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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket Nos. 50-445-2 and 50-446-2
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

CASE'S PROPOSED STANDARD FOR
LITIGATING ALLEGATIONS OF INTIMIDATION

I. Introduction

The issue of harassment and intimidation is easily confused and the responsibilities of the parties with respect to it is subject to substantial distortion. This is evidenced by the Applicant's Proposed Standard For Litigating Allegations Of Intimidation (Motion), filed May 8, 1984. CASE submits that with respect to burdens of proof and burdens of going forward this issue is no different than any other issue and should not be treated differently. Applicant's elaborate dissection of the issue (see Motion) creates an almost infinite number of burdens imposed on intervenors as a prerequisite to a finding on the ultimate issue in this case -- i.e. that there is not reasonable assurance that the Comanche Peak nuclear plant can operate safely. In reality Applicant must prove that it meets the requirements of 10 C.F.R. Appendix B. Part of that proof is not only that on paper Applicant conforms to Appendix B but more significantly that Applicant has fully implemented both the

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letter and the spirit of Appendix B requirements.

A part of the responsibility imposed upon the Applicant to make its case is to show that:

a) Applicant affirmatively encouraged, through training, word and deed, compliance with 10 C.F.R. and the reporting of non-conforming conditions;

b) The work force had the freedom to comply with 10 C.F.R. and report non-conforming conditions;

c) The work force believed that compliance with 10 C.F.R. and reporting non-conforming conditions was its responsibility and that there would be no adverse affects to the work force from doing so; and

d) Compliance with 10 C.F.R. and discovery of non-conforming conditions resulted in a positive response designed to correct the non-conforming condition and bring the facility into compliance with 10 C.F.R.

On the present record Applicant has not made this affirmative showing. Were the parties to litigate this case "by the numbers" Applicants should be required to amend their Final Safety Analysis Report to provide the necessary evidence to establish these elements, and following such an amendment, the parties would conduct discovery and present contrary evidence.

In this case the order has been reversed. CASE has already developed a substantial record to demonstrate, even before Applicant makes its case, that the implementation of Applicant's design, construction and QA/QC program is inadequate. (See e.g. CASE's August 3, 1983 letter and attachments thereto.) The thrust of the CASE presentation to date is that numerous employees were actively discouraged from complying with 10 C.F.R. and/or reporting non-conforming conditions through a variety of tactics which have been lumped under the label "harassment and intimidation".

Were a prima facie showing a prerequisite to explore Applicant's implementation of Appendix B and to require Applicant to prove, inter alia, the four points identified above, the previous filings by CASE, the findings by NRC inspections (e.g. the May 23, 1984 special inspection conducted by the Brookhaven National Laboratory regarding protective coatings), NRC investigations (e.g. the March 7, 1984 Office of Investigation Report, Report 4-84-006 and the October 1983 Office of Inspector and Auditor reports into the circumstances surrounding the termination of Charles Atchison), the direct testimony already received in this case (e.g. Charles Atchison, Henry and Darlene Stiner, Jack Doyle, Mark Walsh and others) and the Board's own preliminary findings and conclusions would more than adequately fulfill that duty. But, we re-emphasize, no such prima facie showing is required to compel the Applicants to prove their case -- i.e. did they implement Appendix B with the appropriate management attitude such that this Board can conclude that the plant was built and will be operated in compliance with 10 C.F.R.? And, if non-conforming conditions exist at the plant, they have all been (with room for a very small margin of error) identified and corrective actions taken.

Thus the standard for this Board to apply is:

> Has the Applicant been able to implement the required programs and procedures for design and construction of the Comanche Peak plant such that there is a reasonable assurance the plant can be operated without endangering the public health and safety. (The four elements previously disclosed on page two are a part of the standard).[1]

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[1] As discussed in more detail infra the Appendix B requirements are separate and apart from actual hardware problems. If Applicant does not meet Appendix B it is irrelevant

In addition to meeting this burden Applicant must also counter evidence introduced and proposed to be introduced by intervenors that far from affirmatively encouraging compliance with 10 C.F.R. and identification and correction of non-conforming conditions Applicant discouraged compliance with 10 C.F.R. and discouraged the reporting of non-conforming conditions.

