UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	(Restart)
(Three Mile Island Nuclear Station, Unit 1)	)	(Reopened Proceedings)
	)	

TMIA'S COMMENTS ON SPECIAL MASTER'S REPORT AND ATOMIC SAFETY AND LICENSING BOARD'S TENTATIVE FINAL DRAFT DECISION

By Memorandum and Order dated May 5, 1982, a quorum of the Licensing Board requested comments on the Special Master's Report (SMR) dated April 28, 1982,and the Board's Tentative Final Draft Decision concerning allegations against Mr. Michael Ross, dated May 5, 1982. In addition, the Order afforded an opportunity to O, W, VV, and any Licensee employee referred to in the SMR to individually comment on the Report.

The Board notes on page 3 of its Order that TMIA omitted findings on the Ross issues, but that it "is not inclined to regard the failure to file proposed findings before the Special Master as a default on the respective Ross issues before us." We appreciate the Board's ruling in this regard. We wish to point out that there may be other topics within the scope of the reopened proceedings on which TMIA did not file findings. As was explained to the Board in the May 3, 1982 telephone conference call, this was not to suggest a lack of interest on TMIA's part. Rather, because of the extraordinarily expedited pace with which the discovery period and the hearings themselves moved, TMIA had little time to master all the issues litigated at the hearing. In addition, we observed Judge Milhollin pursuing

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quite thoroughly many issues in which we had great interest, and were absolutely confident that these issues would be addressed in the SMR. We were in fact proven correct. In view of these facts, we hope the Board will be disinclined to characterize TMIA's failure to file findings on any issue in the reopened proceedings as a default.

As a final introductory comment, we wish to voice our objection to the Board's solicitation of comments from any individual mentioned in the SMR. We believe it totally inappropriate and a clear violation of procedural due process for the Board to consider any evidence outside the record of the reopened proceedings, particularly statements submitted by actual witnesses. Any evidence presented in a case before an administrative agency may be received only in the context of a full adjudicatory hearing,on the record, with an opportunity for cross-examination by all parties. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, cert. den. 99 S.Ct. 92 (1978). We would strenuously object to the Board's reliance on statements made in these comments to support its decision.

SPECIAL MASTER'S REPORT

TMIA recommends that the Board adopt the following findings contained in the SMR: Paragraphs 1-121, 123-135, 137-232, 234-236, 238-249, 252-258, 260-280, 282-283, 288-312, 316, 320, 321, 323-327, 329, 332-337, 339, 341. TMIA finds that with regard to these findings, Judge Milhollin expertly evaluated all the relevant evidence, particularly the weight and credibility of such evidence, confronted each fact contained in the record, derived reasonable inferences from those facts, and adequately supported each conclusion with comprehensive and detailed analysis.

The Board will note that TMIA agrees entirely with Judge Milhollin's findings on the Mike Ross issues, SMR paragraph 137-178, and rejects the

Board's Tentative Final Draft for Party Comments dated May 5, 1982.

Judge Milhollin's findings and conclusions with regard to Mr. Ross are not only fully supported by the record, but are based substantially upon an evaluation of the credibility of the witnesses who testified, particularly Ross and YY. Unlike the Board, Judge Milhollin had the unique opportunity to observe Mr. Ross's demeanor as a witness standing accused of gross and improper conduct. Judge Milhollin also had a chance to assess Ross's credibility in the context of other witness' testimony on the same subject, including that of YY, Mr. Bruce Wilson, Mr. Ross's subordinates,and other Licensee employees. On this basis, and by thoroughly analyzing the entire evidentiary record, Judge Milhollin reached his conclusions.

