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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
TEXAS UTILITIES ELECTRIC)	Docket Nos. 50-445-2
COMPANY, <u>et al.</u>)	50-446-2
)	
(Comanche Peak Steam Electric)	(Application for
Station, Units 1 and 2))	Operating License)

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APPLICANTS' PROPOSED STANDARD
FOR LITIGATING ALLEGATIONS
OF INTIMIDATION

I. INTRODUCTION

This Board has requested that the Applicants propose a standard to be applied in adjudicating allegations raised by the Intervenor regarding intimidation of quality control inspectors. These allegations were raised within the context of contention five, which states as follows:

The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2 and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. § 50.57(a) necessary for issuance of an operating license for Comanche Peak.

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Intervenor has not identified which criteria set forth in Appendix B to Part 50 it believes were violated. Nor has Intervenor identified which findings cannot be made under Section 50.57(a). As a result, it is difficult to propose a standard which will be tailored to the claims Intervenor is in fact attempting to raise. Nevertheless, Applicants have attempted to propose a standard for litigating the allegations of intimidation raised in this proceeding.

II. PROPOSED STANDARD

The Licensing Board should adopt the following standard to determine whether alleged incidents of intimidation constitute a violation of NRC regulations such that the findings necessary under Section 50.57(a) for the issuance of an operating license cannot be satisfied:

Have acts or statements directed to QC inspectors occurred which were intended by the Applicants to cause QC inspectors to fear, or were reasonably perceived by QC inspectors as grounds to fear, loss of employment or other harmful effects should they identify nonconforming conditions, such that the cumulative effects of the acts or statements constitute a systematic breakdown in the quality assurance program of sufficient dimension to render the program inadequate to provide reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public?

The underlying legal basis for each element of this proposed standard is set forth below.

III. LEGAL ANALYSIS

A. Introduction

Applicants' proposed standard is composed of the following elements: (1) acts or statements directed to QC inspectors; (2) which were intended by the Applicants to cause QC inspectors to fear, or were reasonably perceived by the QC inspectors as grounds to fear; (3) loss of employment or other harmful effects; (4) should they identify nonconforming conditions; and (5) such that the cumulative effects of the acts or statements constitute a systematic breakdown in the quality assurance program of sufficient dimension to render the program inadequate to provide reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public.

The proposed standard is based on numerous sources. First, it is based on 10 C.F.R. Part 50, Appendix B and Section 50.57. Second, it is based on the decisions of other NRC tribunals, particularly Union Electric Co. (Callaway Plant, Unit 1),^{1/} which have addressed contentions analogous to the claims raised here. In Callaway the Appeal Board established a general standard to govern the adjudication of whether, in light of various construction defects, there had been a general breakdown of the quality assurance program such that an operating license could not be issued.

^{1/} ALAB-740, 18 NRC 343 (1983).

Finally, Applicants have drawn on precedents from the National Labor Relations Board, which, much like NRC, must determine whether actions or statements unlawfully threaten individuals engaged in certain activities protected by federal law. In particular, Section 7 of the Labor Management Relations Act ("LMRA") provides employees with the right to self-organization; to form, join or assist labor organizations; and to engage in other concerted activities for the purpose of collective bargaining,^{2/} and Section 8(a)(1) of the LMRA prohibits employers from interfering with, restraining or coercing employees in the exercise of those rights.^{3/}

As part of its duties under the LMRA, the National Labor Relations Board ("NLRB") is called upon regularly to decide whether employers or labor organizations were engaged in acts of coercion or intimidation or otherwise threatened those engaged in activities protected by Section 7, contrary to Sections 8(a)(1) or 8(b)(1) of that Act. The precedents developed by the NLRB are useful guidance to the NRC when assessing the existence vel non of intimidation in this proceeding, given the similarity of the factual inquiry undertaken by both this Board and the NLRB. Such is particularly the case in view of the number of cases the NLRB has adjudicated and the expertise it has developed when making, as here, factual findings as to whether incidents of intimidation

^{2/} 29 U.S.C. § 157.

^{3/} 29 U.S.C. § 158(a)(1). Section 8(b)(1) imposes a similar prohibition on labor organizations.

occurred. It is appropriate for the NRC to draw upon this expertise.

