

16989

DOCKETED
USMRC

August 14, 1995

'95 AUG 16 P1:51

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Before Administrative Judges:

Peter B. Bloch, Chair

Dr. James H. Carpenter

Thomas D. Murphy

In the Matter of)

GEORGIA POWER COMPANY)
et al.,)

(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))

Docket Nos. 50-424-OLA-3

50-425-OLA-3

Re: License Amendment

(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

INTERVENOR'S RESPONSE TO GEORGIA POWER
COMPANY'S MOTION TO EXCLUDE ADMISSION OF OI CONCLUSIONS

I. INTRODUCTION

Intervenor, Allen Mosbaugh, hereby requests this honorable Licensing Board to deny Georgia Power Company's Motion to Exclude Admission of OI Conclusions ("Georgia Power's Motion"). The conclusions of the OI Report are admissible because they are reliable. The inherent reliability of a governmental report makes sponsorship unnecessary. Licensee is free to impeach the conclusions contained in the OI Report and this is the normal and most appropriate safeguard available.

II. BACKGROUND

The Licensing Board provisionally admitted a number of conclusions from the OI Report and gave Georgia Power the opportunity to submit a brief on this issue. Tr. 9325. Georgia Power submitted its brief on July 28, 1995. Intervenor takes this opportunity to respond.

9508230178 950814
PDR ADOCK 05000424
G PDR

2503

III. ARGUMENT

A. The Conclusions of the OI Report Are Admissible

Factually based conclusions are not excluded from the scope of Rule 803(8)(C) merely because they contain opinions or conclusions. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 162 (1988). Rule 803(8)(C) "explicitly excepts public records and reports 'resulting from an investigation made pursuant to authority granted by law', from exclusion under the hearsay rule, because official reports contain inherent indicia of trustworthiness." Clark v. Clabaugh, 20 F.3d 1290, 1294 (3rd Cir. 1994). The Supreme Court extended the application of Rule 803(8)(C) to include portions of investigatory reports which contain factually based conclusions, and are otherwise admissible when they satisfy the Rule's trustworthiness requirement. Complaint of Nautilus Motor Tanker Co., Ltd., 862 F.Supp 1251, 1253 (D.N.J 1994). The following nonexclusive factors are to be considered when evaluating trustworthiness:

- 1) Timeliness of investigation;
- 2) Investigator's skill or experience;
- 3) Whether a hearing was held;
- 4) Possible bias when reports are prepared with view to possible litigation.

Beech Aircraft, 488 U.S. at 167, n. 11.

To exclude evidence which falls under this rule, the Licensee must make "an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to

testify. Nautilus, 862 F.Supp. at 1254-55; See Clark, 20 F.3d at 1295 ("the party challenging the validity of a official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness"). It is also important to note that no one factor is dispositive Nautilus, 862 F. Supp. at 1254-55. Georgia Power has failed to make an affirmative showing or put forth any evidence sufficient to impugn the trustworthiness of the conclusions contained in the OI Report. Therefore the conclusions of the OI Report are trustworthy and admissible and it is up to the trier of fact to give whatever weight it deems appropriate to the conclusions set forth in the report.

1. The OI investigation was timely.

The NRC Office of Investigations conducted a timely investigation of the allegations contained in the OI Report. The OI investigation was halted by the NRC when it transferred its jurisdiction to the U.S. Department of Justice ("DOJ") in 1991. The Office of Investigations was unable to resume its investigation until the late 1992-93 time frame when jurisdiction was returned to the NRC. The resulting delay was unavoidable and not the fault of OI. The OI incurred a reasonable delay and therefore the investigation was timely. Additionally, Mr. Robinson had inquired into some of the issues contained in the allegations during the Operational Safety Inspection in 1991 and was therefore able to include these interviews in the OI Report.

The fact that criminal investigations are under way provides a logical explanation for a delay in a government investigation. Nautilus, 862 F.Supp. at 1255. In Nautilus a shipping vessel grounded in 1990 and the investigative report was not completed until 1993. The investigator was able to gather some evidence in 1991 and therefore the Court found that "not all material contained within the report was necessarily untimely" and that the delay was reasonable. Id. Furthermore the Licensee provided no evidence that the time within which the NRC OI conducted its investigation was out of the ordinary, given the complexity of the investigative record or "that the delay was of such a degree as to permit an inference of untrustworthiness with respect to the resulting report." Taylor v. Bouchard Transportation Co., Inc., 1991 WL 107219 (S.D.N.Y. 1991), page 3 (not reported in F.Supp). The OI Investigation was timely commenced and the delay resulting from a U.S. Department of Justice review does not impact on the reliability of the OI Report.

2. **Mr. Robinson is a highly skilled investigator.**

Larry Robinson is a Senior Investigator, Grade 14, GG-14. Deposition of Larry Robinson taken November 8, 1994 at 4 (hereinafter "Robinson Depo."). He has worked as an investigator for the Office of Investigation of approximately 11 years. Robinson Depo. at 8. Mr. Robinson's prior experience includes three years with the Federal Bureau of Investigation and five years as a special agent investigator for the Veterans Administration. Robinson Depo. at 5-7.

Within the NRC's Office of Investigations, Mr. Robinson was highly respected. This view was held by Mr. Ben Hayes, the then Director of the Office of Investigations. Deposition of Ben Hayes taken March 17, 1995 at 6, 24 (hereinafter "Hayes Depo."). Mr. Hayes stated, "In the Georgia Power case, we had a very, very competent investigator. I was very comfortable with Larry on this case . . . Larry is probably the most experienced agent in the regional office. So it was natural that he would get probably one of the biggest investigations that office had ever undertaken." Hayes Depo. at 24-25.

According to Mr. Hayes, the investigation undertaken by Mr. Robinson was major. "[T]his was not a run-of-the-mill investigation. This is one where senior members of the NRC staff were briefed, were shown slides, were given two or three opportunities to ask questions, different opportunities at different briefings." Hayes Depo. at 39-40. Mr. Robinson spent more time with Mr. Mosbaugh than typically spent with normal, average allegeders because "this was a much more complicated issue than . . . normally encounter[ed] in OI's investigative work. This was a very sensitive, complicated matter with lots of facets to it." Id. at 160-161. Mr. Hayes did not have the impression that Mr. Robinson spent more time than what a competent field investigator would spend on such an investigation. Id. at 81.

Moreover, in comparison to the hundreds of OI Reports that Mr. Hayes has reviewed in his career, he concluded that OI Report II-90-020R was "an outstanding effort by a very competent,

professional investigator." Hayes Depo. at 253. In fact, Mr. Mr. Robinson was apparently named agent of the year. Id. Mr. Hayes had no doubts about Mr. Robinson's integrity or competency. Id. He stated that at no time during the course of NRC's review of the report were there "any questions as to its lack of authenticity or attempt to mislead or anything like that." Id. It should also be noted that Investigators Craig T. Tate and James D. Dockery of Region II also participated in the investigation.

