

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

MOTION OF UNION ELECTRIC COMPANY
FOR A STAY OF SUSPENSION ORDER
PENDING APPEAL BOARD REVIEW

Pursuant to Section 2.788(f) of the Commission's Rules of Practice, 10 C.F.R. § 2.788(f), the Union Electric Company hereby moves the Appeal Board to stay the effectiveness of the Licensing Board's Initial Decision On Order To Show Cause which issued in the captioned proceeding on September 28, 1978, pending consideration and decision by this Appeal Board of Union Electric Company's exceptions thereto (which exceptions are being filed herewith).

In support of said stay motion, Union Electric Company states the following:

1. The Initial Decision authorizes the Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission ("NRC"), "to suspend Construction Permits Nos. CPPR-139 and CPPR-140 until such time as the Licensee, including its employees, agents and contractors engaged in activities under the license, submits to such investigations as the Commission deems

781020 0182 G

necessary and as authorized by the Atomic Energy Act of 1954, as amended, [and] the Commission's regulations" (I.D. at p. 22).

2. This authority to suspend is, by explicit order of the Licensing Board below, to become effective as final Commission action "within thirty (30) days after the date of issuance" of the Initial Decision (I.D. at p. 22). The prescribed timetable plainly does not provide the parties in disagreement with the rulings of the Licensing Board in the show cause proceeding to pursue fully here their filed exceptions to the Initial Decision, and obtain an Appeal Board decision thereon, before the suspension order takes effect.^{1/}

3. Without issuance of the requested stay, Union Electric Company will effectively be deprived of a meaningful opportunity to contest the Initial Decision on appeal. As indicated in the Affidavit of John K. Bryan, Vice President-Nuclear of Union Electric Company (a copy of which is attached hereto as Exhibit "A"), the prospect of suspension of the Callaway construction permits thirty (30) days hence carries with it dire consequences in terms of substantial manpower layoffs, economic losses and plant schedule slippages. Obviously, Union Electric

^{1/} The Licensing Board included in its Order a briefing schedule for exceptions filed with the Appeal Board that tracks the prescribed schedule set forth in Section 2.762 of the Commission's Rules of Practice, 10 C.F.R. § 2.762. Pursuant thereto (I.D. at pp. 22-23), a total of 70 days after the filing of exceptions will elapse before the appeal briefs of all parties will be submitted. Additional time will then be required for the Appeal Board to consider the briefs, hear oral argument from the parties and render its decision.

Company can ill afford to allow the present controversy over the NRC's investigation into the firing of a single worker to result in issuance of a suspension order which will, over time, effectively terminate virtually all of the current work force at the construction site.

4. This means, of course, that, unless the requested stay issues, the Company is placed in the untenable position by the Licensing Board's suspension order of having to forego pursuing its appeal rights with respect to the rulings below on significant legal issues which are admittedly a matter of "first impression" before this agency (I.D. at p. 13).

5. Whether NRC inspectors have authority under the Atomic Energy Act of 1954, as amended, to investigate the causes for firing a worker employed at a nuclear power plant construction site raises serious legal and policy questions nowhere addressed by the Licensing Board below. Notwithstanding the cavalier treatment of this issue in the Initial Decision by nothing more than a casual reference to Sections 161(c) and 161(o) of the Act (I.D. at pp. 12-13, 16, 20), the fact remains that the question of authority presented in this show cause proceeding has provoked serious debate within the Commission itself,^{2/} and, just

^{2/} The differing views on the authority of the Commission to take action in this area, both from a legal perspective and as a matter of sound policy, are set forth in some detail in Report Secy-78-308 to the NRC, dated June 9, 1978, from Robert B. Minogue. The Licensing Board's refusal to accept this Report into the record was, we submit, clear error. In any event, the Report is certainly a document of which this Appeal Board can properly take official notice for purposes of the present appeal.

recently, prompted the United States Senate to pass additional legislation directly on point.^{3/}

6. Contrary to the Licensing Board's unreasoned perception of the matter, it is far from clear that the statutory provisions relied upon below were intended to embrace NRC investigations into disciplinary actions by management against employees working at an authorized construction site. Indeed, the plain language of Sections 161(c) and 161(o), when carefully read, provides no support for such a conclusion. Nor are there any good policy reasons arguing in favor of the NRC suddenly becoming entangled in labor-relations matters which require a special knowledge and expertise that the Commission understandably lacks.

