C. K. McCoy
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SOUTHERN COMPANY
Energy to Serve Your World™

December 1, 1997

Docket No. 50-424
50-425

U. S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D. C. 20555

LCV-1009-L

Ladies and Gentlemen:

VOGTLE ELECTRIC GENERATING PLANT
SUPPLEMENTAL RESPONSE TO NRC REGARDING ALLEGED VIOLATION
FOR DISCLOSURE OF PERSONAL INFORMATION TO A UNION REPRESENTATIVE

On September 25, 1997, by letter LCV-1009-J, Southern Nuclear Operating Company (SNC) responded to "Violation B" of Enforcement Action 97-208-02014 identified in Nuclear Regulatory Commission (NRC) Integrated Inspection Report Nos. 50-424;425/97-03. In that response, SNC denied that a violation of regulatory requirements had occurred. Southern Nuclear Operating Company also suggested that, if the NRC had doubts as to the legal authority of the union representatives to request information to determine whether to file a grievance on behalf of an employee, NRC representatives should discuss the matter with the General Counsel of the National Labor Relations Board (NLRB).

By letter dated September 16, 1997, Christopher S. Miller, Esq. counsel for SNC, requested advice concerning the NRC's rejection of SNC's position that the union business agent was the employee's "representative" for purposes of 10 C.F.R. § 26.29(b). A copy of Mr. Miller's letter, and the National Labor Relations Board's response, are attached.

The NLRB's General Counsel concludes that an employer has a statutory obligation to provide requested information that is potentially relevant to its employee's union in the context of the union performing its duty as collective bargaining representative, including the union's responsibilities regarding the processing of grievances. Therefore, according to the NLRB, it would appear that under National Labor Relations Act principles, when the NRC's Fitness for Duty information meets the relevancy standard, (i.e., concerning grievances, labor disputes or conditions of work), the union is the subject employee's "representative" within the meaning of 10 C.F.R. § 26.29(b).

IE01

We note that the NLRB General Counsel also concluded that a licensee may refuse to provide Fitness for Duty information to the union until the affected individual provides the employer/licensee a written consent. As a matter of prosecutorial discretion, the NLRB would not issue a complaint against an employer if the employer, in response to a union's request for relevant information which falls within 10 C.F.R. § 26.29(b), offers to provide the information only upon the consent of the subject employee or employees.

10 C.F.R. § 26.29(b) currently permits disclosure of personal information to other licensees for unescorted access decisions, on the explicit condition that the licensee has obtained a release from the employee. In contrast, 10 C.F.R. § 26.29(b) contains no equivalent requirement for a release in order to disclose personal information to the representative of the employee. Future regulatory clarifications could be made if appropriate to make 10 C.F.R. § 26.29(b) consistent with an employer's obligation to furnish information to union representatives under the National Labor Relations Act.

Based upon the advice from the NLRB's General Counsel, SNC respectfully requests that Violation B (EA 97-208-02014) be withdrawn.

Should you have any questions regarding this request, please contact this office.

Sincerely,

C. K. McCoy

CKM/AD/afs

Enclosure 1: Troutman Sanders (Miller to Feinstein) letter dated September 16, 1997.
Enclosure 2: National Labor Relations Board's Response dated November 3, 1997.

cc: Southern Nuclear Operating Company
Mr. J. B. Beasley, Jr.
Mr. M. Sheibani
NORMS

U. S. Nuclear Regulatory Commission
Mr. L. A. Reyes, Regional Administrator
Mr. D. H. Jaffe, Senior Project Manager, NRR
NRC Senior Resident Inspector, Vogtle

Enclosure 1 to LCV-1009-L

Troutman Sanders (Miller to Feinstein) letter dated September 16, 1997.

TROUTMAN SANDERS
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CHRISTOPHER S. MILLER, Ph.D.