The burden to show an investigator lacks skill and experience rest squarely on the party who opposes the admission of the official report. Complaint of Munyan, 143 F.R.D. 560, 565 (D.N.J. 1992). Licensee merely seeks to cast a black cloud over Mr. Robinson reputation merely because it disagrees with the conclusions of the report.

Additionally, in Taylor, Supra., the Court also held that concerns regarding trustworthiness due to the lack of experience of an investigator were lessened by the signature and approval of his superior. Id. Not only was Mr. Robinson a highly skilled investigator but he was also supported in his findings by Mr. James Y. Vorse, Director of OI's Region II Field Office, and by Mr. Hayes, Director Office of Investigations, both of whom approved and signed the OI Report after careful review. The OI Conclusions are therefore trustworthy and should be admitted.

3. Georgia Power waived its right to a hearing.

Licensee contends that it was not offered the opportunity during the investigation to respond to any of the OI conclusions prior to the release of the Report. Georgia Power's Motion at 7. Licensee had the opportunity after the Notice of Violation was issued to request a hearing. It did not. Instead, it negotiated with the NRC and reached a settlement as to the final Notice of Violation.

Licensee further argues that Mr. Robinson did not take into account documents it provided to OI in October 1993. Id. n. 3. The investigator is not required to make use of all available materials in order to compile a trustworthy report for the purposes of Rule 803(8)(C). Nautilus, 862 F. Supp. at 1254-55; citing Taylor, 1991 WL at 3.

The absence of a hearing does not require finding the OI Report to be untrustworthy. Munyan, 143 F.R.D. at 565. "Requiring that the government report of an investigation be based on an evidentiary hearing providing an opportunity for cross examination would rob Rule 803(8)(C) of any practical utility." Taylor, 1991 WL at p. 4., citing In re Japanese Electronic Products, 723 F.2d 238, 268 (3rd Cir. 1983). A formal hearing is not "a sine qua non of admissibility under Rule 803(8)(C) when other indicia of trustworthiness are present. Munyan, 143 F.R.D. at 565. Further, the mere lack of a hearing, in the absence of any other convincing indication of lack of

trustworthiness, does not in and of itself create evidence of untrustworthiness." Taylor, 1991 WL at p. 4.

Licensee has failed to show that a evidentiary hearing is normally provided during an OI investigation or that it requested one. The lack of a hearing alone does not indicate the OI conclusions are untrustworthy. Therefore the OI conclusions are admissible.

4. Mr. Robinson's investigation was not bias.

Licensee contends that Mr. Robinson was partial to and had a close relationship with the Intervenor in this matter, Mr. Mosbaugh. Licensee cites to the fact that Mr. Robinson and Mr. Mosbaugh have had extensive contact with regard to the allegations in this case. Licensee states in particulars that the contacts were so extensive that Mr. Mosbaugh would brief Mr. Robinson "sometimes daily" about information from depositions in this case. Georgia Power's Motion at 9. However, Licensee fails to point out that the OI Report was issued December 20, 1993 and that the diesel generator depositions it refers to occurred after the report was issued (summer of 1994). Moreover, NRC would be remiss in its duty to safeguard the public if it did not allow allegers to freely provide information.¹

¹ Larry Robinson's initial contact with Allen Mosbaugh occurred when he:

interviewed him as a witness in a case previous to the diesel generator case. For lack of a better term, we'll call it the dilution valve case. At that point in time, . . . I sensed that he might have wanted to tell me - - give me more information than what he was saying in that interview, so I gave him my card after the interview and told him that

The relationship and interactions between Mr. Robinson and Mr. Mosbaugh may be characterized as that of an investigator and alleged. While Mr. Robinson stated that this case was unique in terms of the number of hours he devoted to it, he does not claim that his interactions with Mr. Mosbaugh were unique with respect to other alleged or confidential informants. Robinson Depo. at 219.

When questioned about whether special precautions were taken to guard against a relationship with Mr. Mosbaugh that was not objective and unbiased, Mr. Robinson stated that he believed that he took care and that his interactions with Mr. Mosbaugh were not inconsistent with an investigator conducting an investigation with an alleged. Robinson Depo. at 220. Moreover, when asked if he had occasion to socialize with Mr. Mosbaugh, Mr. Robinson unequivocally claimed that he did not. Id. The meetings that occurred at Mr. Mosbaugh's residence may be characterized solely as working meetings. Id. Moreover, at no time did Mr. Robinson share confidential information with Mr. Mosbaugh. Id. at 221.

Mr. Mosbaugh characterizes his relationship with Mr. Robinson in the following manner:

I've been a confidential informant and, you know, an alleged and it's been a relationship of an alleged with the NRC. I mean, it's a professional relationship.

if he wanted to talk to me, any other information that - - to feel free to do so."

Robinson Depo. at 9.

Tr. 10,501 (8/8/95). Mr. Mosbaugh does not socialize with Mr. Robinson and does not know details of his personal life. Tr. 10,502 (8/8/95).

There are procedural safeguards to protect against biases and prejudices in conclusions drawn by OI investigators. First, the OI manual dictates that an OI manager, including the field office directors or the director, does not have the authority to change an investigator's conclusions. A disagreement is documented and sent to the Office of Investigation's headquarters office to be reviewed by the OI director staff and then by three separate OI directors that are not involved with the investigation. All subsequent conclusions are documented and included in the record. The ultimate responsibility for the findings rests with the Director of the Office of Investigation. Hayes Depo. at 32-33. Mr. Robinson's conclusions were accepted at the regional level and subsequently at the OI headquarters without changes or alterations. Id. at 33-34. All persons involved with Mr. Robinson's report agreed that this was the appropriate finding based on the evidence obtained during the investigation. Id. at 34. Second, there are built in checks to ensure that OI investigators do not lose objectivity. Headquarter staff review of the evidence protects against biases. Id. at 85. "The report is going to speak for itself, and it is going to stand or fall on the merits of the evidence in the final analysis." Id. at 86.

Furthermore, the fourth factor in the test for trustworthiness is the possible bias when reports are prepared with view to possible litigation. Mr. Robinson has no interest in the proceeding at hand. In Clark, the Court held that while the investigators interviewed persons who were parties to the litigation and incorporated their statements into the report, "the bias of those interviewed does not render the...Report itself inherently untrustworthy, and such bias cannot be imputed to the investigating officers." Clark, 20 F.3d at 1295. The Court further stated that the investigators had interviewed persons from all factions involved and had thus "achieved some measure of balance between opposing perspectives. Id. Additionally, the fourth factor is to focus on the motives of the investigator and not the witnesses who may have made statements. Munyan, 143 F.R.D. at 565. "The fact that some of the sources of information in a report may be biased, does not, in and of itself, render the report untrustworthy so long as the public official who prepared it considered other sources of information and was not biased himself. Id., citing Taylor, Supra.