The current status of the hearing is now focussed on this latter evidence. As we have made clear, and contrary to the Applicant's assertions, there is no threshhold or hurdle which must be passed before intervenors can introduce evidence which tends to establish that the Applicant has discouraged compliance with 10 C.F.R. and discouraged reporting of non-conforming conditions. In addition, some of this evidence may inevitably lead to evidence of defective hardware in the plant or evidence that demonstrates that it is not possible to tell whether the hardware is in compliance with 10 C.F.R. requirements. We believe such additional evidence, while obviously relevant to the issues in this case, is not essential to make the point that Applicant discouraged the very conduct which it should have (as required by Appendix B) encouraged.

CASE contends that there was a pattern and practice of harassment and intimidation which included threats, coercion, annoyances, physical abuse, termination, job transfers, decrease in compensation, and other examples of harassment and

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that no specific hardware defects are identified. One of the affects of a failure to meet Appendix B is the failure to know which hardware is defective.

intimidation, and that the pervasiveness of the resultant oppression is, if proven, in and of itself enough to prevail on CASE's contention five.

II. Application Of The Standard

A. Case Law

Three principal cases, in addition to Board rulings in this case, form the legal foundation for the Board's exploration of the harassment and intimidation issue. First, the Byron Appeals Board Ruling [In the Matter of Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ASLBP 79-411-04PE, Jan. 13, 1984], which holds that specific hardware defects need not be established in order to find non-compliance with Appendix B. It is sufficient to show a breakdown in the implementation of Appendix B which is sufficiently pervasive that it destroys the reasonable assurance that Appendix B has been effective. In such a case the Applicant must prove that the plant was built to the required specifications.

Second, the Zimmer Order To Suspend Construction [In the Matter of Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station), EA 82-129, Nov. 12, 1982], which stands for the proposition that where a sufficient number of defects are found which, if Appendix B had been properly implemented should have been found and corrected earlier, it can be inferred that implementation of Appendix B has failed and reinspection will be required. In Zimmer numerous faulty pieces of hardware and inadequate documentation found the basis for the inference. In this case numerous instances of harassment and intimidation as

well as hardware and document problems form the basis for the inference.

If Applicant had implemented Appendix B properly would all these employees have been illegally fired (DOL findings), would all these employees be reporting breakdowns to the Office of Investigations, the Government Accountability Project (GAP) and CASE, would all these witnesses be testifying about their genuine feelings of harassment, would NRC be finding verification for many of the substantive complaints which whistleblowers could raise only outside established plant procedures? We submit these incidents and more form the basis for the inference that Appendix B has not been properly implemented.

Finally, in Midland [In the Matter of Consumers Power Company (Midland Nuclear Power Plant, Units 1 and 2) Director's Decision 83-16, 84-02] the Commission establishes that when the nature of numerous recurring quality assurance/ quality control problems are caused by a failure to implement Appendix B any effort to fix the problem must come from an outside, independent and comprehensive reinspection program. In Midland nothing short of this type of program will cure the problems which have at their root Applicant's bad attitude and managerial incompetence.

We submit these examples are applicable to the issue before this Board.

B. Applicant's Affirmative Burden Under Appendix B

We will not elaborate on this aspect of the filing inasmuch as Applicant has surprisingly not shown much inclination to carry

it burden. Although faced with dozens of claims of harassment by employees which discouraged compliance with 10 C.F.R. and/or with reporting non-conformances, Applicant's response both here and in the Department of Labor has been to deny rather than to correct. Allegations of specific events which any rational person would call harassing produce from Applicant, even after the Staff confirms the event, an incredible assertion that the event was not harassing. With such stonewalling there is little need to elaborate on what Applicant should do. The following discussion is illustrative rather than definitive.

Even without proof of extensive harassment Applicant should be able to prove that throughout construction, as part of meeting Appendix B, it had:

1) An affirmative program to encourage reporting of deficiencies including regular meetings with inspectors to emphasize this, meetings with craft to explain the need for this and encourage cooperation, a site ombudsman, a site hot line, posted signs advising the work form of its rights, etc.

2) An affirmative program to address promptly all concerns about harassment and intimidation and swift action against those whose conduct had the affect of making workers feel harassed and/or intimidated and/or discouraged from doing their job.

3) An affirmative program to reconcile the conflicts between the plants desire to speed up construction and the need to see that the plant was constructed properly.