The Board seems to believe that its observations of Ross during the first part of the hearing at which he tesified on technical matters, and during which he clearly had no interest in giving false testimony, gives it equal footing to judge Ross's credibility on these particular subjects. The Board in fact places much credence on their past credibility determinations to support Ross's denial of wrongdoing. Curiously, even the Board admits that some of Ross's testimony "doesn't square with the record,"although the Board also states that Ross's seeming memory lapse is due to a natural tendency to recall events during testimony in a light favorable to one's innocence. (emphasis added). While there may be a tendency to interpret events according to one's self-interest, selective recollection of events to support one's innocence is plainly untruthful. It is startling that the Board so easily excuses Ross's poor testimony, apparently because of observations made of Ross which are irrelevant to these proceedings. The Board asserts no reasonable basis to support its conclusion that Ross's testimony should be considered credible. By directly contradicting Judge Milhollin's determinations, the Board runs afoul of the basic administrative law principle that the findings of a hearing examiner

who heard the testimony of the witness and who has a "feel of the case" which no printed transcript and impart, Cone v. West Virginia Pulp and Paper Co., 330 US 216 (1947), are entitled to great weight. Universal Camera Corp. v. NLRB, 340 US 474 (1950), Dolan v. Celebrezze, 381 F.2d. 231 (2d. Cir., 1967), Zinkle v. Weinberger, 401 F.Supp. 945 (N.D. W.V. 1975), Nichols v. Cohen, 290 F.Supp. 207 (S.D. Ill. 1968).

Likewise, Judge Milhollin concluded that YY's testimony was honest and forthright. Yet the Board, who never observed YY's demeanor, finds his accusations noncredible and unreliable. The Board does not support its assertions with evidence of malice by YY towards Ross because in fact the record is devoid of any such evidence. In fact, YY's credibility is strengthened when one considers the risks YY took by voluntarily contacting the NRC when he did, and the personal jeopardy he has been in since the initial call. Further, the Board attempts to buttress its credibility argument by characterizing YY's statement as equivocal, yet YY stated quite plainly that he believed Ross indicated he had kept the proctor out of the room to facilitate cheating. Tr. 26,015,16.

The Board is also incorrect to suggest that Ross's due process rights were violated by his inability to confront YY directly. Mr. Ross was fully cognizant of the claims against him, and so admitted. In fact, Licensee's counsel never objected to the questioning of either Ross or YY, or of Mr. Bruce Wilson who explained in a credible fashion why certain changes in the answer key were made. It is totally inappropriate for the Board to assert a due process violation at this point in time.

It is clear that an evaluation of the credibility of witnesses had a substantial bearing upon Judge Milhollin's decision. In addition, he expressly discussed and evaluated all the evidence presented in the record. No evidentiary fact was omitted from the SMR which could provide the basis

for the Board's rejection of the report. Nichols, supra. Thus, the Board is obligated to accept his findings and conclusions on the Ross issues.

Although TMIA agrees substantially with the findings and conclusions contained in the SMR, we believe the following changes are warranted:

A. Paragraphs 122, 318-319. Mr. U.

We agree with the findings in paragraphs 122 and 318 and agree that there was insufficient evidence to establish that U was "stationed" in Mr Husted's office by management or other person. However, the possibility that U stationed himself in the exam room was not discussed in the report, nor the possibility that management did have knowledge of U's activities at some point during the exam itself. The evidence does not appear to preclude this possibility .

A number of witnesses testified that they heard that someone was available and OO heard specifically that someone would be posted. SMR, paragraph 113. It is certainly possible that OO did not acquire this knowledge until 20 minutes before the commencement of the RO/B exam when U discussed the A exam with the B examinees. Tr. 26,880. Mr. Husted had just that morning given U permission to use his office. Tr. 26,916(Husted). It is reasonable to infer that U did not take on his role as voluntary assistant to examinees until immediately before tha RO/B exam, and there is certainly no reason to assume that anyone in particular had placed him in Mr. Husted's office.