7. It is, moreover, readily apparent that the sort of investigation under scrutiny in this proceeding is not covered by any existing Commission regulation. The Licensing Board's passing reference to Rule 50.70 of the Commission's Rules of Practice is nothing more than "question begging". That Rule

^{3/} Senate Bill S.2584, which was passed on September 18, 1978, provides in Section 210 for protection of employees of an applicant or holder of an NRC license or permit (or said employer's contractors and subcontractors) against discriminatory action in retaliation for employee participation or contemplated involvement in the NRC licensing process. Where claims of employer discrimination are made, the Senate Bill provides that the investigatory responsibility regarding such matters rests with the Secretary of Labor, not with NRC inspectors. The Licensing Board's refusal to take cognizance of this new legislation was error. Certainly, Senate Bill S.2584 is something that this Appeal Board can take official notice of for purposes of the present appeal.

speaks in terms of "inspections * * * necessary to effectuate the purposes of the act" (10 C.F.R. § 50.70; emphasis added). The very issue before the Licensing Board -- and one which still awaits resolution on the basis of a learned analysis of the law -- is whether an inspection of disciplinary action taken against a worker employed at a nuclear reactor construction site is indeed "necessary" to accomplish the statutory purposes. We continue to think not.

8. Nor do we find any legal basis for escaping the warrant requirement announced by the United States Supreme Court in Marshall v Barlow's, Inc., ____ U.S. ____, 56 L. Ed. 2d 305, 46 USLW 4483 (May 23, 1978), in view of the absence of regulatory directives in this area. Before one can invoke the warrantless search exception discussed in Barlow's, Inc., it must be demonstrated that the questioned agency action is within prescribed regulatory guidelines. Such is not the case here.

9. For these reasons, among others noted in our filed exceptions,^{4/} Union Electric Company believes that careful consideration by this Appeal Board of the "first impression" legal issues raised in the present proceeding is imperative.

^{4/} The exceptions of Union Electric Company also take issue with the Licensing Board's refusal to appreciate the soundness of deferring any action that might be taken by the NRC in this area until the conclusion of the ongoing Union grievance proceeding, which is also investigating the causes of Mr. Smart's firing. Also challenged in the Company's exceptions is the suspension order itself, which departs from prior Commission precedents in other show cause proceedings, all of which signalled a contrary result in circumstances such as are involved here.

It is decidedly in the interest of the Commission, as well as in the interest of the public at large, to have this matter reviewed and decided on appeal with full attention to the difficult legal and policy arguments that were inexplicably ignored in the Initial Decision.

10. Unless the present stay motion is granted, Construction Permits Nos. CPPR-139 and CPPR-140 will be subject to suspension thirty (30) days hence if Union Electric Company does not compel its contractor to submit to the contested NRC investigation which the Company strongly believes to be unauthorized by statute or Commission regulations. Fundamental considerations of due process argue forcefully against placing any appellant in such a position without first allowing him the opportunity to exhaust his appeal rights. Indeed, the Commission's own Rules of Practice are generally designed so as to permit a full airing before this Appeal Board of exceptions to an Initial Decision prior to the date when that decision becomes effective (see 10 C.F.R. § 2.760) -- except where the immediate effectiveness rule in 10 C.F.R. § 2.764 applies (which is not the case here).

11. To the extent that the Licensing Board's suspension order departs from this accepted procedure, it is, we submit, unduly harsh and analytically unsound. There exists no threat to public health and safety by allowing construction work to

continue at the Callaway site pending Appeal Board review and decision. By stipulation of the parties, it is settled that a thorough inspection by NRC personnel of the various allegations by Mr. Smart regarding possible safety problems at the site "did not disclose any circumstances warranting suspension of the construction permits" (Stipulation, ¶ 4, quoted at I.D., n.2). Moreover, it is uncontested that Union Electric Company and Daniel Construction Company are placing no impediment whatsoever in the way of continued on-site inspections of construction work by NRC inspectors -- whether in response to specific allegations by workers on location or otherwise -- to insure that all safety requirements are being satisfied. Nor has the NRC been discouraged in any respect from undertaking an independent investigation to determine whether the firing of Mr. Smart has "chilled" other workers at the Callaway site from alerting the NRC to possible new safety concerns they perceive to exist.

12. In these circumstances, the requested stay is fully justified. It will permit the Commission's appeal process to run its normal course with respect to the legal issues of "first impression" which have been brought to the Appeal Board, and yet will not, in the interim, pose any threat to the public health and safety due to continued construction activity at the Callaway site.