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September 16, 1997

VIA FACSIMILE AND OVERNIGHT MAIL

Fred Feinstein, General Counsel
National Labor Relations Board
Office of the General Counsel
1099 14th Street, N.W.
Room 10100
Washington, D.C. 20570

Dear Mr. Feinstein:

As counsel to Southern Nuclear Operating Company, Inc. ("Southern Nuclear") we would like to make you aware of a conflict with the Nuclear Regulatory Commission ("NRC") which impacts on Southern Nuclear's ability to fulfill its legal bargaining obligation with IBEW, Local No. 84 ("Union"), the exclusive bargaining representative of employees employed by Plant Vogtle. In September, 1996, a Southern Nuclear employee represented by the Union was required to participate in rehabilitation processes after aberrant behavior was observed at work and he was evaluated in accordance with the NRC-mandated Fitness for Duty program. Thereafter, the employee failed to attend required meetings with the employee assistance staff, and the status of his continued employment was questioned. In a December 27, 1996 meeting between members from Southern Nuclear's labor relations staff and the Union's business agent and business manager, the business agent provided the labor relations staff members with the following information: 1) that the employee in question had personal problems but not drug or alcohol problems; 2) that the employee did not feel comfortable with the assistance program; 3) that there were problems with the employee's [illegible] during this period; and 4) that Southern Nuclear's Manager of Labor Relations should look into this entire issue at the request of the Union.

Additionally, the Union's business agent who routinely handled all matters associated with the terms and conditions of employment for Southern Nuclear employees represented by the Union repeatedly asked a member of Southern Nuclear's labor relations staff why this particular employee's attendance with the employee assistance provider was required. Consistent with

Southern Nuclear's duty to furnish relevant information to the Union associated with its right to gather information for the purpose of processing grievances, the labor relations coordinator provided the business agent with treatment information concerning the employee's rehabilitation progress; although some of this information was erroneous and was later retracted, the correctness of this information is not the source of the NRC's current dispute with Southern Nuclear. Issues associated with the employee's discipline and subsequent termination are now subject to a pending arbitration.

Disclosure of information related to fitness for duty examinations performed on employees employed in a nuclear environment is controlled by 10 CFR 26.29(b), which states:

> (b) Licensees, contractors, and vendors shall not disclose the personal information collected and maintained to persons other than assigned Medical Review Officers, other licensees or their authorized representatives legitimately seeking the information as required by this Part for unescorted access decisions and who have obtained a release from current or prospective employees or contractor personnel, NRC representatives, appropriate law enforcement officials under court order, the subject individual or his or her representative, or to those licensee representatives who have a need to have access to the information in performing assigned duties, including audits of licensee's, contractor's, and vendor's programs, to persons deciding matters on review or appeal, and to other persons pursuant to court order. This section does not authorize the licensee, contractor, or vendor to withhold evidence of criminal conduct from law enforcement officials.

On August 27, 1997, the NRC issued an NRC Inspection Report to Southern Nuclear in which it concluded that Southern Nuclear had violated a regulatory requirement by providing the Union business agent with information about an employee's fitness for duty results. Specifically, the NRC rejected Southern Nuclear's interpretation that the business agent was the employee's "representative" for purposes of 10 CFR 26.29(b); the NRC concluded that because the employee informed the NRC that he had not asked the Union to act as his "personal representative" nor signed a consent form to allow the Union representative to act as his representative with respect to obtaining drug test results, Southern Nuclear was not "authorized to release the personal information to the union representative under an exemption to 10 CFR 26.29(b)." Although the NRC may have been unaware of the December 27, 1996 meeting between the labor relations staff and the Union representatives, Southern Nuclear had acted on its belief that the Union does not need a consent form or specific designation to act as the employee's "personal representative" before it is entitled to this information, given its authority as the employee's exclusive bargaining representative.

It is well-established that the term "representative" in the context of a collective bargaining relationship applies to a labor representative:

> The word "representative" in Section 186 of the National Labor Relations Act and elsewhere ... is used in its ordinary everyday meaning and means a labor representative. As such, it includes any person who is empowered, authorized, or designated in any way, directly or indirectly, by any employee or employees, to represent such employee or employees in any matter relating to their wages or hours or working conditions by standing in the place of such employee or employees in any responsible dealing with the employer involving such matters.
>
> Any labor organization, such as a local union, ... which is empowered, authorized or designated, by any employee or employees to act on his or their behalf in any dealing with the employer with respect to hours, wages or working conditions is by virtue thereof a representative of such employee or employees, and any individual who actively holds and occupies an office or position of responsibility in any such union local [or] council .. who is empowered or authorized in such office or position to act for any such labor organization in which he holds office in such way as to affect any such employee in a substantial way in any dealing with the employee's employer with respect to hours or labor, wages or working conditions, is thereby also a representative of such employee or employees.