Unsupported allegations of bad faith are often made against regulatory agencies to hinder investigations and such attempts to undermine the enforcement process should not be tolerated. Spannaus v. Federal Election Commission, 641 F.Supp. 1520, 1533 (S.D.N.Y. 1986). "Where a regulatory agency is legitimately and properly conducting an investigation or otherwise exercising its statutory authority, the burden of showing the agency's actions

are motivated by bad faith or an improper purpose is on the party being investigated." Id. The OI Conclusions are therefore trustworthy and should be admitted in this proceeding.

5. The OI Report is a final report.

A fifth factor has developed in which there is a consideration as to the finality of the report. Taylor, 1991 WL at p. 3. It is within the Courts discretion to admit or exclude reports that are interim or incomplete. Meriwether v. Coughlin, 879 F.2d 1037, 1039 (2nd Cir. 1989). The Court in Taylor stated that the fact the investigator's superior approved and signed the report was convincing evidence of the report's completeness and finality. 1991 WL at p. 3.

The OI Report is the final report of the Office of Investigations on the allegations. The fact that Messrs. James Vorse and Ben Hayes approved and signed the OI Report is evidence of the report's completeness and finality and therefore the OI Conclusions are admissible.

B. OI Report Admissible Without Sponsor

To exclude evidence which technically falls under a hearsay exception "providing that reports and statements of public offices...setting forth factual finding resulting from an investigation made under authority granted by law there must be an affirmative showing of untrustworthiness, beyond the obvious fact that declarant is not in court to testify." Bradford Trust Company of Boston v. Merrill Lynch, 805 F.2d 49, 54 (2nd Cir. 1986). The weight to be given to government reports admitted as

exceptions to the hearsay rule is to be determined by the trier of fact. Id. The Court in Bradford Trust explained that to ignore a report simply because the preparer is unavailable for cross-examination:

...is just another way of saying that the report [is] hearsay. Ignoring it on this ground is inconsistent with the notion of having exceptions to the hearsay rule.

Id. at 55. Furthermore, in determining admissibility, the court must only consider whether the report was compiled in a way that indicates that its conclusions could be relied upon, not whether the court agrees with the conclusions. Nautilus, 862 F.Supp. at 1255. The admission of the conclusions of the OI Report are "subject to the ultimate safeguard--the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions. Beech Aircraft, 488 U.S. at 168. Therefore they should be admitted into the record.

C. Admission of the OI Conclusions is Necessary

Once again it is the trier of fact who determines the weight to be given to an investigatory report and in determining admissibility, the court must only consider whether the report was compiled in a way that indicates that its conclusions could be relied upon, not whether the court agrees with the conclusions. Nautilus, 862 F.Supp. at 1255.

No other investigative reports have been admitted to the record of this proceeding and so the OI Report and its findings would not be cumulative. The Board, as the trier of fact, will determine the weight it will give the OI Conclusion. Licensee is

free to submit evidence which contradicts the findings of the OI Report. Hence the OI Conclusions should be admitted.

IV. CONCLUSION

For the reasons stated above the conclusions of the OI Report should be admitted to this proceeding and any such conclusions that have been provisionally admitted as related testimony should remain in the record.

Respectfully submitted,

Mary Jane Wilmoth / by Bw

Michael D. Kohn
Mary Jane Wilmoth
KOHN, KOHN & COLAPINTO, P.C.
517 Florida Ave., N.W.
Washington, D.C. 20001
(202) 234-4663

CERTIFICATE OF SERVICE

I hereby certify that the above document was served via hand delivery upon the persons on the attached service list on this 14th day of August 1995 at the Telfair Inn, Augusta except as indicated by "**".

Mary Jane Wilmoth / by Bw
Mary Jane Wilmoth

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

'95 AUG 16 P1:52

In the Matter of)

GEORGIA POWER COMPANY)
et al.,)

(Vogtle Electric Generating)
Plant, Unit 1 and Unit 2))

Docket Nos. 50-424-OLA-3)
50-425-OLA-3)
OFFICE OF SECRETARY
DOCKET AND SERVICE
BRANCH

Re: License Amendment)
(transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

SERVICE LIST

Administrative Judge
Peter B. Bloch, Chair
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mitzi Young/Charles Barth
Office of General Counsel
U.S. N.R.C
Washington, D.C. 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ernest L. Blake, Jr.
David R. Lewis
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037

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

*Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Service via First Class Mail.

(CITE AS: 1991 WL 107279 (S.D.N.Y.))

Joseph TAYLOR, Plaintiff,

v.

BOUCHARD TRANSPORTATION CO., INC. and Tug Evening Tide Corp., Defendants.

No. 89 Civ. 5965(PKL).

United States District Court, S.D. New York.

June 12, 1991.

Friedman, Biondi & James, New York City (Bernard D. Friedman, of counsel), for plaintiff.

Freehill, Hogan & Mahar, New York City (John J. Walsh, and Thomas M. Canevari, of counsel), for defendants.

OPINION AND ORDER

LEISURE, District Judge:

*1 This action is brought by plaintiff seeking damages under the Jones Act, 46 U.S.C. s 688, for personal injuries he sustained in an accident while employed as a deckhand aboard defendants' tugboat the Evening Tide. The United States Coast Guard (the "Coast Guard") conducted an investigation following the accident and compiled a report indicating its findings, including the apparent cause of the accident. Defendants now move the Court to preclude the admission of the report into evidence, asserting that it is inherently untrustworthy and thus the hearsay exception embodied in Federal Rule of Evidence 803(8)(C) is inapplicable. Defendants also move to dismiss the second claim in plaintiff's complaint on the ground that plaintiff has reached the maximum possible cure with respect to his injuries, or, in the alternative, to preclude plaintiff from introducing evidence as to future losses, pain and suffering. Finally, although not mentioned in defendants' notice of motion, defendants' moving brief demands that plaintiff submit to physical therapy as part of plaintiff's duty to mitigate his damages.

Background

The instant action arises from an accident aboard the tugboat the Evening Tide on August 13, 1989, in which plaintiff Joseph Taylor suffered alleged bodily injury. Plaintiff served as a deckhand aboard the Evening Tide and was performing his duties when he sustained his injuries in the accident. Defendants are Bouchard Transportation Company, Inc. and the Tug Evening Tide Corp., the owners and operators of the vessel involved in this action.