WHEREFORE, the Union Electric Company requests that

the present motion be granted, and that this Appeal Board issue a stay of the effectiveness of the Initial Decision pending its full consideration of, and final decision on, the exceptions filed by Union Electric Company.

Dated: October 6, 1978.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Wm. Bradford Reynolds
Wm. Bradford Reynolds
Gerald Charnoff

Counsel for Union Electric Company

AFFIDAVIT OF JOHN K. BRYAN

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

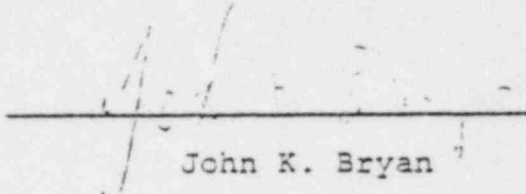
John K. Bryan, having first been duly sworn, deposes and states under oath the following:

1. That he is Vice President-Nuclear of Union Electric Company, the holder of Construction Permit Nos. CPPR-139 and CPPR-140, and in such capacity has complete responsibility for the construction activities taking place at Callaway Plant, a nuclear electric generating plant presently under construction in Callaway County, Missouri. As the responsible officer of Union Electric Company he is duly authorized to make this affidavit on behalf of said corporation, and the statements contained herein are true and accurate to the best of his knowledge, information and belief;
2. That an indefinite suspension of the Callaway construction permits, as ordered by the Atomic Safety and Licensing Board in its "Initial Decision on Order to Show Cause", dated September 23, 1978, would necessarily result in an immediate reduction in the work force at the Callaway construction site of about 1600 employees with a resultant payroll loss of approximately \$30,000 for every week of suspension. Employee layoffs and accompanying payroll losses would increase progressively if the suspension were to last longer than 1 month;

EXHIBIT A

3. That a shutdown of any duration would cause a schedule loss, in addition to the period of suspension, of approximately 3 months due to the need to remobilize the work force in an orderly manner;
4. That in order to properly secure and maintain the project, the overhead staff and a certain number of craft personnel and rental equipment would have to be retained on the project and payments would have to be made to subcontractors to keep them in a state of readiness for when the suspension is lifted;
5. That a suspension of 1 week would cost approximately \$6.5 million; a suspension of 30 days would cost approximately \$8 million; if the suspension were to last 90 days, costs would rapidly escalate to \$30-\$40 million as penalties could be expected from 12 major contractors who are engaged in, or about to embark on, major facets of construction;
6. That a suspension of the permits would necessitate a postponement of the fuel loading and commercial operating dates for Callaway Unit 1, and each month of deferral of the fuel loading and commercial operating dates would add to the present cost about \$1.3 million for escalation and \$3.5 to \$9 million for additional interest costs;
7. That a deferral of the in-service date of Callaway Unit 1 would require the generation of energy demands from older

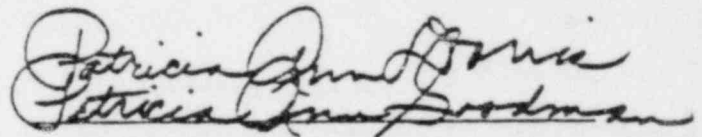
and less economic plants at an estimated replacement power cost in late 1982 and early 1983 of about \$250,000 a day.


John K. Bryan

Subscribed and sworn to before me this 4th day of October, 1978, by John K. Bryan who personally appeared before me and is known to me to be the person described in and who executed the foregoing instrument in my presence and acknowledged he executed the same as his free act and deed on behalf of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in St. Louis, Missouri, this 4th day of October, 1978.

(SEAL)


Patricia Ann Dorris

Notary Public

PATRICIA ANN DORRIS
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 1/31/82
ST. LOUIS COUNTY

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Motion Of Union Electric Company For A Stay Of Suspension Order Pending Appeal Board Review" were served upon each of the following, delivering by hand to those in the Washington, D. C. area, and by mailing copies, postage prepaid, to all others, all on this 6th day of October, 1978:

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

John F. Wolf, Esquire
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Hugh K. Clark, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph F. Tubridy, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

James P. Murray, Esquire
James Lieberman, Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Michael H. Bancroft, Esquire
Diane B. Cohn, Esquire
Suite 700
2000 P Street, N.W.
Washington, D. C. 20036

Fulton City Library
709 Market Street
Fulton, Missouri 62251

Olin Library of Washington University
Skinker and Lindell Boulevards
St. Louis, Missouri 63103

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Wm. Bradford Reynolds
Wm. Bradford Reynolds
Counsel for Union Electric Company