KK's statement that "the person [stationed outside the examination room] was performing his duty... with at least the knowledge of someone higher up in the company, Staff Ex. 27 at 30, is found by Judge Milhollin to be unsubstantiated. However, the statement does appear consistent with other testimony if one does not necessarily infer that anyone had arranged for

him to be there, nor that management had pre-exam knowledge that someone would be there. It is quite possible, for example, that a management person acquired his knowledge during the B exam, since during the exam review, Licensee reviewers frequently went in search of documentation to support their arguments. Tr.24,161, and Mr. Husted's office contained such documentation. It is quite likely that one of the reviewers discovered, during an excursion in search of documenting material, that U had stationed himself in Husted's office for the purpose of aiding exam candidates.

The preponderance of the evidence supports a conclusion that U was indeed stationed in the vicinity of the exam to help answer questions and that management likely knew about it at least during the course of the exam. In light of this, and the fact that U did in fact offer assistance to at least one person, as well as the other evidence cited by Judge Milhollin in SMR at paragraph 122, the sanctions against U should be stiffer than those recommended by Judge Milhollin, specifically that he be permanently removed from licensed duties.

B. Paragraphs 233, 236 237. VV/O and the Material False Statement.

We agree substantially with Judge Milhollin's findings regarding the 1979 VV/O cheating incident. However, we believe sanctions are plainly warranted against the members of Licensee's management who approved certification of false information to the NRC in the August 3, 1979 letter. It should be emphasized that upper management at the time, Vice-President Jack Herbein, was thoroughly aware of the incident and personally approved sending the letter. Judge Milhollin concludes that the letter amounted to a false statement upon which the NRC relied in renewing VV's license . SMR, paragraph 237. Clearly this is the type of material false statement prohibited by 18 U.S.C. 1001. Further, since at least Miller and Herbein, as well as Messrs. Zechman, Beers, and Lawyers, were involved in approving the letter,

TMIA Ex. 74, 18 U.S.C. 371 appears also to have been violated. The Board should recommend to the Commission that both Miller and Herbein, as well as Zechman, Beers, and Lawyers, be criminally prosecuted under the above cited statutes. In addition, in light of this particular incident, and reinforced by Miller's failure to present credible testimony on the W/O issue, SMR paragraph 227, each of these individuals should be found to be incompetent to remain in any management or operational capacity with GPU or any of its subsidiary companies .

C. Paragraphs 250 and 251. Licensee's training and testing program.

TMIA agrees substantially with the conclusions of Judge Milhollin in these paragraphs. In paragraph 251, Judge Milhollin specifies a number of weaknesses which existed and still exist in the training program, evidencing a failure by the Licensee to adequately respond to the Commission's Order of August 9, 1979. The record demonstrates that most of these deficiencies have not been corrected, and that Licensee does not intend to correct them, particularly as they relate to the method of instruction, failures to teach operators subjects in which they are weak, and actual quiz construction. In addition, Judge Milhollin is correct in expressing skepticism that the recently instituted training procedures dealing with exam administration will sufficiently prevent cheating, let alone enable the Commission to conclude that the Licensee has met its burden under the August 9th Order.

Other than its own unsupported assurances that the new procedures will cure past deficiencies, Licensee has provided no evidence that its training program is now adequate. If the Board is to find such assurances credible, it must ignore the fact that this utility, one of the most scrutinized in the world, lacked the motivation to even insure that its training program prevented commonplace cheating. The Board must ignore the fact that at least

one witness testified that a casual attitude toward the Cat-T exams still exists. The Board must ignore the fact that the Licensee not only employed a training instructor who unhesitatingly attempted to cheat on an NRC licensing exam and gave non-credible testimony to NRC investigators and during the reopened hearings, but now insists that it will apply no sanction against him even in the face of Judge Milhollin's recommendations. The Board must ignore the overall lack of integrity found by Judge Milhollin in the operation staff, and well as in a number of management people. The Board must ignore that even when cheating was detected, the Licensee constrained the NRC investigation, and conducted and consistently supported a biased and totally inadequate investigaion. SMR, paragraph 215. And the Board must ignore the fact that when faced with accusations of improper conduct, Licensee management, including Mr. Robert Arnold, President of GPU Nuclear, had such disrespect for the process and lack of concern for the public health and safety, that it chose to present non-credible testimony. This is astounding evidence, but what is most astounding is that all of it developed after the accident and continued through the hearing itself. The Board would be arbitrary to find mere assu rances by the Licensee entitled to any consideration whatsoever. Thus, there exists no evidence that Licensee's training department will improve, and in fact the integrity of this company has been shown to be so extraordinarily poor that the Board must conclude that this company is incapable ofoperating the plant safely.