At the time of the accident, the Evening Tide was attempting to bring a barge alongside the tug by bringing in the slack of the eight inch stern line that connected the barge and the tug. Ordinarily, this task would be accomplished by putting the eight inch line on a capstan. However, plaintiff alleges that the stern capstan suitable for the task was not operable on the Evening Tide the day of the accident. The eight inch line was instead to be drawn in by a towing machine. The line, however, proved to be too wide to negotiate the level winder of the towing mechanism through which it needed to pass. The eight inch line was then attached to a five inch line, which was rigged to an operable capstan at the bow of the tug, with the intention that the five inch line would force the eight inch line through the level winder. The accident occurred upon activating the towing mechanism, at which time the five inch line parted and struck plaintiff, severely injuring his thigh. Plaintiff was attended to by one of the crew members before being evacuated from the tug by the Coast Guard. He received emergency medical treatment and has since been

declared permanently unfit to resume his duties.

Plaintiff has commenced this Jones Act suit seeking damages stemming from his personal injuries. A crucial issue to be determined in this action is whether Captain Joseph Carey, the captain of the *Evening Tide*, ordered the eight inch line to be attached to the five inch line and drawn through the level winder in the manner described above.

*2 On December 12, 1989, defendants officially reported the accident to the Coast Guard on a CG-2692 form. The Coast Guard subsequently began an investigation of the accident, conducted by Lieutenant Commander Charles F. Barker of the Coast Guard ("Commander Barker"), pursuant to 46 CFR s 4.07-1, requiring the Coast Guard to investigate marine casualties. Commander Barker reported the findings of his investigation in the form of both facts and opinions on portions of the CG-2692 form submitted by defendants (the "Report"). [FN1] Under the portion of the Report marked "Description of Casualty," Commander Barker stated:

1. The stern capstan on the tug *Evening Tide* was inoperative on the day of the accident. In order to make up to a barge, Mr. Carey, the person in charge of the *Evening Tide*, ordered a 5" line to be spliced to an 8" line, and the 5" line led to the bow capstan. The path of the 5" line took it through a 5" level-winder. A deck hand was stationed at the bow capstan, Carey was on the bridge, and Taylor was at the stern. The bow capstan was energized, and the 5" line was brought up. When the 8" line reached the 5" roller, it would not pass through. Carey yelled to the bow capstan operator to stop, but the 5" line strained and parted. The 5" line recoiled and struck Taylor in the left thigh.

2. There is no evidence that drugs or alcohol played a part in this accident.

Affirmation of John J. Walsh, Esq., sworn to on March 12, 1991 ("Walsh Aff."), Exhibit C. Commander Barker concluded in the Report that the apparent cause of the accident was:

an error in judgement on the part of towing vessel operator Carey, in that he thought an 8" line would pass safely through a 5" roller. Contributing to this accident was that the operating company permitted the *Evening Tide* to work without an operable stern capstan.

Walsh Aff., Exhibit C. The Report was completed by Commander Barker on July 9, 1990, and approved by his superior, Captain Murdock, two days later.

Discussion

Defendants first move the Court to preclude admission of the Report into evidence, asserting that the Report is untrustworthy within the meaning of Federal Rule of Evidence 803(8)(C). Rule 803(8)(C) provides that:

[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:

... (8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (C) in civil actions and proceedings ... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed.R.Evid. 803(8)(C). "This rule is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports." *Bradford Trust Co. v. Merrill Lynch Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir.1986). "To exclude evidence which technically falls under 803(8)(C) there must be 'an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify.'" *Bradford Trust*, supra, 805 F.2d at 54 (quoting *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613, 618 (8th Cir.1983)).

*3 Four nonexclusive factors have traditionally been applied by courts in

determining whether a document sought to be introduced under Rule 803(8)(C) is untrustworthy. These factors are: "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n. 11 (1988) (citing Advisory Committee's Notes on Fed.R.Evid. 803(8)). "As with any exception to the rule against hearsay, Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court's sound exercise of discretion in determining whether the hearsay document offered in evidence has sufficient independent indicia of reliability to justify its admission." *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir.1981), cert. denied, 454 U.S. 1164 (1982). "A wide variety of public documents have been admitted pursuant to Rule 803(8)(C)." *Gentile v. County of Suffolk*, 129 F.R.D. 435, 448 (E.D.N.Y.1990) (citing cases).

Defendants argue that under the *Beech Aircraft* factors the Report is untrustworthy and should be excluded from evidence. Defendants first address the issue of timeliness. Defendants argue that the Coast Guard investigation was conducted in an untimely manner, asserting that Commander Barker did not request a CG-2692 form from them until December 1989, and that the investigation itself did not begin in substance until February 1990. However, the pertinent law and regulation required that defendants report the accident within five days of its occurrence using the CG-2692 form; the Coast Guard had no duty to send defendants the form. See 46 U.S.C. s 6101 and 46 CFR s 4.05-10(a). Thus the delay, to the extent there was a delay, was partly the result of defendants' failure to comply with the law. Moreover, there is no evidence that the speed with which the Coast Guard conducted its investigation was any less than is usually the case, or that the delay was of such a degree as to permit an inference of untrustworthiness with respect to the resulting Report.

Defendants next argue that the investigator's lack of skill and experience renders the Report untrustworthy. Although they concede that Commander Barker had been employed by the Coast Guard for over ten years at the time of the accident, defendants note that Commander Barker had only four months experience in the field of marine casualty investigations. They further argue that in carrying out his investigation, Commander Barker failed to consider certain sources of evidence. His level of experience is not disputed by plaintiff. Rather, plaintiff contends that Commander Barker's level of experience is largely unimportant to the issue of trustworthiness, given his supervisor's signed approval of the Report.

Although the Court does not agree that Commander Barker's prior experience is irrelevant, the presence of Captain Murdock's signature of approval lessens the Court's concern that the Report is somehow untrustworthy. In addition, although defendants list several omissions on the part of the investigator, they make no attempt to show that these omissions have any bearing on the Report's trustworthiness. There is no requirement that an investigator make use of all available materials in order to compile a trustworthy report for the purposes of Rule 803(8)(C). The relevant case law considers the completeness and finality of the document at issue to be the important question. For example, Judge Weinstein in *Gentile*, *supra*, 129 F.R.D. at 458, includes "finality of findings" as an additional consideration to those enumerated in *Beech Aircraft*. See also *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742-43 (2d Cir.1989) (it was within district court's discretion to exclude government reports in part because of their interim or inconclusive nature). But see *Meriwether v. Coughlin*, 879 F.2d 1037, 1039 (2d Cir.1989) (admitting into evidence the last page of an interim report). The

approval signature of Captain Murdock on the Report is convincing evidence of the Report's completeness and finality.