Shapiro v. Rosenbaum et al., 171 F. Supp. 875, 883-84 (S.D.N.Y. 1959).

Consequently, Southern Nuclear now finds itself in a serious dilemma – pursuant to the NRC's limited and erroneous interpretation of the term "representative," Southern Nuclear is forever prohibited from providing information related to an employee's fitness for duty evaluations pursuant to the Union's request for information and also violates Section 8(a)(5) of the National Labor Relations Act by refusing to provide relevant information to the exclusive bargaining representative of the employee in question. In fact, Southern Nuclear would be prevented from relinquishing this information at an arbitration held over this very subject. As is evident here, the NRC has simply failed to recognize that not only do most employees (including the employee in question in the instant matter) realistically expect a union to pursue their grievances without signing a consent form or designating a labor representative as their personal representative, but also that a labor organization is the statutory representative of employees in the respective bargaining unit. You may also want to take note that in issuing the Fitness for Duty rule, the NRC made it clear that the rule was not intended to preempt the NLRA.

Southern Nuclear is in the process of responding to the NRC's August 27, 1997, Inspection Report. At this time, Southern Nuclear is asking your office for guidance on this matter given that the NRC must receive its response by September 27, 1997. In the alternative, Southern Nuclear would like to suggest to its respective NRC agents that they contact your office for clarification of the term "representative" within the confines of a collective bargaining relationship.

We appreciate your assistance with this matter. Please feel free to contact the undersigned with any questions you may have.

Very truly yours,

Christopher S. Miller

CSM:mvc

cc: Mr. Paul Bizjak
John Richard Carrigan, Esq.
Balch & Bingham LLP
Arthur H. Domby, Esq.
Laura H. Kriteman, Esq.

Enclosure 2 to LCV-1009-L

National Labor Relations Board's Response dated November 3, 1997.

United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570

November 3, 1997

rec'd
11/11/97
a.m.

Christopher S. Miller
Troutman Sanders
NationsBank Plaza
600 Peachtree Street, N.E.,
Suite 5200
Atlanta, Georgia 30308-3900

Dear Mr. Miller:

This is in response to your September 16, 1997 letter advising me of a potential conflict between the Nuclear Regulatory Commission's Regulations and an employer's statutory bargaining obligation under the National Labor Relations Act. In particular, you have referenced an inspection report in which the NRC determined that your client, Southern Nuclear Operating Company, Inc., violated a regulatory requirement by providing its unit employees' collective-bargaining representative (IBEW, Local No. 84) with information about an employee's fitness for duty results pursuant to the Union's information request. You have asked for advice concerning the NRC's rejection of Southern Nuclear's position that the union business agent was the employee's "representative" for purposes of 10 C.F.R. 26.29(b), and of the NRC's consequent determination that the Union was not entitled to the fitness for duty information in the absence of consent or a specific designation of personal representative status by the subject employee.

I generally agree that under the NLRA, an entity that constitutes a Sec. 2(5) "labor organization" should be considered an employee's "representative" for purposes of receiving the employee's fitness for duty information pursuant to the NRC Regulations. As defined in Sec. 2(5) of the NLRA, a labor organization "exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." "The essence of a labor organization . . . is a group or person which stands in an agency relationship to a larger body on whose behalf it is called upon to act." General Foods Corp., 231 NLRB 1232, 1234 (1977). Further, in "dealing with" employers concerning Sec. 2(5) subjects, a labor organization serves as the agent of the unit as a whole, as well as the agent "on behalf of any irate employee to assist him on pressing his case." Id. at 1235. See also NLRB v. Cabot Carbon Corp., 360 U.S. 203, 213 (1959)(labor

organization handled grievances on behalf of employees); FTS Corp., 184 NLRB 787, 795 (1970)(labor organization served as representatives of individual employees on individual grievances).[1]