D. Paragraph 259. Certification.

Licensee's new certification rules require certification by the training department that individuals are qualified to sit for exams. However, in light of the failures in the Licensee's training program as outlined in the SMR, and the general lack of integrity of management particularly of training personnel such as Mr. Husted, the pattern of certifying unqualified candidates as

described in the SMR paragraphs 252-258 will continue. Clearly the Licensee has not met its burden of establishing that its new certification procedures correct past deficiencies and are adequate to satisfy the August 9th Order.

E. Paragraphs 281, 285, 286, 287, 340, 342. Reliance on Licensee in construction and review of answer keys.

TMIA agrees substantially with the findings contained in these paragraphs. The NRC has placed too much reliance on Licensees' provision of exam answers, and much of the problem can be solved by changing the content of the exams themselves. However, given this training department's failures and the continuing attitude and integrity deficiencies of management and the operations staff, particularly its abuse of the exam review procedures, any reliance on this Licensee by the NRC for assistance in exam reviews should be prohibited. Clearly, this Licensee can not be trusted to responsibly review answer keys, and if the NRC is incapable of constructing an exam without this Licensee's assistance, it should be prohibited from administering exams altogether at TMI.

F. Paragraph 284. Staff attitude.

The Board should draw the ultimate conclusion that in light of the evidence presented in SMR paragraph 282-283, the Staff attitude is poor, and thus is in violation of its responsibilities under the Atomic Energy Act.

G. Paragraph 313. GG sanction.

In light of the Licensee's refusal to independently recognize the seriousness of GG's action, as evidenced by its refusal to impose any sanction whatsoever against GG, the Board should order the Licensee to discipline GG immediately by suspending him either from licensed duties or employment with the company, on a temporary basis.

H. Paragraph 314, 315. Shipman sanction.

Judge Milhollin recommends that Mr. Shipman be removed from licensed duties, however only until he names his questioner or gives a credible reason why he can not name him. TMIA agrees that Mr. Shipman should be removed from licensed duties but disagrees the removal should be conditional. Mr. Shipman's willingness to shield his questioner throughout the NRC investigation and the reopened hearings shows a thorough disrespect for the NRC process, lack of integrity, and an extremely poor attitude. Such conduct provides no reasonable assurance that he is capable of safely operating the plant. His license should be permanently removed.

I. Paragraph 317. Husted sanction.

As a member of the training department, Mr. Husted has tremendous influence over the attitude of operators toward the training program, which Judge Milhollin has found to be quite poor. His attempted cheating during the NRC exam renders him a totally inappropriate and unqualified training instructor, and he should be removed immediately from the training department. His flippant attitude and willingness to present non-credible testimony, as well as the improper solicitation, are sufficient reasons to also remove him permantly from licensed duties. Any lesser sanction against Mr. Husted is inadequate to meet the seriousness of his offenses.

J. Paragraphs 136, 322, 328, 338. Management condoning cheating.

TMIA agrees substantially with these paragraphs to the extent that there is no evidence that upper management encouraged, participated in or knew of cheating. This assumes Mr. Ross and Mr. VV are not considered "upper management." However, the record supports a conclusion that indeed upper management has condoned and continues to condone cheating. For example, management failed to take any disciplinary