*4 Defendants' final argument under the Beech Aircraft case is, in effect, that the Report must be untrustworthy because no hearing took place prior to its issuance. The absence of a hearing, however, does not require finding the Report to be untrustworthy. As Judge Weinstein has noted, "[r]equiring that the government report of an investigation be based on an evidentiary hearing providing an opportunity for cross examination would rob Rule 803(8)(C) of any practical utility." Gentile, *supra*, 129 F.R.D. at 456 (quoting *In re Japanese Electronic Products*, 723 F.2d 238, 268 (3rd Cir.1983)). In the case at bar, the mere lack of a hearing, in the absence of any other convincing indication of lack of trustworthiness, does not in and of itself create evidence of untrustworthiness. [FN2]

Defendants' remaining arguments are unconvincing. Defendants argue that the Report was incomplete, and that it was prepared for purposes other than those that it would serve at trial. The issue of completeness has already been discussed above, and will not be repeated here. As for the remaining issue, the Court believes that the fact that the original purpose of the Report was not to establish fault does not in any way suggest the Report is untrustworthy. The relevant regulation specifically provides that Coast Guard investigations "are not intended to fix civil or criminal responsibility." 46 CFR s 4.07-1(b). Nevertheless, the same regulation requires that such investigations: determine as closely as possible ... (3) Whether there is evidence that any act of misconduct, inattention to duty, negligence or willful violation of the law on the part of any licensed or certificated man contributed to the casualty ... [and] (4) Whether there is any evidence that ... any ... person caused or contributed to the cause of the casualty.

46 CFR s 4.07-1(c)(3) and (4). By carrying out these purposes, the Report is directly relevant to the issues in this case, and certainly no inference of untrustworthiness may be drawn therefrom.

Accordingly, having failed to make the requisite "affirmative showing of untrustworthiness," see *Bradford Trust*, *supra*, 805 F.2d at 54, defendants' motion to preclude admission of the Report into evidence, pursuant to Federal Rule of Evidence 803(8)(C), is denied. [FN3] It is important to recall that, as with any piece of admitted evidence, the ultimate determination of the Report's trustworthiness will rest with the jury. "The weight and credibility extended to government reports admitted as exceptions to the hearsay rule are to be determined by the trier of fact." *Bradford Trust*, *supra*, 805 F.2d at 54. Defendants will have ample opportunity to call witnesses at trial in order to attempt to establish the untrustworthiness of the report.

Future Loss, Pain and Suffering

Defendants next move the Court to dismiss plaintiff's claim for maintenance and cure, or, in the alternative, to preclude plaintiff from introducing evidence of future losses, pain and suffering. "Maintenance and cure" is the right, under general maritime law, of a seaman injured in the service of a ship to wages, subsistence, lodging and care to the point where the maximum attainable cure has been reached. See *Rodriguez Alvarez v. Bahama Cruise Line Inc.*, 898 F.2d 312, 314-15 (2d Cir.1990); *Staffer v. Bouchard Transportation Co., Inc.*, 878 F.2d 638, 644 (2d Cir.1989).

*5 Both plaintiff and defendants agree that plaintiff's maximum medical cure was attained on August 21, 1990. Plaintiff agrees that he is not entitled to maintenance and cure beyond this date. Accordingly, plaintiff's maintenance and cure claim is dismissed to the extent that it represents a claim for damages beyond the agreed date of maximum medical cure.

Mitigation of Damages

Finally, defendants argue that plaintiff has a duty to mitigate damages and is therefore required to submit to physical therapy. Plaintiff agrees that he has the duty to mitigate his damages, but argues that physical therapy has not been recommended by any physician and is not an appropriate measure.

The Court notes that, in a trial by jury, it is not the duty of the Court to appraise the measures taken by the parties in an effort to mitigate damages. "Ordinarily, it is left to the jury to determine whether plaintiff in the exercise of ordinary care and at reasonable expense could have mitigated defendants' damages." *Fisher v. First Stamford Bank and Trust Co.*, 751 F.2d 519, 524 (2d Cir.1984). Thus, whether or not plaintiff has failed to mitigate his damages is a question for the jury to resolve, and this Court will not require plaintiff to submit to medical treatment he does not believe is in his own best interest.

Conclusion

For the reasons set forth above, defendants' motion to preclude introduction of the Report into evidence on the ground that it is untrustworthy is denied. Defendants' motion to dismiss plaintiff's claim for maintenance and cure is granted, to the extent said claim is for damages for maintenance and cure beyond the date of maximum medical cure, i.e., August 21, 1990. Defendants' motion to compel plaintiff to undergo physical therapy is denied. This action will be placed on the trial ready calendar.

SO ORDERED.

FN1. Defendants claim that they are uncertain as to which report plaintiff wishes to introduce as evidence, owing to the alleged existence of various versions of the CG-2692 form. However, only one report, included in defendants' moving papers as Exhibit C, bears the final approving signature of Captain Murdock of the Coast Guard. This report is the version discussed in plaintiff's papers in opposition to defendants' motion, and is clearly the report at issue.

FN2. Defendants concede that they have no evidence of any bias on the part of Commander Barker. Therefore, the fourth Beech Aircraft factor weighs in favor of admission of the Report. *Beech Aircraft*, supra, 488 U.S. at 167 n. 11.

FN3. In reaching this conclusion, the Court finds it unnecessary to refer to, or rely on, a statement of deckhand Arthur M. Tonnesan submitted to the Court by plaintiff.

END OF DOCUMENT

Robinson

VI

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
GEORGIA POWER COMPANY,) Docket Nos. 50-424-OLA-3
et al.) 50-425-OLA-3
(Vogtle Electric) Re: Licensee Amendment
Generating Plant) (Transfer to
Units 1 and 2)) Southern Nuclear)

DEPOSITION OF
LARRY L. ROBINSON

November 8, 1994

8:40 a.m.

United States Nuclear Regulatory Commission
101 Marietta Street, N.W.
Suite 2900
Atlanta, Georgia

Teresa A. Irons, CCR-B-1218, RPR

BROWN REPORTING, INC.
1100 SPRING STREET, SUITE 750
ATLANTA, GEORGIA 30309
(404) 876-8979

1 look through your resume and tell me whether you
2 believe it's still accurate?

3 A. Well, my current title is senior
4 investigator. Current grade is 14, GG-14. It's
5 basically correct. I've taken some additional
6 computer courses since that time.

7 Q. Okay. But otherwise, all the information
8 here is accurate --

9 A. Regarding law enforcement background,
10 that's correct.

11 Q. Following your service in the Marine
12 Corps, which ended in 1968, I read here that you
13 worked for Firestone Tire and Rubber Company from
14 1968 through 1976?

15 A. That was -- no. That would have been
16 through 1973. That's a mis -- '73 to '76, I was
17 with the FBI. And then '68 to '73, I was with
18 Firestone Tire and Rubber Company.

19 Q. With respect to the Firestone employment,
20 the second sentence is unclear to me. Could you
21 explain it?

22 A. Oh. That should be "sold" rather than
23 "solid". Sold steel wheels and rims to truck and
24 trailer manufacturers.

25 Q. What was the reason that you left

1 Firestone?

2 A. Because I had applied for a job with the
3 Bureau and was accepted by the Bureau, FBI, Federal
4 Bureau of Investigation, and I decided to -- since I
5 had the acceptance by the Federal Bureau of
6 Investigation, I decided to terminate my employment
7 with Firestone.