Moreover, as you suggest, an employer has a statutory obligation to provide requested information that is potentially relevant to its employees' union in performing its duties as collective-bargaining representative, including its responsibilities regarding processing grievances. GTE California, Inc., 324 NLRB No. 78, slip op. at 3 (Sept. 26, 1997)(citing NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)). Accordingly, it would appear that under NLRA principles, when the NRC's fitness for duty information meets the relevancy standard, the union is the subject employee's "representative" within the meaning of 10 C.F.R. 26.29(b).

Even if, however, a union is an employee's "representative" within the meaning of the NRC Regulation, "a union's interest in relevant and necessary information . . . does not always predominate over other legitimate interests." GTE California, 324 NLRB No. 78, slip op. at 3. As the Supreme Court explained in Detroit Edison Co. v. NLRB, 440 U.S. 301, 314 (1979), "[a] union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Thus, where an employer asserts a legitimate claim of confidentiality in response to a request for relevant information, the parties are required to bargain toward an accommodation of those interests. Pennsylvania Power & Light Co., 301 NLRB 1104, 1105-06 (1991). If the parties are unable to reach an acceptable accommodation, the Board "must balance the union's need for the information against any legitimate and substantial confidentiality interest established by the employer." GTE California, 324 NLRB No. 78, slip. op. at 3 (citations omitted).

Turning to the NRC Regulation, the accommodation reflected in 10 C.F.R. 26.29(b) -- that the subject employee must consent to a representative's receipt of assertedly confidential information concerning the employee's fitness for duty -- is precisely the accommodation that the Supreme Court found appropriate in Detroit Edison, supra. Specifically, the Court held that the employer in Detroit Edison satisfied its bargaining obligation by offering to disclose to the union test scores linked with the employees' names only upon receipt of consents from the affected individuals. The Court found that such a disclosure process struck an appropriate balance between the legitimate interests of the employer in preserving employee confidence in the testing program and of the union in processing employee grievances. 440 U.S. at 317-320. Moreover, the accommodation was appropriate even when the employer required consent "from the very employees whose grievance is being processed." 440 U.S. at 319.

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[1] Accord Shapiro v. Rosenbaum, 171 F. Supp. 875, 884 (S.D.N.Y. 1959)("a labor organization is empowered . . . by any employee or employees to act on his or their behalf in dealing with the employer with respect to hours, wages, or working conditions [and] is by virtue thereof a representative of such employee or employees").

An employer cannot refuse to provide a union with requested, relevant information without first bargaining in good faith toward an accommodation between the union's interest in the information and the employer's confidentiality interest. Minnesota Mining & Mfg. Co., 261 NLRB 27, 32-33 (1982), enfd. sub nom. Oil, Chemical & Atomic Workers v. NLRB, 711 F.2d 348 (D.C.Cir. 1983). Under the authority of Detroit Edison, however, as a matter of prosecutorial discretion, I would not issue a Sec. 8(a)(5) complaint based on the fact that an employer, in response to a union's request for relevant information that falls within 10 C.F.R. 26.29(b), makes a good-faith offer to provide the information only upon the consent of the subject employee or employees. Thus, the NRC has not imposed an obligation that would conflict with the NLRA by requiring consent prior to disclosure of fitness for duty information, even from an employee whose individual grievance is being processed by the union.

For the above reasons, it is my view that 10 C.F.R. 26.29(b) does not on its face undermine an employer's ability to fulfill its statutory bargaining obligations under Sec. 8(a)(5) of the NLRA. Of course, regardless of the facial validity of the regulation, an individual employer's good-faith in proposing and implementing an accommodation regarding the disclosure of confidential information must be determined on an individual basis.

Thank you for your inquiry. If I can be of any further assistance to you in this or any other matter, please do not hesitate to contact me.

Sincerely,

Fred Feinstein
General Counsel