action against VV and still refuses to characterize his conduct as cheating. SMR, paragraph 237, Tr. 23,617 (Arnold). Thus, management is plainly representing to the rest of the company that such conduct will be excused. Similarly, Licensee's only response to the Shipman incident has been to place a letter in his file, despite the fact that he continues to shield a cheater. One can hardly take seriously Mr. Hukill's assertions that he would seriously consider terminating an individual who acted in a way similar to Shipman. Tr. 23,985 (Hukill). Judge Milhollin's findings regarding Mr. John Wilson's investigation, SMR, paragraphs 202-215, including Licensee's decision not to pursue rumors reported to them during the course of their supposed investigations, indicates that management has always been more interested in finding evidence to exonerate cheaters than in discovering the extent to which cheating and other misconduct existed throughout the organization. This is a clear signal to operators that the company is willing to sacrifice its own professional integrity in order to conceal cheating. Licensee has also indicated a clear willingness to completely overlook conduct such as Mr. Husted's, U's and GG's, (Licensee counsel's May 6, 1982 letter). Thus, the Board must conclude that upper management has condoned and continues to condone cheating.

K. Additional findings.

VV

The 1979 VV/O incident evidences VV's irresponsibility and general lack of integrity. He is unfit to hold any position with the Licensee which is critical to the public's health and safety. The Board should instruct that he be removed from such a position if he is currently so employed.

NRC

A number of individuals have engaged in such conduct as to require their

removal from licensed duties. Because of the seriousness of their offenses, all of which reflect severe integrity and attitude problems, it is clear that their current ability to operate any nuclear power plant safely is highly doubtful. Yet it is possible any one of these individuals could apply for an NRC operating license elsewhere.

Thus, the Board should instruct the NRC that if any individual mentioned herein who is removed from licensed duties reapplies for a license at another facility, the NRC must judge that individual's qualifications in light of his TMI-1 experience. Detailed summaries of each individual's wrongdoing should be placed in each of their NRC files.

PID on Management Issues.

The broad issue in the reopened proceeding states as follows:

> The broad issue to be heard in the reopened proceeding... may involve the issues of Licensee's management integrity, the quality of its operating personnel, its ability to staff the facility adequately, its training and testing program, and the NRC process by which the operators would be tested and licensed. SMR, paragraph 3.

In formulating such a broad issue, the Board must have contemplated the possibility that evidence could develop which would mandate amendments to the PID besides those specified in footnotes 18, 19, 21-24. In fact, the evidence which developed raises serious questions of management competence and ability to operate the plant safely pursuant to the Commission's August 9th Order. TMIA submits that the new evidence developed during the course of the reopned proceeding requires the Board to amend a number of findings and conclusions in the PID, some of which were specifically left open by the Board, some of which were not.

PID paragraph 106.

Taking into account the SMR, as well as the items mentioned by the Board in this paragraph, the Board must conclude that the operations and technical staff of TMI-1 is not qualified to operate the plant safely, and thus Board Issue 2 of the March 6, 1980 Commission Order has not been sat isfactorily resolved.

PID paragraph 133.

The Board must reevaluate its statement that, "we found nothing in Mr. Arnold'slengthy appearance as a witness ... to indicate inappropriate attitudes and emphases." This characterization is now invalid in light of the evidence developed at the reopened hearing. Mr. Arnold was responsible for overriding Mr. Herbein's and Mr. Miller's recommendation to suspend VV without pay, and for failing to replace their recommendation with any disciplinary action whatsoever. Moreover, his testimony on this topic was not credible, SMR, paragraph 237, and he still refuses to concede that VV and O's action constituted cheating. Tr. 32,617 (Arnold). In light of the VV/O incident, Mr. Arnold's firm support for John Wilson's biased and totally inadequate company investigation, SMR paragraph 215, and the May 6, 1982 letter from Licensee counsel indicating that the Licensee refuses to sanction Mr. Husted, U or GG despite the evidence and Judge Milhollin's recommendations, it appears that Mr. Arnold is consistently willing to excuse any company personnel for cheating unless they explicitly admit guilt. Such an individual is unfit to hold the highly critical positions of President, and Emergency Support Director, PID at paragraph 132. He should be removed immediately, and the Board should so order this in its decision.

PID paragraphs 154, 155.