8 Q. You decided while you were at Firestone
9 to make this career change and apply to the FBI?

10 A. Right.

11 Q. You're with the FBI from '73 to '76?

12 A. That's correct.

13 Q. And what was the reason for leaving the
14 FBI in 1976?

15 A. I decided that I wanted to pursue a
16 career outside the government at that point and get
17 into the sales field, and there was an opportunity
18 available with Medtronic Pacemaker Company.

19 Q. You were with them for approximately one
20 year?

21 A. Right.

22 Q. It says "sold and assisted in the
23 surgical implantation of heart pacemakers"?

24 A. Yes.

25 Q. Did you actually assist in surgery?

1 A. I was present in surgery. I didn't
2 actually do any surgical procedures, but while the
3 surgeon was implanting the pacemaker, I was
4 required -- at the point in time when he thought he
5 had the lead properly implanted in the base of the
6 patient's heart, I had a re-ecstatic electronic
7 device that was able to measure the amount of
8 electricity, the amount of amperage required to
9 stimulate the heart, so that when he attached the
10 permanent pacemaker to that end of the lead, we knew
11 that the lead position was correct in the heart so
12 that that -- the electrical power of the permanent
13 pacemaker would be sufficient to stimulate the
14 heart.

15 Q. So you didn't actually touch any surgical
16 tools in this process?

17 A. No.

18 Q. Okay. And what was the reason for your
19 leaving that position?

20 A. I basically did not -- two reasons. One,
21 Medtronic Pacemaker Company went through a recall
22 process where their pacemakers, a small percentage
23 of their pacemakers, were found to suddenly cease
24 power rather than in their normal design --
25 normally, their rate that was assigned to the

1 pacemaker would decrease by ten percent when there
2 was approximately two weeks or a month remaining in
3 the power of the pacemaker, which would give the
4 patient time to -- there was a small -- and we
5 had -- there was a small number of pacemakers that
6 were found to suddenly cease power, which obviously
7 could be severely traumatic to the patient.

8 And dealing with that particular
9 situation, the cardiologists and thoracic surgeons
10 and heart surgeons weren't real anxious to see the
11 Medtronic representative coming in, that plus the
12 fact that my exposure to the hospital background, I
13 wasn't -- I found that I didn't really like the
14 exposure to the hospital arena.

15 And leading to the next issue, the -- I
16 was called out of the blue by a member of the
17 Veterans Administration who indicated that there was
18 an investigator in town that was looking for
19 temporary investigators, and I told him I wasn't
20 interested in a temporary job, but that I'd talk to
21 him about a permanent job, and it appeared to be
22 attractive enough that I got back into government
23 investigative work.

24 Q. This problem with the pacemakers, was it
25 one that you discovered?

1 A. No.

2 Q. Or --

3 A. No.

4 Q. Or you just learned about it after the
5 fact, I suppose?

6 A. I learned about it after the fact, right.

7 Q. And you were with the Veterans

8 Administration then as a special agent for five
9 years?

10 A. Right.

11 Q. Or approximately five years. And then
12 went to Region II here and have been here ever
13 since?

14 A. Right. That's approximately 11 years, a
15 little over 11 years.

16 Q. Were any of the departures from these
17 positions, Larry, under unfavorable circumstances?

18 A. No.

19 Q. Larry, you'll remember back in 1990 Allen
20 Mosbaugh contacted you with respect to the diesel
21 generator statements issue, which is addressed in
22 your December 1993 OI report, and I'd like you to
23 just give me your general recollection of the
24 circumstances of Mr. Mosbaugh's initial contact with
25 OI, including as best as you can recall the dates

1 the situation here is just that the conversation --
2 the internal conversations of Georgia Power
3 management were documented on tape and exposed.

4 MR. LAMBERSKI: I'm not going to touch
5 that one.

6 MR. SHAPIRO: Thank God.

7 Q. (By Mr. Lamberski) In your career with
8 OI, Larry, is this case unique in terms of the
9 number of hours that you devoted to it?

10 A. Yes.

11 Q. And I'm focusing on the diesel starts.

12 A. Yes.

13 Q. And as well as unique in the nature of
14 the interaction that was required with the
15 intervenor in this case?

16 A. I wouldn't say in my entire investigative
17 career that my -- that the interaction with
18 Mr. Mosbaugh was unique with respect to interaction
19 with other alleged or confidential informants at
20 some point in my investigative career.

21 Q. Well, I mean, with respect to in
22 particular the number of hours you are required to
23 spend with Mr. Mosbaugh in interpreting tapes and
24 analyzing documents and what have you, would you
25 call this unique?

1 A. This amount of time in doing those type
2 of activities was the first time that I've spent
3 that much time in doing that in -- of the cases that
4 I've had in the various investigative agencies.

5 Q. Did you take any special precautions to
6 guard against a relationship with the intervenor
7 that was not objective and unbiased?

8 A. I believe that I did. I don't believe
9 that my interactions with Mr. Mosbaugh are
10 inconsistent with an investigator conducting an
11 investigation with an alleged.

12 Q. Do you have occasion to socialize with
13 Mr. Mosbaugh?

14 A. No.

15 Q. No?

16 A. No.

17 Q. Do you --

18 A. I had meetings at his house. If you call
19 them -- they weren't social --

20 Q. I would characterize that as a working
21 meeting.

22 A. Absolutely.

23 Q. Do you believe Mr. Mosbaugh views his
4 actions against the company with respect to the
25 diesel starts issue as an investment?

1 A. I can't really answer that.

2 Q. Did he ever discuss it with you in terms
3 of an investment in the future?

4 A. No.

5 Q. Have you shared any information that is
6 typically treated as confidential within OI with
7 Mr. Mosbaugh?

8 A. No.

9 MR. LAMBERSKI: At this point, I need
10 to take a break because I need to use the
11 rest room.

12 (A recess was taken.)

13 Q. (By Mr. Lamberski) The next area of
14 questioning I have is with respect to the interviews
15 that you conducted of NRC personnel in connection
16 with the investigation, and I've brought the -- if
17 you need to refer to any of them, I've brought the
18 OI exhibits, and they are apparently separated into
19 a number of different exhibits from 18 through what
20 looks to be 26. Let me just keep them here if you
21 need to refer to any one of them as we go through.

22 These interviews were not transcribed
23 interviews; correct?

4 A. Correct.

25 Q. My understanding is that you took notes

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

4 In the Matter of)
5) Docket Nos. 50-424-OLA-3
6 GEORGIA POWER COMPANY,) 50-425-OLA-3
7 et al.)
8 (Vogtle Electric) Re: Licensee Amendment
Generating Plant) (Transfer to
Units 1 and 2)) Southern Nuclear)

9
10
11 DEPOSITION OF
12 BENNY BILL HAYES

13
14 March 17, 1995

15 9:10 a.m.