B. Elements of the Standard

1. Acts or Statements Directed to Quality Control

Inspectors. In order for intimidation to exist, there must be an act or statement. The act or statement could consist of threats to transfer an individual to a less desirable position, to impose more onerous working conditions on an individual, or to demote or discharge an individual.^{4/} Further, the act or statement must be made by an individual having the means to carry it out. Thus, any threats with respect to job loss, demotion, transfer, or other job action would have to be made by supervisory personnel.^{5/}

As the Board has already ruled, the inquiry into allegations of intimidation also should be limited in scope to claims

^{4/} See, e.g., NLRB v. F&F Laboratories, Inc., 517 F.2d 551, 89 LRRM 2549 (7th Cir. 1975); NLRB v. Hertz Corp., 449 F.2d 711, 78 LRRM 2569 (5th Cir. 1971); Jamaica Towing, Inc., 98 LRRM 1495, 236 NLRB No. 223 (1978); Fidelity Telephone Co., 98 LRRM 1210, 2365 NLRB No. 26 (1978); NLRB v. Harrison Steel Castings Co., 115 LRRM 2957 (7th Cir. 1984); Westpoint Transport, Inc., 91 LRRM 1195, 222 NLRB No. 345 (1976).

^{5/} Transway Corp., 81 LRRM 1175, 198 (NLRB No. 185 (1972)). Applicants recognize the conceptual possibility of other threats (e.g., threats of physical harm) made to QC inspectors by fellow inspectors or by craft personnel. We are not aware that Intervenor has alleged any such incidents. In any event, such incidents would be relevant here only if there were also present evidence of management complicity either by direct encouragement or by management inaction following knowledge of the incident. For example, only if management knew or reasonably could have known of incidents of threats of physical harm to a QC inspector and took no steps to alleviate the justifiable fears of the inspector, would evidence of alleged intimidation by non-supervisory personnel be relevant here.

involving QC inspectors, with the exception of the Stiners.^{6/} The proposed standard takes into account this ruling.

2. Which Were Intended by the Applicants to Cause QC Inspectors to Fear, or Were Reasonably Perceived by the QC Inspectors as Grounds to Fear. This element of the proposed standard involves the issue of whether the acts or statements in question were intended by the Applicants to be intimidating. If it can be shown that the Applicants intended to intimidate an inspector with adverse employment action for identifying nonconforming conditions, then such activity would arguably provide a basis for concluding that an incident of intimidation occurred. In this sense the intent of the Applicants is pivotal.^{7/} However, the understanding of the listener and the context of the act or statement should also be considered.^{8/}

The burden should be put on the Intervenor to demonstrate intent to intimidate. Although the Applicants have the overall burden of proof in this proceeding, they should not, as a matter of fundamental fairness, be required to prove a negative, i.e., that they did not intend to intimidate QC inspectors, absent

^{6/} Board's Memorandum (Clarification of Open Issues), March 15, 1984, at 13 n. 20.

^{7/} NLRB v. Hertz Corp., 78 LRRM 2569, 449 F.2d 711 (5th Cir. 1971); NLRB v. Brennan's Inc., 63 LRRM 2019, 366 F.2d 560 (5th Cir. 1966).

^{8/} NLRB v. Harrison Steel Castings Co., 115 LRRM 2957, 2962-63 (7th Cir. 1984); NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 71 LRRM 2481, 2497 (1969).

evidence to the contrary.^{9/} There is no legal or factual basis of which Applicants are aware to warrant an initial presumption by the Board that Applicants unlawfully intended to intimidate quality control inspectors and thereby to prevent them from identifying nonconforming conditions.

Without a showing by the Intervenor that Applicants intended to intimidate a QC inspector, the Board should assess based upon all of the objective circumstances whether the QC inspector could have reasonably concluded that he/she was being intimidated. When doing so an objective, reasonable person standard should be used.^{10/} This would preclude the Intervenor from merely confirming that a statement was made or act occurred and then requesting that the Board accept the view of the QC inspector that he/she was intimidated by it. Instead, under this reasonable person standard the Board would evaluate all of the circumstances surrounding the alleged incident to determine whether a reasonable person would have been intimidated as a result of the alleged incident.

3. Loss of Employment or Other Harmful Effects. This element of the proposed standard should be read in conjunction

^{9/} See notes 15-17, infra, and accompanying text.