In light of the SMR on Mike Ross , paragraphs 137-178, the Board should

order his immediate removal from licensed duties and from a position of management within the company.

PID paragraph 174

Judge Milhollin found the Licensee's training curricula to inadequately respond to the Commission's August 9, 1979 Order. SMR paragraph 251. The Board must find that Licensee has not met its intended goals as stated in this paragraph, and in fact, is incapable of meeting them. See p. 7-8, supra.

PID paragraph 183-192,196-207, 264.

The Board's glowing account of the training and testing programs, and conclusions as to its adequacy, must be completely reconsidered in light of the SMR, paragraphs 230-251.

PID paragraph 193.

The Board states, "subject matter not satisfactorily understood by individual operators is reviewed with them." This statement must be qualified in light of the SMR paragraph 251, which states, "when operators showed that they were weak in a given area there was no apparent effort to actually teach them materials in that area." Judge Milhollin's conclusion is supported by the testimony presented presented by G and H. SMR paragraphs 243-245.

PID paragraph 204, footnote 18.

The Staff's conclusions have been shown to be invalid. SMR paragraph 287.

PID paragraph 206, footnote 19; 249 footnote 21; 264 footnote 22.

In light of the SMR, Paragraphs 269-284, 286-287, it is obvious that the NRC exams do not provide reasonable assurance that candidates can safely and

competently operate the facility.

PID paragraphs 222, 230, 232.

In light of the SMR paragraph 281, the Board should find that a Staff review of the Cat-T exam without a review of the method by which it is taught and administered, is not a proper response to the Commission's August 9th Order.

PID paragraph 262.

In view of the SMR paragraph 287, it is clear that the training program does not equip participants with knowledge sufficient for them to understand and safely operate TMI-1. In addition, the record demonstrates that the Licensee employs unfit training personnel, such as Mr. Husted. Even Mr. Brown, another member of the training department, was shown to present weak testimony on certain topics, SMR paragraph 39, and was involved with Ross in improperly broadening answer keys along with Mr. Boltz. SMR paragraph 153-178. Thus, the Board is incorrect in presenting these findings. Clearly, these three individual training instructors should be removed from the training department.

PID paragraph 267.

Findings that operators "appreciate the importance of their functions" and appear enthusiastic and dedicated,are directly contradicted by overwhelming evidence throughout the record. Operators have an extremely poor attitude toward the NRC exams, SMR paragraph 328, have serious morale problems of which even management is aware, SMR paragraph 191, and were flippant and uncooperative at the hearing. (See Husted, G,) Judge Milhollin found that the following operators gave weak or noncredible testimony: A (par. 24), G and H (par. 205, 215), I (par. 24), P (par. 107), U (par. 119-122), and GG (par. 93).

In addition, Judge Milhollin found management directly responsible for the poor attitude which has developed among operators, and which ultimately caused cheating to occur, SMR paragraph 338, in contradiction to the Board's assertion that "responsible attitude training is part of General Employee Training (GET)." Clearly, this has been proven untrue.

PID paragraphs 268-272, footnotes 23, 24.

As shown above, the evidence and the SMR indicates that the NRC license exams are not adequate to insure that operators are competent to operate the plant safely. The Board should amend its findings to so reflect this evidence.

PID paragraph 275.

As discussed on p. 8-9 supra, the Board should conclude that the company's certification procedures are inadequate to satisfy the August 9, 1979 Commission Order.

PID paragraph 279.

For the reasons stated above, the Board must find that Licensee's training program is not adequate and does not comply with the Commission's Order of August 9, 1979, and of March 6, 1980 insofar as they relate to training.

PID paragraphs 583 and 584.

In light of the findings contained in the SMR, and for all of the reasons stated above, the Board must conclude that Licensee's management is not competent to operate TMI-1 safely, and that the short-term actions under the Commission's August 9, 1979 Order have not been satisfied.

Respectfully submitted,

Louise Bradford

Louise Bradford
TMIA

Dated: May 24, 1982