16
17 5200 NationsBank Plaza
18 600 Peachtree Street, N.E.
19 Atlanta, Georgia

20
21 Teresa A. Irons, CCR-B-1218, RPR

22
23 BROWN REPORTING, INC.
24 1100 SPRING STREET, SUITE 750
25 ATLANTA, GEORGIA 30309
(404) 376-8979

1 consulting work prior to leaving the government, but
2 that was last year and has nothing to do with
3 Georgia Power or these proceedings.

4 Q. Then let's go back to the last time that
5 you were given an employment situation that had some
6 relevance to Georgia Power or investigations at
7 Georgia Power by NRC.

8 What was your last title held with the
9 Nuclear Regulatory Commission?

10 A. I was the director of the Office of
11 Investigations.

12 Q. For what length of time did you hold that
13 position?

14 A. From February 1983 through July 1994.

15 Q. Did you hold any other positions with the
16 NRC?

17 A. No.

18 Q. Prior to joining the NRC, could you give
19 a brief recap of your prior employment history?

20 A. Yes. I was employed by the United States
21 Treasury Department, Internal Revenue Service, as a
22 criminal investigator from about 1965 through 1982,
23 early '83.

24 My previous occupation prior to becoming
25 director at the NRC was the chief of the criminal

1 to be assigned a case.

2 Q. Were you involved in the determination
3 about who would be interviewed and on what
4 scheduling or what sequence?

5 A. I would be informed as to how they were
6 going to approach the case. I'd get a briefing --
7 you know, where are we on the case, what have we
8 gotten so far, what is your game plan to continue
9 the investigation, who are we going to talk to.

10 So they would give me a briefing. So
11 that was the information going to me.

12 Q. Did that play a role in those
13 briefings -- wait a minute; I don't know; we ought
14 to go to the left; we ought to go to the right; we
15 ought to interview this person first not that one?
16 Did you provide direction?

17 A. What I would provide is why are you going
18 this way as opposed to this way, in other words, in
19 order to raise the issue.

20 In the Georgia Power case, we had a very,
21 very competent investigator. I was very comfortable
22 with Larry on this case. It was more him telling me
23 what was going on.

24 He is in my view even then -- meaning
25 '92, '93, '94 -- as well as today probably the

1 individual within the NRC that knows more about this
2 investigation than anybody else.

3 So I relied very heavily on what he
4 thought was the appropriate avenue to be taken.

5 Q. Did you pick Larry Robinson for this
6 investigation?

7 A. I don't know that I picked him. I think
8 Jim Vorse said that he was going to put Larry on the
9 case, and I said, That's great.

10 Let me say this. Anytime a director is
11 assigned an investigation, if I had a problem with
12 the assignment, you know, I had the authority to
13 make my concerns known and change it if I thought it
14 warranted change.

15 Usually the cases that are assigned are
16 assigned based on existing work load and priorities
17 as well as the experience and competent factor as
18 well as the individual agents. Some have more
19 experience than others.

20 So Larry is probably the most experienced
21 agent in the region office. So it was natural that
22 he would get probably one of the biggest
23 investigations that office had ever undertaken.

24 Q. Was that understood from the outset that
25 it would be one of the biggest investigations the

1 going to be on the various allegations.

2 Q. What would your role have been in review
3 or editing of any of the report?

4 A. I didn't edit the report.

5 Let me give you a little history about
6 OI. I think our OI manual dictates that any
7 manager, including the field office directors or the
8 director, does not have the authority to change an
9 investigator's conclusion.

10 Okay? That doesn't mean we agree with
11 them necessarily in every case. But I think to
12 maintain the integrity of the investigative process
13 we developed a system whereby if any investigator
14 felt as though someone were guilty and his manager
15 said, no, I think they're innocent in terms of a
16 specific allegation, then the agent wrote up the
17 case, made their call, and that individual manager
18 then made their call, and it all comes up to
19 headquarters' office.

20 The OI director staff would review it.
21 They would make a recommendation to me saying yes or
22 no, whatever, and if it could not be worked out at
23 that level with the individual agent, no matter what
24 case it is, then the case is sent to three separate
25 OI directors not involved in the investigation, all

1 evidence under the report.

2 They're independently reviewed, and those
3 three directors send in their views on that
4 investigation to the OI staff.

5 The ultimate responsibility for the call
6 rests with the director of the Office of
7 Investigations, the ultimate responsibility.

8 But all that input is in there and in the
9 case file if there's any disagreement so that the
10 file clearly reflects the position of each
11 individual OI staff person.

12 I felt real strongly about that because
13 there was a history at the NRC where managers were
14 changing agents' conclusions. I think that's
15 totally inappropriate.

16 So I think my staff feels very, very free
17 to make whatever call they think is appropriate, and
18 they do so.

19 Q. Now, did this process get applied in the
20 Georgia Power case?

21 A. No.

22 Q. So essentially, Mr. Robinson's
23 conclusions were accepted at the regional level and
24 subsequently accepted by your headquarters' people
25 and ultimately by you?

1 A. That is correct.

2 Q. So there were no changes or alterations
3 in what Mr. Robinson's views were that you recall
4 now?

5 A. No, no. That doesn't mean there's not
6 discourse back -- you know, what's the evidence to
7 support this or that sort of thing.

8 But whatever is in the report on this
9 investigation, if my memory serves me, Mr. Vorse
10 agreed to -- my headquarters' review staff,
11 Mr. Fortuna and I all agreed that this was the
12 appropriate finding based on the evidence obtained
13 during the investigation.

14 Q. What is the procedure for review at
15 Mr. Vorse's level, for example, of Mr. Robinson's
16 product? How does he do that? What kind of review
17 is undertaken?

18 A. By Mr. Vorse?

19 Q. Yes. It doesn't have to be Mr. Vorse. I
20 think it was in this case. But I'm talking about at
21 the regional level.

22 What kind of review is done of the
23 individual investigator's work product -- how
24 detailed is it, how much review of individual
25 evidence, that kind of thing?

1 my headquarters' staff didn't see it in the review
2 process because there's a lot of interchange between
3 the headquarters' staff and the field staff on any
4 major investigation.

5 Q. Let me go back to the question that I
6 asked, whatever your definition is of
7 "comprehensive" and make it -- I don't want to put
8 words in your mouth.

9 In your view, have you ever done a
10 comprehensive review of Larry Robinson's work?

11 A. I think so. I was very, very comfortable
12 with the findings in Mr. Robinson's case. I read a
13 lot of the evidence, participated in the briefings,
14 gave two or three briefings on this investigation to
15 the senior staff, including the EDO, NRR, and at
16 least two as I remember.

17 Also, the senior management meeting gave
18 a briefing on the Georgia Power investigation and
19 what we were finding and the evidence.

20 There were slides made that the senior
21 executive staff of the NRC was present and we put up
22 evidence that we had found.