^{10/} See, e.g., N.L.R.B. v. Berger Transfer & Storage Co., 678 F.2d 679, 689 (7th Cir. 1982); N.L.R.B. v. Service Employees International Union, Local 254, 5345 F.2d 1335, 1337-38 (1st Cir. 1976). Cf. International Ladies Garment Workers' Union and Georgetown Dress Corporation, 214 NLRB 706, 706 n.1 (1974); James Lees and Sons Co., 130 NLRB 290, 291 n.1 (1961).

with the first element of the standard, viz., acts or statements directed to quality control inspectors. Its purpose is to link an alleged incident of intimidation to a fear of loss of employment or other harmful effects. As discussed earlier, if the individual making a threatening statement or taking a threatening act cannot implement the threat, then it would be unreasonable to perceive the statement or act as threatening. In addition, if there is no evidence that the individual allegedly threatened reasonably feared that he would be discharged or suffer other harmful effects, then it is unlikely that such individual was in fact intimidated.

4. Should They Identify Nonconforming Conditions. This element of the standard is to require a showing that a QC inspector was intimidated so that he/she would not identify nonconforming conditions. It is also intended to preclude the litigation of alleged incidents of intimidation when the claim of intimidation is based on legitimate action taken by the Applicants. Such action is appropriate when, for example, a QC inspector fails to perform in accordance with plant procedures. This element is needed to account for the obligation imposed upon Applicants by Appendix B to establish a balanced quality assurance program both in which QC inspectors have sufficient organizational freedom to perform their jobs and in which licensee management exercises sufficient supervisory authority over those inspectors to assure that quality assurance functions are performed

correctly. Thus, if QC inspectors are intentionally (or even unintentionally) using incorrect criteria or are not properly applying pertinent criteria, the licensee under Appendix B has an affirmative obligation to assure that this situation is corrected and that the quality assurance program is implemented properly. If a QC inspector claims that he/she was intimidated but the underlying basis for the claim was action taken for failing to inspect in accordance with the correct procedures, then the incident would not constitute a claim of intimidation. In short, the QC inspector is like the baseball umpire whose job it is to call balls and strikes, but not to decide on his own how wide home plate should be.

In addition, supervisors must assure that QC inspectors perform their jobs in a reasonably timely and efficient manner. Management actions with this objective in mind cannot be relevant here, even if the employee fears job loss or other job action.

5. Such that the Cumulative Effects of the Acts or Statements Constitute a Systematic Breakdown in the Quality Assurance Program of Sufficient Dimension to Render the Program Inadequate to Provide Reasonable Assurance That the Activities Authorized by the Operating License Can be Conducted Without Endangering the Health and Safety of the Public.

This element of the proposed standard reflects the need to document demonstrated effects on hardware caused by alleged incidents of intimidation involving QC inspectors. The ultimate

determination the Board must make in this proceeding is whether there is reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public. If there are no significant, uncorrected effects on hardware resulting from any lapse in the QA/QC program, then it would follow that there is no basis to question whether Comanche Peak can be operated safely.

Further, this element of the proposed standard reflects the fact that it is unreasonable to expect any quality assurance program to function in perfect fashion. In Callaway, supra, the Appeal Board stated:

In a project even remotely approaching in magnitude and complexity the erection of a nuclear power plant, there inevitably will be some construction defects tied to quality assurance lapses. It would, therefore, be totally unreasonable to hinge the grant of an NRC operating license upon a demonstration of error-free construction.^{11/}

Applicants submit that similarly it would be unreasonable for the Licensing Board to examine claims of intimidation with the expectation that any single claim of intimidation is of sufficient import that it warrants a full-blown inquiry and that as a result of such a claim a basis could exist to question whether the QA/QC program overall was inadequate to meet its objective. Just as error-free construction is an unreasonable expectation, so a quality assurance program totally devoid of any disagreements among inspectors and supervisors is an unreasonable expectation.

^{11/} Callaway, supra, 18 NRC at 346.

As the Licensing Board in Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2)^{12/} recognized, quality assurance programs are administered by fallible human beings and cannot be expected to be implemented perfectly.

In addition, evidence of a systematic breakdown in the quality assurance program should be required. During the construction of a project the size of Comanche Peak, instances of disagreement between managers and employees obviously will arise, given human nature and the traditional relationship between employers and employees. In view of the thousands of employees at the site and the interface that must exist between those employees and management, some conflicts are inevitable. They arise for a host of reasons. They arise because an employee feels that he is undercompensated, because an employee misinterprets the intent of an instruction by his supervisor, or because a supervisor believes that an employee is not performing his job adequately. They arise also because inspectors must perform their functions using acceptance criteria established by others. This had led to instances when inspectors have had honest, although unfounded, disagreements with the qualified engineer who sets the standards as to what is acceptable.

