the employee protection provisions of the Energy Reorganization Act. The extension of the employee protection provisions of the Energy Reorganization Act to allegations of violation of the Atomic Energy Act was confirmed by Bruce Berson, Regional Counsel for the Nuclear Regulatory Commission.

Complaint

Complainant Morley Puckett has alleged that he had been discharged by Comstock because he had discovered construction deficiencies in the Braidwood Nuclear Power Plant and had brought these discoveries to the firm's attention. Mr. Puckett had also filed a complaint regarding this matter with the Nuclear Regulatory Commission.

Protected Activity

Mr. Puckett engaged in a protected activity as defined by Part 24.2(b)(1) in that his notification to Comstock Engineering of construction problems is seen as the first step in the process which included his subsequent filing of complaints with the Nuclear Regulatory Commission and Wage-Hour.

Timeliness

Mr. Puckett was terminated by Comstock Engineering on August 27, 1984. He filed a complaint at the Cincinnati, Ohio, Wage-Hour office which complaint was written on September 6, 1984, and received on September 10, 1984.

Complainant's Position

In addition to the information provided in his complaint, Mr. Puckett provided additional evidence as noted in Mr. Puckett's position is that he had the background and qualifications for the Level III Quality Control Inspector. He also argues that the results of practical and written examinations he took while at Comstock were sufficiently successful for him to remain employed. He argues that he was conscientiously attempting to find problems and the solutions to these problems. He argues that he was performing the duties of his position in a competent manner and that his discharge resulted from his reporting of procedural deficiencies.

Conciliation

On October 17, 1984, a conciliation in this matter was attempted with Mr. Glen O. Smith, Jr., Labor Counsel for the firm. Also present at the meeting for the firm were: Thomas W. Trumble, Corporate Staff-Administration; Walter G. Cheney, Corporate Staff-Human Resource Manager; Robert E. Marino, General Manager, Quality Control Services; Irving F. Dewald, Quality Control Manager, Braidwood Site; Larry G. Seese, Assistant Quality Control Manager, Braidwood Site.

A conciliation was attempted but the firm refused, indicating that any agreement to conciliate would be viewed in the industry as an admission of guilt and negatively impact the firm's competitive standing.

Respondent's Position

The position of Comstock Engineering in this matter is represented by

Comstock argues that Mr. Puckett does not have the competence necessary to successfully perform at the Level III Quality Control Inspector position. Comstock said that Mr. Puckett's performance in the examinations administered by the company was not at a sufficiently high level. Comstock also argues that Mr. Puckett has committed procedural errors. The firm also said that Mr. Puckett was hired to provide solutions to problems and that he had not done so.

Other Data

Employee interviews support Mr. Puckett's contention that he was competent to perform the duties of the Level III Quality Control Inspector position. Inspector indicated that he also had not seen a welder's stamp that was to have been present in one of the examinations given to Mr. Puckett and for which he was downgraded because he did not locate this stamp.

Indication of Findings

During a discussion with Area Director New it was decided that Mr. Puckett's complaint had merit because no objective criteria had been developed to determine the minimum successful score for a level III inspector in two of the examinations which the complainant had been said to fail and because the errors or mistakes committed by Mr. Puckett were not of sufficient magnitude to cause his dismissal in such a short period of employment.

Disposition

On November 4, 1984, a letter indicating the findings of investigation in this matter was forwarded to the respondent with copies to the complainant, the Nuclear Regulatory Commission, and the Chief Administrative Law Judge. This letter specified the actions necessary to make Mr. Puckett whole.

On November 12, 1984, Comstock Engineering requested a hearing before an Administrative Law Judge.

R. Wzruski
Compliance Officer

U.S. Department of Labor

Employment Standards Administration
 Wage and Hour Division
 230 South Dearborn, Room 412
 Chicago, Illinois 60604
 Telephone: 312/353-8145



November 6, 1984

Reply to the Attention of:

Mr. T. Trumble
 Corporate Administrator
 Comstock Engineering, Inc.
 912 Fort Duquesne Blvd.
 Pittsburgh, PA 15222

Re: Worley O. Puckett Vs.
 Comstock Engineering, Inc.

Dear Mr. Trumble:

This letter is to notify you of the results of our compliance actions in the above case. As you know Worley O. Puckett filed a complaint with the Secretary of Labor under the Energy Reorganization Act on September 11, 1984. 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 Worley O. Puckett 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:

1. With regard to the examinations Mr. Puckett had been said to fail, no objective criteria had been developed to determine the minimum successful score for a Level III inspector.
2. The mistakes or errors committed by Mr. Puckett are subject to dispute and not of sufficient magnitude to justify his dismissal in so brief a period of employment.