4) Affirmative evidence that the claims of authority to implement Appendix B actually functioned by showing direct evidence of personal involvement of the highest level of Applicant's management and affirmative responses to complaints that produced mutual satisfaction among the workers involved.

5) Affirmative evidence that Applicant not only had an Appendix B program but that it was and is the attitude of management and supervisors that Appendix B be implemented to the letter and the spirit.

This and similar evidence has not been forthcoming. It is CASE's expectation to have expert testimony to establish what are the minimum requirements for effective Appendix B implementation to further underscore that Applicant has not met its minimum burdens here.

C. Harassment And Intimidation: What CASE Will Prove

CASE contends that when the evidentiary record is complete there will be ample evidence in this case that the programs and procedures at the Comanche Peak site have been significantly undermined. For its part Applicant prove that the breakdown in the implementation of approved program and procedures (1) was not pervasive and (2) did not affect the overall implementation of the quality assurance/quality control, design, or construction program. We do not believe that this is requiring Applicant to prove a negative. Instead we are challenging Applicant to prove that each incident was, in fact, only an isolated occurrence, or a "fluke", a misunderstanding, a communication problem, a labor dispute, or whatever other explanation Applicant has for each incident presented and not part of a larger pattern of practice at the site. If Applicant fails to convince the Board that the numerous examples of harassment and intimidation did not affect the performance of the work force, or if the Applicant cannot prove incidents were only isolated and insignificant then CASE has prevailed on this theory of its case.

CASE contends that the implementation of Appendix B was interfered with by a pattern of practices collectively referred

to as "harassment and intimidation" and that the results of that interference were both subjective and objective. Objectively CASE will demonstrate that as a result of the atmosphere of oppression individual members of the work force either were not able to or chose not to follow their prescribed procedures -- be it inspections, installations, document review, etc. CASE will demonstrate, through the testimony of experts, that subjectively the import of the objective conduct was to create an atmosphere which was bound to influence the exercise of judgment and the performance of duties by the work force.

Further, CASE will prove that Applicant had a motive to promote the atmosphere of oppression through both direct and tacit approval, as well as active participation in the interference with an unfettered implementation of Appendix B. This motive was the desire to complete the plant as quickly as possible without regard for those requirements of 10 C.F.R. which Applicant believed were unnecessary and/or unduly burdensome.

CASE will also demonstrate that the regulatory "check and balance system" failed to such an extent that it became part of the problems encountered by the work force. Instead of the Nuclear Regulatory Commission being interested in or willing to isolate and identify those problem areas which should have long ago indicated serious problems with the implementation with Appendix B the NRC Staff did nothing. Instead of providing relief when employees of have turned to the NRC the regulators engaged in undermining the concerns of the work force, revealing their identity, and actively engaging in the non-disclosure of

generic design and construction. The affect of this conduct was to increase the deleterious impact of the Applicant's harassment and intimidation.

CASE will also establish that no "11th hour corrective action program" -- short of 100% reinspection -- can adequately assure that Comanche Peak can operate without endangering the public health and safety. This will be proven, inter alia by showing the breadth, depth and duration of the harassment and intimidation at the plant.

These elements represent what we will strive to prove. They do not represent what we believe we need to prove to prevail. We discuss in the following section our opposition to Applicant's attempt to force proof of these and other elements as a pre-requisite to CASE prevailing on this issue.

III. CASE's Opposition To Applicant's Proposed Standard

CASE submits that the standard proposed by Applicant on this issue is substantially flawed for the following reasons:

(1) It improperly assumes that intimidation alone, proven by overt acts or statements must exist, as a premise to the introduction of any evidence of the results of such intimidation.

CASE does not believe that overt acts or statements are required "in order for intimidation to exist", (Motion, at 5) as claimed by the Applicant.

Instead CASE asserts that Criterion I of 10 C.F.R. Appendix B requires that Applicant maintain a quality assurance/quality control program which has sufficient authority and organizational freedom. The maintenance of such a program is to foster an

attitude which supports independence from all pressures in order to ensure that a job -- whether design, craft or quality assurance/quality control -- can be properly carried out.

(2) It proposes that any actions or statements (threats) must have been made by supervisory personnel (p. 5).