Thus, several unrelated claims of intimidation could well have no relevance as to whether there were any systematic breakdowns in quality assurance. They could simply be the results

^{12/} LBP-83-77, 18 NRC 1365, 1368 n. 6 (1983).

of honest disagreements as to the correctness of a particular acceptance criterion. Accordingly, unless an incident of intimidation can be related to a systematic breakdown of the quality assurance program, then that incident when viewed in isolation, should not provide any basis for alleging deficiencies in the quality assurance program.

Finally, this element of the standard is needed to establish the benchmark against which the safety significance of any alleged breakdowns in the quality assurance program must be compared in this operating license proceeding. It is drawn from 10 C.F.R. § 50.57. This benchmark is needed for several reasons. Allegations of specific incidents of intimidation may not have any safety significance, such as, for example, an alleged incident of intimidation which did not cause the inspector to deviate from approved procedures. Further, even if as a result of alleged intimidation a systematic breakdown could arguably be identified in one, discrete area, it does not inevitably follow that a structure, system, or component will not perform satisfactorily in service. The Atomic Energy Act and the Commission's implementing regulations do not require error-free construction. Rather, they require reasonable assurance that, as built, Comanche Peak can and will be operated safely.^{13/} At bottom, the Licensing Board should "reject the impractical proposition that any minor violation of quality assurance regulations regardless of whether the violation

^{13/} Callaway, ALAB-740, supra, 18 NRC at 346.

calls plant safety seriously into question, would call for denial of a license."^{14/}

IV. LITIGATION OF INTIMIDATION

When applying the proposed standard, Applicants believe that the Licensing Board should bear in mind three points. First, while the Applicants may have the ultimate burden of proof in this proceeding, "Intervenors also bear evidentiary responsibilities"^{15/} These evidentiary responsibilities place upon Intervenor first the burden of going forward with evidence to buttress a contention as to why the license in dispute should be denied.^{16/} This burden of going forward requires the Intervenor to introduce "sufficient evidence to establish a prima facie case," before the burden shifts to Applicants to provide, as part of their overall burden of proof, "sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license."^{17/}

In particular, the evidence offered by the Intervenor should be directly relevant to the standard adopted by the Board regarding intimidation. Intervenor is making allegations that

^{14/} Perry, LBP-83-77, supra, 18 NRC at 1368 n.6.

^{15/} Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980).

^{16/} Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 388 (1974) citing Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-123, 6 AEC 331, 345 (1973).

^{17/} Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983).

federal law was violated. These are serious charges and should not be made lightly. Nor should the Licensing Board draw any inferences in favor of those charges unless they are supported in the record by probative and reliable evidence. In short, Intervenor should not be permitted to make vague and unsubstantiated claims, or claims not relevant to the adopted standard, and then expect the Licensing Board to conduct a full scale inquiry into every aspect of intimidation Intervenor believes but is unwilling or unable to show occurred. It must be required to meet its evidentiary burdens.

Second, while the use of hearsay evidence is admissible in the NRC licensing proceedings,^{18/} that evidence must, nevertheless, be reliable.^{19/} Hearsay evidence involving exchanges between individuals on which a claim of intimidation is based, by definition, is unreliable. Rather than involving a hardware deficiency, the existence of which can be ascertained by examining the hardware or reviewing documentation, alleged incidents of intimidation require the trier of fact to reconstruct a conversation or other exchange between individuals and to account for circumstances which could bear on how one or both of the parties perceived the exchange. Accordingly, Applicants urge that the Board limit evidence concerning incidents of intimidation

^{18/} Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-335, 4 NRC 397, 412 (1976).

^{19/} See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B) ALAB-367, 5 NRC 92, 121 (1977).

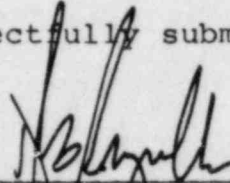
where a conversation or exchange between individuals is in dispute only to first-hand knowledge and to exclude hearsay evidence as to such matters.

Third, Section 2.749 permits the use of summary disposition in operating license proceedings as to any issues where there is no genuine dispute as to material facts. Depending on the standard ultimately adopted by the Board, it may be possible to obviate inquiring into allegations which, even if true, do not constitute intimidation. Therefore, Intervenor must immediately disclose to Applicants the exact nature of its claims, the identities of its witnesses and the persons Intervenor believes to have knowledge of this issue. Failure to do so would effectively deprive Applicants of the ability to prepare for trial and to avail themselves of Section 2.749.

V. CONCLUSION

In light of the foregoing, Applicants urge the Licensing Board to adopt the standard set forth above governing litigation of claims of intimidation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Proposed Standard for Litigating Allegations of Intimidation" in the above-captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid, this 8th day of May, 1984:

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