23 So this was not a run-of-the-mill
24 investigation. This is one where senior members of
25 the NRC staff were briefed, were shown slides, were

1 given two or three opportunities to ask questions,
2 different opportunities at different briefings.
3 This was a major investigation.

4 Q. Have there been more major
5 investigations?

6 A. Sure.

7 Q. More major than this, that is, in your
8 view?

9 A. As major, yeah. Tennessee Valley
10 Authority, Northeast Utilities, Arizona Public
11 Service are some of the ones that come to my mind
12 right off the top of my head, and years ago, D.C.
13 Cook, if you remember.

14 Q. Yes.

15 A. You were involved in that.

16 Q. Who is Ed Addison?

17 A. Ed Addison? Southern? Is he with
18 Southern? Is that who that is?

19 Q. Whatever.

20 A. That's what comes to my mind, but that's
21 all I know.

22 Q. What about Bill Dahlberg?

23 A. Southern or Georgia Power.

24 Q. Did you ever speak with him that you
25 recall?

1 Q. Do you have any sense that Mr. Robinson's
2 contact with Mr. Mosbaugh in this situation would
3 have been more than your investigators had with
4 people who raised allegations on any other occasion,
5 that is, that Mr. Robinson met with, spent time
6 with, Mr. Mosbaugh more than any other investigator
7 in OI's history from your knowledge has spent with
8 any other person who has raised allegations with OI?

9 A. That's difficult to answer because I am
10 unaware of the level of contact that my staff has
11 with sources of information on a continuing basis.

12 I am on this case because I know that
13 Larry would talk to Mr. Mosbaugh by phone or would
14 meet him. How many times, I don't know. I just
15 don't know.

16 If I thought that we were spending too
17 much time, you know, meeting or wasting resources,
18 you know, I would have put a stop to it, but I
19 didn't have the impression that we were doing more
20 than what a competent field investigator would do.

21 Q. Have you had other OI investigations
22 where the person raising allegations had tape
23 recordings that played a role in the investigation?

24 A. I don't think so, Ernie. Nothing comes
25 to mind right now. I don't think so.

1 whether it's someone inside or outside.

2 Q. What procedural steps or mechanisms did
3 you put in place to ensure your OI investigators
4 wouldn't suffer that?

5 A. Well, I think it's in my policies. It's
6 in a review by my headquarters' staff. When the
7 reports come in with the associated evidence, that
8 evidence is looked at.

9 If there is a sense of impropriety or
10 lack of objectivity or what have you, it would
11 surface at that particular management review.

12 In this particular case in question, my
13 involvement in it was more extensive than the
14 routine investigation. I would have seen a sense
15 of, you know, have you lost your objectivity. I
16 mean, I would have felt it.

17 Q. So you were the quality assurance or the
18 quality control in this instance?

19 A. No. I didn't say that.

20 Q. You would, however, have seen it, you
21 think, if it was taking place in this proceeding?

22 A. I would have had a sense of it as well as
23 Mr. Vorse would have had a sense of it as well as
24 Mr. Fortuna would have had a sense of it as well as
25 my staff and headquarters because they were in touch

1 on every investigation as well as I and they would
2 have come in and said, hold it, we're out of balance
3 here, Ben.

4 So there's built-in checks to try and
5 sense that before it contaminates the conclusion.

6 Q. If you believe that familiarity could
7 lead to a lack of objectivity, did you place any
8 restriction on how much time your investigators were
9 to spend with one who was raising the allegations as
10 opposed to those that were being accused of
11 something?

12 A. No.

13 Q. So what were the mechanisms, if any,
14 other than your own sense or others in the review
15 chain sense that lack of objectivity might be
16 occurring?

17 A. A review of the evidence. I mean, in the
18 final analysis, Ernie, the evidence is going to
19 speak for itself, the report is going to speak for
20 itself, and it's going to stand to fall on the
21 merits of the evidence in the final analysis.

22 And during this final process, I did not
23 have a sense that we were outside the bounds of a
24 professional criminal investigation.

25 I think the report is well-written and

1 Looking at the last bullet on that page,
2 it says "Volunteered tapes to OI for review prior to
3 GPC" and then "Assisted OI with many hours of tape
4 review". What does the first bullet mean?

5 A. I don't know.

6 Q. It's the first sentence.

7 A. I don't know. I have no recollection
8 what that means.

9 Q. The reference in the second to many hours
10 of tape review, does that help you respond to my
11 earlier question about how much time you know
12 Mr. Robinson might have spent with Mr. Mosbaugh?

13 A. No. I told you that I don't know how
14 many hours, days, or what have you that it was
15 necessary for Larry to work with Mr. Mosbaugh on
16 these tapes.

17 Q. But at least as of today it doesn't seem
18 to you that -- well, maybe it does.

19 I don't mean to mislead you one way or
20 the other, but you don't have the impression today
21 that Mr. Robinson spent more time with Mr. Mosbaugh
22 because of his need to go through these tapes than
23 any other investigator spends with any other
24 allegor?

25 A. No. I would think that Larry spent more

1 time with Mr. Mosbaugh than we would with the
2 normal, average alleged.

3 This was a much more complicated issue
4 than what you would normally encounter in OI's
5 investigative work. This was a very sensitive,
6 complicated matter with a lot of facets to it.

7 It's not, you know, a radiographer case
8 or a hospital case or something that is fairly
9 cut-and-dried.

10 This case was an outlier compared to
11 other cases that we undertake. It was a major
12 investigation.

13 Q. Do you recall whether tapes were played
14 in the course of this presentation to the
15 congressional staff?

16 A. I don't think so. I don't think any
17 tapes were played.

18 Q. Do you recall any presentation of tapes
19 or their knowledge of tapes?

20 A. Excuse me. What do you mean by
21 presentation?

22 Q. Do you recall any discussion by the
23 congressional staff people who attended the meeting
24 of the tapes or their knowledge of the tapes?

25 A. No, I don't.

1 as an expert witness in any proceeding?

2 A. No.

3 Q. And since you've been with the Office of
4 Investigations, how many OI reports have you been
5 involved with, do you think?

6 A. Hundreds.

7 Q. And based on your comparison of the
8 OI Report II-90-020R which is the diesel generator
9 report, how would you consider the level of
10 professionalism that went into preparing this report
11 as compared to hundreds of other OI reports you have
12 reviewed?

13 A. In comparison to other reports, this
14 report I think is an outstanding effort by a very
15 competent professional investigator.

16 Mr. Robinson I believe was named agent of
17 the year at one particular point by the director. I
18 just don't question his integrity or his
19 competence.

20 The report is well-done. Even the review
21 staff that looked at it, I don't know of any
22 questions as to its lack of authenticity or attempt
23 to mislead or anything like that.

24 Q. Do you know what the standard of review
25 is or like legal-type standard of review the