Applicants demonstrate a grave misunderstanding of the issue by their argument that threats of intimidation "must be made by an individual having the means to carry it out." Surely Applicants are familiar with the allegations of peer pressure raised by Darlene and Harry Stiner, for example, on this hearing record already. Also it should be noted that the most familiar examples of harassment and intimidation at other plant sites which counsel is aware of were situations in which the craft were directly "harassing" quality control inspectors from doing their jobs.[2] Such obviously relevant examples would not be covered by Applicants definition of the harassment and intimidation issue.

(3) It improperly assumes that the Board has definitively ruled that this issue only applies to quality control personnel.

Contrary to Applicant's representation, CASE does not believe the Board has not ruled on limiting the harassment and intimidation issues only to quality control inspectors. Instead, according to intervenors notes of that conference call the Board suggested that he wanted to see the issue of intimidation and harassment of quality control inspectors tried first, and that of craft (such as the Stiners and Dobie Hatley) tried later. CASE

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[2] See, In the Matter of Houston Power and Light, (South Texas Plant, Units 1 and 2) LBP 84-13, March 18, 1984, pp. 266-275. See also, generally Enforcement Notices against the William H. Zimmer plant, supra, November 1981.

believes it is essential to its case that it be allowed to present witnesses and examples from all disciplines at the plant.

(4) It requires a showing of intent to intimidate as pivotal to even a recognition "that an incident of intimidation occurred".

Intervenor disagrees with Applicant's suggestion that it is necessary for CASE to prove intent as an element of harassment or intimidation. Although such an act, if proven, could be considered criminal it is not the responsibility of this Board to determine whether or not the Applicant committed criminal acts through deliberate violations of the Atomic Energy Act, pursuant to 42 U.S.C. 2232. Instead it is to determine whether an atmosphere and attitude resulting from harassment and intimidation existed on the construction site which prevented implementation of the design, construction, and quality assurance/quality control program.

In the context of making CASE's evidentiary presentation we intend to prove the intent which Applicant holds out as a pre-requisite, however, our evidence will only supplement the record of incidents which we will have presented to establish that harassment and intimidation was a common occurrence.

(5) It improperly suggests use of a "reasonable person standard" to judge whether an individual would have been likely to be intimidated.

Applicant proposes that if intervenor cannot show intent to intimidate that a reasonable person standard should be used to objectively determine whether or not intimidation had occurred. CASE opposes the use of such a standard. Even if it was possible to re-enact the exact incident, or series of incidents which a witness contends caused him/her to be unduly influenced in the

context of the hearing room or a deposition it would not be possible to re-create in the Board that cumulative effect of a decade of disregard for the requirements of 10 C.F.R. In other words, a "snapshot" of each incident of harassment, intimidation, threats or coercion, etc. only produces a decision on the facts surrounding the event. CASE wants to present to the Board an entire series of pictures, individual incidents in which a member of the work force felt harassment or intimidation, in order to have a determination on the totality of the circumstances at the Comanche Peak site.

If any standard would be used it should be drawn from the preponderance of the evidence standard used by the Department of Labor in ruling on whether or not a worker was discriminated against in violation of Section 210 of the Energy Reorganization Act.[3]

Isolating each incident in space and time to hold it up to a reasonable person standard undermines CASE's ability to demonstrate the pervasiveness of harassment and intimidation on the site.

(6) It suggests that a particular threat must have been implemented, or that intervenor produce other evidence to demonstrate that "the individual allegedly threatened reasonably feared that he would be discharged or suffer other harmful effects" in order to establish that the intimidation had occurred.

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[3] Section 210 prohibits any employer, including applicants, licensees, contractors, and subcontractors, from discriminating against any employee "with respect to his or her compensation terms, conditions or privileges of employment because the employee assisted or participated or is about to assist or participate, in any manner in any action to carry out the purposes" of the Energy Reorganization Act.

As already stated in items 1 and 5 (supra), CASE disagrees with the Applicant's motion, drawn apparently from tort law, that in order to be harassment and intimidation (fear loss of job) the action must come from someone with the ability to take personnel action against an individual. Such a concept fails to accept the reality that harassment or intimidation is a "state of being" not just an event, and that the result of severe or extensive harassment or intimidation is an actual decrease in the number of overt acts or incidents required to enforce an oppressive atmosphere which would undermine 10 C.F.R. Appendix B.[4]

(7) It suggests that intervenor be required to produce objective evidence that a quality control inspector did not identify non-conforming conditions as a result of intimidation, while at the same time being able to argue that if the non-conforming condition wasn't really non-conforming, as a result of a misunderstanding that there was no harassment or intimidation.