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

1. Reinstatement of Mr. Puckett to the Level III Q.C. inspector position or a mutually acceptable monetary award.
2. Payment of wages lost to Mr. Puckett for the period from his dismissal to date.
3. Payment of relocation and temporary living costs for Mr. Puckett's move to Illinois and return to Ohio (and return to Illinois if reinstated), under the terms of Comstock's relocation policy.

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:

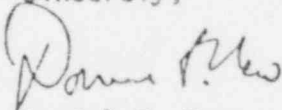
Mr. T. Trumble
Corporate Administrator

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 Worley O. Puckett 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 Worley O. Puckett and to me at 230 South Dearborn Street; Chicago, Illinois 60604; (312) 353-8145. 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 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.

Sincerely,



Daniel P. New
Area Director

DPN:lm

cc: ✓Mr. Worley O. Puckett
Nuclear Regulatory Commission

MAILGRAM SERVICE ITER
MIDDLETOWN, VA. 22645
12AM

Western Union Mailgram



4-0193989317002 11/12/84 ICS IPMNTZZ C8P PGHB
1 4122818988 MGM TDMT PITTSBURGH PA 11-12 0133P EST

Exhibit 4

T M TRUMBLE CORP S HUGHES
912 FORT D'QUESNE BLVD
PITTSBURGH PA 15222

NOV 18 1984

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

4122818988 TDMT PITTSBURGH PA 11-12 0133P EST
PMS CHIEF ADMINISTRATOR LAW JUDGE, DLR
US DEPT OF LABOR SUITE 700 VANGUARD BLDG 1111 20 ST NORTHWEST
WASHINGTON DC 20036
SUBJECT: WORLEY O PUCKETT VS COMSTOCK ENGINEERING INC

ON BEHALF OF COMSTOCK ENGINEERING INC I WISH TO APPEAL THE RECENT
DECISION ISSUED IN MR DANIEL P NEW'S LETTER OF NOVEMBER 6 1984
REGARDING THE ABOVE CASE COMSTOCK ENGINEERING WISHES TO EXERCISE ITS
RIGHT TO A FORMAL HEARING
T M TRUMBLE CORPORATE STAFF

13:35 EST

MGMCOMP

cc: Daniel P. New
Worley O. Puckett
W. G. Cheney
E. T. McGonigle
Legal File
File

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

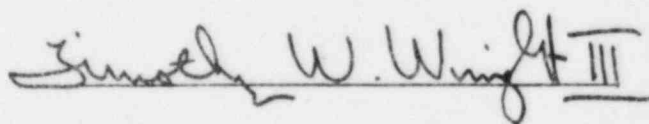
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
COMMONWEALTH EDISON COMPANY) Docket Nos. 50-456
) 50-457
(Braidwood Nuclear Station,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of Intervenors' Response To Applicant's Motion In Limine - Puckett Settlement Agreement on all parties to this proceeding by having said copies placed in envelopes, properly addressed and postaged, and deposited in the U.S. mail at 109 North Dearborn, Chicago, Illinois 60602 on this 3rd day of June, 1986; except that the Licensing Board, NRC Staff Counsel and counsel for Edison were served personally by delivery to the hearing in Markham, Illinois held on June 4, 1986.

In addition, copies of Exhibit 5 (Puckett Settlement Agreement) are being served in camera in sealed envelopes to the Licensing Board and to the Docketing and Service Section.

Handwritten signature of Timothy W. Wright III in cursive script, with the name underlined.

BRAIDWOOD SERVICE LIST

Herbert Grossman, Esq.
Chairman and Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

Richard F. Cole
Administrative Judge
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Washington D.C. 20555

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Bethesda, Maryland 20014

Joseph Gallo, Esq.
Isham, Lincoln & Beale
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Suite 1100
Washington D.C. 20036

Region III
Office of Inspection &
Enforcement
U.S. Nuclear Regulatory
Commission
799 Roosevelt Road
Glen Ellyn, Illinois 60137

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington D.C. 20555

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington D.C. 20555

Michael I. Miller, Esq.
Peter Thornton, Esq.
Isham, Lincoln & Beale
Three First National Plaza
Chicago, Illinois 60602

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory
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