Applicant's analogy suggests that they are the owners of a baseball club, the plant management - the coaches, the work force - the ball team, and the quality inspectors the umpires. We think their scenario is a perfect example of our point -- what baseball club owner would not fire the umpire if he had the power (which applicants do) if he called the third strike out on a close call with bases loaded, the score tied, and in the final inning of the World Series? A situation analogous to the financial condition we think Applicants find themselves in.

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[4] At its extreme this point can be illustrated through the following example. If on the first day of construction a quality control inspector wrote an NCR, and was then taken out and hung by management in front of the work force there would probably be no more incidents of harassment or intimidation, but there would also be no more NCR's written.

(8) Applicants suggest that cost and schedule pressures -- probably the single largest reason for intimidation of the work force -- be exempted from the litigation of this issue because it is an acceptable practice.

Criterion I of 10 C.F.R. Appendix B requires quality assurance/quality control to have:

> ... sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. Such persons and organizations performing quality assurance functions shall report to a management level such that this required authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations, are provided. (emphasis added)

Obviously Applicant does not acknowledge the seriousness of this requirement nor the insight of this element. Nothing CASE could argue would be more demonstrable of the root cause of the attitude which has brought the parties to this issue.

(9) Applicant suggests that the Board must find "significant uncorrected" hardware defects resulting from a lapse in the quality assurance/quality control program as a pre-requisite to CASE prevailing on this issue.

CASE invites the parties and the Board to review the Byron appeals board decision, discussed supra at 5 , which establishes that Applicant's proposed element is unacceptable.

The Appeals Board says:

> We find nothing in Callaway that suggests, let alone holds, that an operating license can issue despite the presence of a cloud overhanging the adequacy of safety-related facility construction.[5]

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[5] CASE does not intend to spend the next several months serving as the "independent inspector" for the NRC or Applicant through the production of all hardware and documentation problems only to have Applicant and Staff proceed on the assumption that all known problems are now exposed and corrected. If this happens CASE will be obliged to file, on a quantum meruit theory, for recovery of all expenses related to the development of information used by Applicant to ensure that the Comanche Peak site is

(10) It erroneously argues that intervenor seeks an error free quality assurance/quality control program.

CASE does not seek error-free construction. To the contrary, CASE will be satisfied if the Comanche Peak construction site is held to the standards of construction quality set by the Commission at the Midland or Zimmer facilities -- an infinitely reasonable request.

(11) It correctly recognizes, as does intervenor, that there are and will be instances of "honest disagreements" between the members of the work force "as to the correctness of a particular acceptance criterion", however incorrectly argues that intervenor must relate each incident to a breakdown of the quality assurance program to establish the existence of a claim which is already an accepted contention (p. 12).

(12) It fails to accept that intervenor has already established its burden of proving that the quality assurance program at Comanche Peak is suspect; and as an accepted contention on which the Applicant carries the affirmative burden.

At this point in the proceeding CASE does not have to demonstrate that there was a systematic breakdown, however we intend to do so; instead Applicant must argue that there is some reason the parties, the public and the Board should believe that there was not a systematic breakdown (see, supra, pp. 1 - 5).

CONCLUSION

Our purpose here is to make clear the evidentiary burden we believe Applicant must meet, the evidentiary goals which CASE has set and to explain how the evidence to be presented fits into the general contention regarding implementation of Appendix B. All

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in compliance with 10 C.F.R. Montes v. Naismith and Trevino Construction Company, Tex.Civ.App., 459 SW2d 691.

the evidence is not yet known to us so we cannot definitively say what we will prove or what it will mean. We are confident that at a minimum the Board will be able to find that Applicant did not properly implement Appendix B and as a result a full scale independent reinspection program will be required. Frankly we believe the basis for that conclusion is already known. Nonetheless, the Board should have the full record and we are prepared to present it. We trust this filing has helped clarify where we are headed and how we intend to get there.

Respectfully submitted,

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June 12, 1984

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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that true and correct copies of CASE's Proposed Standard For Litigating Allegations Of Intimidation have been sent to the names listed below this 12th day of June, 1984, by: Express mail where indicated by *; Hand-delivery where indicated by **; and First Class Mail unless otherwise indicated.

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